

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

V.G., Appellant)	
)	
and)	Docket No. 19-0038
)	Issued: June 18, 2019
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS HEALTH ADMINISTRATION,)	
Murfreesboro, TN, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 5, 2018 appellant filed a timely appeal from a June 19, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated April 5, 2017, which became final after 30 days of issuance and is not subject to further review.¹ As there was no merit decision issued by OWCP within 180 days of 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 to review the merits of this case.³

¹ 20 C.F.R. § 501.6(d); *see P.S.*, Docket No. 18-0718 (issued October 26, 2018); *T.B.*, Docket No. 15-0001 (issued July 1, 2015); *C.M.*, Docket No. 15-0471 (issued April 27, 2015); *D.A.*, Docket No. 08-1217 (issued October 6, 2008).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the June 19, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2 (c) (1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 26, 2016 appellant, then a 56-year-old health technician, filed an occupational disease claim (Form CA-2) alleging that on December 12, 2015 she first became aware of two bone spurs in her right foot. On May 20, 2016 she first realized this condition was caused by her federal employment duties over the past 33 years, which had required that she stand on her feet while in the performance of duty. Appellant stopped work on May 19, 2016.

By decision dated July 28, 2016, OWCP denied appellant's claim, finding the medical evidence of record was insufficient to establish a causal relationship between the accepted employment factors and the diagnosed foot conditions.

On September 28, 2016 appellant requested reconsideration.

By decision dated October 4, 2016, OWCP denied modification, finding that the evidence of record failed to establish that the diagnosed foot conditions had been caused or aggravated by the accepted employment factors.

Appellant filed an appeal with the Board on October 17, 2016. By decision dated April 5, 2017,⁵ the Board affirmed OWCP's July 28 and October 4, 2016 decisions. The Board found that appellant had not met her burden of proof to establish her claim as she had failed to submit rationalized medical evidence explaining how her diagnosed medical conditions had been caused or aggravated by the accepted employment factors.

On June 21, 2017 appellant requested reconsideration with OWCP asserting that she had in fact established her claim. In support of her claim, she resubmitted a July 7, 2016 report from Dr. Jared C. Bramlett, a podiatrist. Dr. Bramlett provided a history of the treatment he provided to appellant commencing in May 2016, noted her work history and foot complaints, and summarized physical examination findings from prior reports and findings from reviewing two x-ray interpretations. Diagnoses included calcaneal spur syndrome, chronic plantar fasciitis, some subtalar joint arthritis, and bilateral degenerative joint disease, more prominent on the right. Dr. Bramlett attributed the diagnosed conditions to biomechanical factors.

By decision dated July 10, 2017, OWCP denied appellant's request for reconsideration finding that she had not raised an argument or submitted evidence sufficient to warrant reopening

⁴ Docket No. 17-0067 (issued April 5, 2017).

⁵ *Id.*

her case for further merit review under section 8128(a). It found that Dr. Bramlett's July 7, 2016 report had previously been considered by OWCP in its prior decisions.

In an October 20, 2017 report, Dr. Bramlett noted appellant's work history, reviewed x-ray interpretations, and provided examination findings. He observed that her employment required long hours standing on tile surfaces for the past 30 years. Dr. Bramlett provided diagnoses of calcaneal spur syndrome, chronic plantar fasciitis, right calcaneal stress fracture, and degenerative joint disease which he attributed to biomechanical factors. In support of this opinion, he explained the excessive walking on tile surfaces and hard concrete, with a pronated foot and no arch support, had caused the diagnosed medical conditions.

On June 5, 2018 OWCP received appellant's request for reconsideration dated March 25, 2018. Appellant asserted that her foot problems were due to her work, which required prolonged periods of walking and standing on concrete floors.

By decision dated June 19, 2018, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁶ This discretionary authority, however, is subject to certain restrictions.⁷ OWCP's regulations⁸ establish a one-year time limitation for requesting reconsideration, which begins on the date of the original OWCP merit decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁹ Timeliness is determined by the document receipt date, the received date in OWCP's integrated Federal Employees' Compensation System (iFECS).¹⁰ Imposition of this one-year filing limitation does not constitute an abuse of discretion.¹¹

When an application for review is untimely, OWCP undertakes a limited review to determine whether the application demonstrates clear evidence that OWCP's final merit decision was in error.¹² OWCP procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the

⁶ See 5 U.S.C. § 8128(a); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁷ 20 C.F.R. § 10.607(a).

⁸ *J.W.*, Docket No. 18-0703 (issued November 14, 2018); 20 C.F.R. § 10.607(a); see *Alberta Dukes*, 56 ECAB 247 (2005).

⁹ *J.W.*, *id.*; *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

¹¹ *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹² *C.V.*, Docket No. 18-0751 (issued February 22, 2019); *B.W.*, Docket No. 10-0323 (issued September 2, 2010); *M.E.*, 58 ECAB 309 (2007); *Leon J. Modrowski*, 55 ECAB 196 (2004); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

claimant's application for review demonstrates "clear evidence of error" on the part of OWCP.¹³ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁴

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹⁵ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.¹⁶ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁸ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁹ To demonstrate clear evidence of error, 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 decision.²⁰ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.²¹

ANALYSIS

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

The most recent merit decision was a Board decision dated April 5, 2017, which became final after 30 days of issuance and is not subject to further review.²² As appellant's request for reconsideration was not received by OWCP until June 5, 2018, more than one year after the

¹³ See *D.G.*, Docket No. 18-1038 (issued January 23, 2019); *Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

¹⁴ See *E.P.*, Docket No. 18-0423 (issued September 11, 2018); *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ See *C.V.*, *supra* note 12; *Darletha Coleman*, 55 ECAB 143 (2003); *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁶ See *E.P.*, *supra* note 14; *Pasquale C. D'Arco*, 54 ECAB 560 (2003); *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁷ See *C.V.*, *supra* note 12; *Leon J. Modrowski*, *supra* note 12; *Jesus D. Sanchez* *supra* note 12.

¹⁸ See *E.P.*, *supra* note 14; *Leona N. Travis*, *supra* note 16.

¹⁹ See *E.P.*, *supra* note 14; *Nelson T. Thompson*, *supra* note 14.

²⁰ *D.G.*, *supra* note 13; *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

²¹ See *C.V.*, *supra* note 12; *George C. Vernon*, 54 ECAB 319 (2003); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

²² *Supra* note 1.

April 5, 2017 decision, it was untimely filed.²³ Because appellant's request was untimely, she must demonstrate clear evidence of error on the part of OWCP in having denied her occupational disease claim.

Preliminarily, the Board finds that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's October 4, 2016 decision because the Board considered that evidence in its April 5, 2017 merit decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.²⁴

The underlying issue in this case was whether the accepted employment factors caused or aggravated appellant's diagnosed foot conditions. That issue is medical in nature. Appellant's general contentions do not demonstrate clear evidence of error as they do not raise a substantial question as to the correctness of OWCP's decision which denied her claim. Her statement cannot qualify as medical evidence establishing a causal relationship between her diagnosed conditions and the employment factors as lay opinions have no probative value on medical issues.²⁵ It is, therefore, insufficient to demonstrate clear evidence of error.²⁶

OWCP received a report dated October 20, 2017 from Dr. Bramlett in which he noted appellant's work history and repeated his opinion that the diagnosed conditions were due to biomechanical factors. The Board notes that this report is largely duplicative of prior reports from Dr. Bramlett, previously of record, as well as reviewed by the Board in its April 5, 2017 decision. He again attributed appellant's diagnosed conditions to over 30 years of walking on tiled and concrete surfaces with her foot in a pronated position with no arch support. Moreover, as noted, evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.²⁷

As the evidence and argument submitted are of insufficient probative value to shift the weight in favor of appellant and raise a substantial question as to the correctness of OWCP's last merit decision, the Board finds that appellant has failed to demonstrate clear evidence of error.

CONCLUSION

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

²³ 20 C.F.R. § 10.607(b); *see F.N.*, Docket No. 18-1543 (issued March 6, 2019).

²⁴ *C.V.*, *supra* note 12; *see J.L.*, Docket No. 17-1460 (issued December 21, 2018).

²⁵ *See Don A. Bergau*, Docket No. 05-0944 (issued July 7, 2005).

²⁶ *See N.S.*, Docket No. 17-1420 (issued January 23, 2018).

²⁷ *N.S.*, *id.*; *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

ORDER

IT IS HEREBY ORDERED THAT the June 19, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 18, 2019
Washington, DC

Christopher J. Godfrey, 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