

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

P.B., Appellant)	
)	
and)	Docket No. 17-1963
)	Issued: October 23, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Yonkers, NY, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 21, 2017 appellant, through counsel, filed a timely appeal from an August 29, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated October 15, 2015, 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 the case.

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.

² 5 U.S.C. § 8101 *et seq.*

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 October 16, 2014 appellant, then a 61-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a medical condition as a result of performing his job as a letter carrier.³ He provided an October 14, 2014 statement asserting that his plantar fasciitis and partial plantar fasciitis were caused by his work. Appellant also described his job duties, which included working 8 to 10 hours a day, 5 to 6 days a week, during which time he stood on his feet 2 to 3 hours per day. He also indicated that he engaged in lifting, bending and raising his arms above his head to case mail, and walking six to eight hours a day for five to six days a week. Appellant further advised that he carried up to 35 pounds of mail on his shoulder up and down stairs and over steep hills, while bending and lifting, in all kinds of weather. He noted that he first became aware of his claimed condition and realized its relation to his federal employment on April 3, 2014. Appellant stopped work on that date.

OWCP initially denied appellant's claim in a January 14, 2015 decision. It found that the medical evidence of record was insufficient to establish that the claimed medical condition was causally related to the established work factors. On January 29, 2015 counsel requested a telephonic hearing before an OWCP hearing representative.

In a June 16, 2015 decision, an OWCP hearing representative set aside OWCP's January 14, 2015 decision and remanded the case for further development. The hearing representative found that Dr. Glenn W. Callahan, a podiatrist, provided an unrefuted, unequivocal opinion that appellant sustained a cumulative overuse injury due to standing and walking in his letter carrier job. She remanded the case for a second opinion examination with an appropriate specialist for an opinion regarding whether his standing and walking in his letter carrier duties caused any bilateral foot condition due to his work duties upon his return to regular duty on November 26, 2013. Furthermore, the hearing representative advised that the specialist should be asked whether appellant's federal employment caused him to be objectively disabled from all work from October 4 through November 25, 2013 and April 3, 2014 to the present.⁴

On August 17, 2015 OWCP referred appellant for a second opinion examination with Dr. Mark Kramer, a Board-certified orthopedic surgeon.

In a September 16, 2015 report, Dr. Kramer noted appellant's history, examined him and provided findings. He provided an opinion that there was no evidence of hallux valgus on examination despite appellant's magnetic resonance imaging (MRI) scan findings. Dr. Kramer also found that there was no evidence of active plantar fasciitis and explained that a partial tear as

³ The employing establishment and appellant noted that a new occupational disease claim (Form CA-2) was being filed instead of a Form CA-2a, notice of recurrence, that appellant had inadvertently filed under OWCP File No. xxxxxx858. OWCP assigned the new occupational disease claim File No. xxxxxx462.

⁴ Upon return of the case record, at the suggestion of the hearing representative, OWCP administratively combined File Nos. xxxxxx462, with File No. xxxxxx858, with the latter serving as the master file.

seen on an MRI scan had probably healed, or was a false positive on reading, because he had no tenderness on dorsiflexion of the ankle, no tenderness to palpation, and no palpable gap. He also explained that regarding a neuroma, it was unclear how walking induced a neuroma. Dr. Kramer found that appellant was asymptomatic and had no evidence of any orthopedic disability. He noted that appellant had no evidence of hallux valgus, plantar fasciitis, nor symptomatic Morton's neuroma. Dr. Kramer concluded that appellant was able to work without restrictions.

In an October 6, 2015 supplemental report, Dr. Kramer opined that appellant sustained traumatic plantar fasciitis, which resolved within six to eight weeks of June 3, 2014.

By decision dated October 15, 2015, OWCP accepted appellant's claim for plantar fasciitis. It also found, however, that the condition had resolved as of June 3, 2014 and, therefore, no benefits would be covered after June 3, 2014. OWCP noted that, if appellant disagreed, she should refer to the attached appeal rights.

On April 4, 2016 OWCP received an October 23, 2013 report from Dr. Callahan, who diagnosed excessive pronation syndrome, bilateral; symptomatic anterior metatarsalgia, bilateral; two to four phalangeal joints, symptomatic third interspace interdigital neuroma, left; symptomatic partial skin thickness plantar plate tear; lateral insertion second metatarsal phalangeal joints, bilateral; symptomatic bunion deformity, bilateral; associated symptomatic bursitis/capsulitis; first and fifth metatarsal phalangeal joints, bilateral; symptomatic chronic lateral collateral ligament tear, right; symptomatic chronic anterior talofibular ligament tear, left; symptomatic flexor hallucis longus tenosynovitis, right; and symptomatic inferior calcaneal bursitis, bilateral. Dr. Callahan opined that appellant's conditions were a direct result of chronic and extensive overuse syndrome, causally related to factors of his federal employment. This opinion is further supported by the lack of overt trauma to his feet and the development of bilateral conditions as evidenced by MRI scan test results.

In a letter dated May 18, 2016, counsel indicated that he had attached medical documentation from a medical provider for review.

On June 20, 2016 OWCP received April 14 and May 24, 2016 reports from Dr. Callahan. In his April 14, 2016 report, Dr. Callahan diagnosed chronic excessive syndrome, bilateral; chronic symptomatic second and third intermetatarsal interdigital neuroma, right greater than left, improving; chronic symptomatic plantar fasciitis/inferior calcaneal bursitis condition, bilateral; chronic partial skin thickness plantar plate tear, lateral insertion 2 MPJ bilateral; chronic symptomatic bunion deformity/HAV syndrome bilateral/tailor's bunion deformity bilateral; associated bursitis capsulitis 1 MPJ/5th MPJ bilateral; and intermittent paresthesias plantar aspects bilateral/DDX tarsal tunnel syndrome, left greater than right. Dr. Callahan recommended additional therapy and accommodative shoes. He noted in his May 24, 2016 report that in response to the second opinion's findings, all of appellant's visits revealed chronic pain of his bunion and tailor's bunion deformities. Dr. Callahan explained that his neuromas were symptomatic as well as his plantar fasciitis condition. He further explained that Dr. Kramer's opinion that a Morton's neuroma was a clinical diagnosis and not one made by an MRI scan was incorrect and lacked medical rationale. Dr. Callahan explained that many conditions could mimic a Morton's neuroma condition. However, only an MRI scan could confirm one. Dr. Callahan explained that it would be reckless to perform a Morton's neuroma surgical incision procedure without an MRI scan confirmation. He also provided additional findings and opinion in response to Dr. Kramer's

second opinion examination. Dr. Callahan opined that appellant continued to suffer from residuals of his accepted conditions, which were work related. He provided sedentary work restrictions.

By letter dated October 31, 2016, received by OWCP on January 3, 2017, appellant, through counsel, requested reconsideration. Counsel argued that the medical information received by OWCP on June 20, 2016 constituted a request for reconsideration,⁵ but that no action had been taken on that evidence to date.

On December 28, 2016 counsel requested that OWCP respond to his October 31, 2016 letter.

By corespondence dated June 1, 2017, received by OWCP on June 5, 2017, appellant, through counsel, again requested reconsideration. Counsel noted that he submitted Dr. Callahan's rebuttal to the second opinion physician's report on June 15, 2016, which was in response to OWCP's October 15, 2015 "letter."

By decision dated August 29, 2017, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error. It noted counsel's argument that he submitted Dr. Callahan's May 24, 2016 rebuttal in response to OWCP's October 15, 2015 decision. However, OWCP found that the report did not constitute a request for reconsideration as it was not accompanied by a request for reconsideration, or the appeal request form, or a letter requesting reconsideration.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ One such limitation is that the request for reconsideration must be received by it within one year of the date of the decision for which review is sought.⁸ The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought.⁹ 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).¹⁰

⁵ Counsel cited *S.C.*, Docket No. 12-378 (issued July 8, 2013) in support of this proposition.

⁶ 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).

⁷ 20 C.F.R. § 10.607.

⁸ *Id.* at § 10.607(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

⁹ *Id.* at Chapter 2.1602.4.

¹⁰ *Id.*

OWCP will consider an untimely request for reconsideration only if the request demonstrates “clear evidence of error” on the part of OWCP in its “most recent merit decision.”¹¹ The request must establish on its face that such decision was erroneous.¹² Where a request is untimely and fails to present any clear evidence of error, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹³

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP.¹⁴ The evidence must be positive, precise, and explicit and it must be apparent on its face that OWCP committed an error.¹⁵ 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.¹⁶ 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 shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP’s decision.¹⁷

ANALYSIS

The Board finds that OWCP properly determined that appellant’s request for reconsideration was untimely filed. OWCP issued its last merit decision on October 15, 2015. Appellant, therefore, had until October 15, 2016 to request reconsideration of that decision.¹⁸ As appellant’s reconsideration request was not received until January 3, 2017, more than one year after OWCP’s October 15, 2015 decision, OWCP properly determined that the reconsideration request was untimely filed.¹⁹ Consequently, appellant must demonstrate clear evidence of error on the part of OWCP.

The Board finds that appellant has not demonstrated clear evidence of error on the part of OWCP. In its October 15, 2015 decision, OWCP accepted appellant’s claim for plantar fasciitis and found no evidence of ongoing disability.

¹¹ 20 C.F.R. § 10.607(b).

¹² *Id.*

¹³ 20 C.F.R. § 10.608(b).

¹⁴ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁵ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁶ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁷ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁸ *See supra* note 8.

¹⁹ The Board finds that counsel’s submission of additional medical evidence on June 20, 2016 does not constitute a request for reconsideration. In contrast to *S.C.*, Docket No. 12-378 (issued July 8, 2013), counsel in the present case merely submitted the medical evidence without a cover letter explaining its relevance or his disagreement with the October 15, 2015 merit decision.

On reconsideration, counsel argued that he had submitted a timely request and referred to medical reports from Dr. Callahan. The Board finds, however, that the medical reports submitted in support of reconsideration fail to demonstrate that the office committed clear error in denying appellant's claim for disability compensation.

Clear evidence of error is intended to represent a difficult standard. The submission of a detailed, well-rationalized medical report which, if submitted before the merit decision was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.²⁰ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP.²¹

In this case, the additional medical evidence failed to demonstrate clear evidence of error on the part of OWCP in issuing the October 15, 2015 decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) because it was untimely filed failed to demonstrate clear evidence of error.

²⁰ *James R. Mirra*, 56 ECAB 738 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5(a) (October 2011).

²¹ *Nancy Marcano*, 50 ECAB 110 (1998).

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 23, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board