

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
B.S., Appellant)	
)	
and)	Docket No. 17-0274
)	Issued: October 29, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Tempe, AZ, Employer)	
_____)	

Appearances:
William Bothwell, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 17, 2016 appellant, through her representative, filed a timely appeal from a September 27, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated April 7, 2014,

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On July 16, 2013 appellant, then a 57-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained Achilles tendinitis which she attributed to "consistent standing" and getting in and out of her vehicle while on her new delivery route. She identified June 10, 2013 as the date she first became aware of her claimed condition and realized its relationship to her employment. Appellant continued to work.

OWCP received treatment notes from appellant's podiatrist, Dr. William J. Leonetti. In a June 18, 2013 report, Dr. Leonetti diagnosed right Achilles tendinitis and right scar tissue adhesions. He noted that appellant was a postal worker and that she experienced pain stepping in and out of her truck while making deliveries. Dr. Leonetti also noted that appellant's x-rays revealed that the entire posterior-superior aspect of the calcaneus had been surgically removed. He further noted that the prior surgery caused a tremendous amount of scar tissue adhesions along the Achilles tendon. Dr. Leonetti advised appellant to restrict her standing and walking to one hour, intermittently. He also noted that appellant could sit a maximum of four hours and that she could push/pull a maximum of 20 pounds. Dr. Leonetti instructed appellant to be very careful getting in and out of vehicles, and further commented that stepping up and down was very difficult on the Achilles. He did not believe that further surgery would improve appellant's condition. Dr. Leonetti recommended massage therapy and possibly physical therapy to help break up the adhesions.

Dr. Leonetti's July 10, 2013 treatment notes indicated that appellant was seen for a follow-up regarding chronic injury with loss of function, gait, and balance of the right foot secondary to a work injury to the right foot on September 11, 2001. He reported that appellant suffered an Achilles tendon insertional injury and underwent surgical intervention as a result. Dr. Leonetti noted that the surgical procedure was so aggressive that it permanently altered the insertional function of appellant's right Achilles tendon.

OWCP also received a July 10, 2013 attending physician's report (Form CA-20) from Dr. Leonetti, who diagnosed right Achilles tendinitis. Dr. Leonetti reiterated that the date of injury was September 11, 2001. The reported history was right Achilles injury recently aggravated by

² 5 U.S.C. § 8101 *et seq.*

³ Together with her appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated April 13, 2017, the Board exercised its discretion and denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 17-0274 (issued April 13, 2017).

change in route with increased standing and getting in and out of her vehicle. Dr. Leonetti indicated that appellant's current condition was employment related and explained that the recent changes in her route aggravated her condition. He further noted that appellant was able to work with restrictions as of June 18, 2013, and would be able to resume her regular work as of October 1, 2013. Appellant's current restrictions included standing/walking one hour at a time, with a maximum of four hours per day. He also noted that appellant could work in a seated position for at least 4 hours a day, at 30-minute increments.

In a July 16, 2013 duty status report (Form CA-17), Dr. Leonetti continued to diagnose Achilles tendinitis due to stepping in and out of a vehicle at work on September 11, 2001 and advised that appellant was capable of working with the following restrictions: lifting and carrying no more than 4 hours per day, sitting 30 minutes at a time; standing no more than 4 hours per day, walking no more than 1 hour per day with 15-minute breaks, and pulling/pushing no more than 20 pounds.

On August 19, 2013 Dr. Leonetti reviewed a magnetic resonance imaging (MRI) scan dated December 18, 2012 and found no evidence of Achilles tendon tear and thickening and changes along the posterior calcaneal margin, suggesting prior surgery. There was no associated stress response, edema, or fracture. Dr. Leonetti diagnosed status post right Achilles tendon injury and status post permanent scar tissue with loss of range of motion, strength, and overall function of the right Achilles tendon. He reported that appellant insisted that she was unable to perform her job duties of getting in and out of a vehicle and then filing mail into multiple mailbox stations due to her injury. Dr. Leonetti released appellant to full-time, full-duty work, but with no overtime.

The record contains an investigative report dated September 6, 2013 from the employing establishment's Office of the Inspector General (OIG), including a DVD of video surveillance of appellant performing her work duties on July 26, 2013 delivering mail by minivan. The investigative report also contains OIG interviews of Dr. Leonetti on July 30 and August 20, 2013. Dr. Leonetti related that he had been appellant's doctor for several years and believed that she was exaggerating the affect her injury was having on her employment. When the OIG investigator informed Dr. Leonetti that appellant drove a minivan and sat on the left side, he stated that appellant had told him that she drove a right-side delivery truck in which she sat on the right side of the vehicle. On August 20, 2013 the OIG investigator reinterviewed Dr. Leonetti who stated that he felt appellant had misled him by telling him her foot hurt because she had to continuously get in and out of a right-handed drive vehicle on her route, when she actually drove a left-handed drive minivan. He stated that appellant also misrepresented that she stepped down onto uneven ground when she actually stepped down onto evenly paved parking lots.

By decision dated October 17, 2013, OWCP denied appellant's claim, finding that the factual evidence of record was insufficient to establish that the work events occurred as alleged.

In an October 29, 2013 report, Dr. Leonetti noted that appellant's pain could cause episodes that were severe enough to limit her activities at work, and these episodes could be brought on by weather changes or walking on uneven ground surfaces. He advised that appellant could control her pain with certain types of shoes, stretches, anti-inflammatories, and other palliative measures and was capable of remaining on a full work status.

On November 13, 2013 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated April 7, 2014, an OWCP hearing representative conducted a review of the written record and affirmed the prior decision, finding that appellant had not established fact of injury. She found that the OIG's September 9, 2013 investigative report determined that appellant had misrepresented her condition to Dr. Leonetti. The OIG surveillance conducted on July 26, 2013 showed appellant exiting her vehicle, left foot first, onto paved parking lots and sidewalks, with no obvious signs of pain or difficulty. Dr. Leonetti indicated that he felt appellant had misled him by telling him her foot hurt because she had to continuously get into and out of a right-handed drive vehicle on her route when she actually drove a left-handed drive minivan. He also noted that the surveillance video of appellant did not demonstrate that she was in pain.

On June 23, 2015 appellant, through her representative, requested reconsideration and argued that OWCP's April 7, 2014 decision was, on its face, erroneous.

By decision dated July 6, 2015, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On June 20, 2016 appellant, through her representative, again requested reconsideration. Appellant's representative continued to argue that OWCP's April 7, 2014 decision was, on its face, erroneous. He submitted a DVD of an audio recording between appellant and her treating physician discussing her case.

By decision dated September 27, 2016, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted the submitted recording was cumulative and irrelevant to the issue of fact of injury.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁶ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS).⁷ OWCP will consider an untimely request for reconsideration only if the request

⁴ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ *Id.* at § 10.607(a). A request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. The one-year period begins on the next day after the date of the originally contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

⁷ *Id.* at Chapter 2.1602.4b.

demonstrates “clear evidence of error” on the part of OWCP in its “most recent merit decision.”⁸ The request must establish on its face that such decision was erroneous.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP.¹⁰ The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error.¹¹ It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. Evidence that does not raise a substantial question concerning the correctness of OWCP’s decision is insufficient to demonstrate clear evidence of error.¹² The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision.¹³

Where a request is untimely and fails to demonstrate clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁴

ANALYSIS

The Board finds that OWCP properly determined that appellant’s request for reconsideration was untimely filed. OWCP’s last merit decision was dated April 7, 2014. Appellant’s representative filed the current request for reconsideration on June 20, 2016, which was well beyond the one-year filing period for a timely request for reconsideration.¹⁵ As appellant’s June 20, 2016 request for reconsideration was untimely filed, she must demonstrate clear evidence of error on the part of the hearing representative in finding that she failed to establish fact of injury.¹⁶

The Board finds that the evidence submitted by appellant in support of her request for reconsideration does not raise a substantial question as to the correctness of the hearing representative’s April 7, 2014 decision or shift the weight of the evidence of record in her favor.

In support of her reconsideration request, appellant submitted a DVD of a recording between herself and her treating physician discussing her case. The term clear evidence of error

⁸ 20 C.F.R. § 10.607(b).

⁹ *Id.*

¹⁰ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹¹ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹² *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ 20 C.F.R. § 10.608(b).

¹⁵ *Id.* at § 10.607(a).

¹⁶ 20 C.F.R. § 10.607(b); *see Debra McDavid*, 57 ECAB 149 (2005).

is intended to represent a difficult standard.¹⁷ Even a detailed, well-rationalized medical report which would have created a conflict in medical opinion requiring further development if submitted prior to issuance of the denial decision, does not demonstrate clear evidence of error.¹⁸ It is not enough to show that evidence could be construed so as to produce a contrary conclusion. Instead, the evidence must shift the weight in appellant's favor.¹⁹ The DVD recording is merely an audio recording which is not medical evidence and is found to have no probative value. The new DVD recording does not show error with respect to OWCP's April 7, 2014 decision, which found that the employment exposure did not occur as alleged. The Board has held that repetitive or cumulative evidence is insufficient to shift the weight of the evidence in favor of the claimant.²⁰ Appellant has not sufficiently explained how the submission of this recording raises a substantial question concerning the correctness of OWCP's decision.

The Board finds that the evidence appellant submitted is insufficient to *prima facie* shift the weight of the evidence in favor of her claim or raise a substantial question that OWCP erred in its April 7, 2014 decision. Thus, OWCP properly denied her request for reconsideration because it was untimely filed and failed to demonstrate clear evidence of error.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (October 2011); see *Dean D. Beets*, *supra* note 10.

¹⁸ See *D.G.*, 59 ECAB 455 (2008); *L.L.*, Docket No. 13-1624 (issued December 5, 2013).

¹⁹ See *M.N.*, Docket No. 15-0758 (issued July 6, 2015).

²⁰ See *D.E.*, 59 ECAB 438 (2008); *A.F.*, Docket No. 11-1297 (issued December 20, 2011).

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 29, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board