

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

FACTUAL HISTORY

On September 6, 2002 appellant, then a 43-year-old letter carrier, filed an occupational disease claim alleging that he developed a stress fracture in his right foot on or before August 6, 2002 due to the walking required in his job.

By letter dated December 12, 2002, the Office advised appellant that he needed to submit additional evidence, including a medical report from his treating physician with a diagnosis and explanation as to how the condition was causally related to his employment.

In notes dated September 17, 2002, Dr. Joseph B. Blanda, an attending orthopedic surgeon, diagnosed a right second metatarsal fracture and stated, "[Appellant] walked on this foot about a month having moderate pain."

By decision dated January 28, 2003,³ the Office denied appellant's compensation claim on the grounds that the evidence did not establish causal relationship between the stress fracture in his foot and his employment.

In undated letters received by the Office on October 2 and December 19, 2003, appellant indicated that he had not received a decision on his claim. By letter dated October 23, 2003, an Office claims examiner advised appellant that his copy of the January 28, 2003 decision had not been returned to the Office as undeliverable.⁴ The claims examiner provided another copy of the decision and advised appellant to refer to the appeal rights enclosed with the decision.

³ The record reflects that a copy of the decision was mailed to appellant's correct address of record.

⁴ The Board has held that there is a rebuttable assumption that a letter properly addressed will have arrived at its destination in due course. *See Levi Drew, Jr.*, 52 ECAB 442 (2001) Since the January 28, 2003 decision was properly addressed to appellant, it is presumed to have arrived at its destination in due course. Although appellant indicated that he did not receive a copy of the January 28, 2003 decision, the record shows that appellant responded to a December 12, 2002 letter from an Office claims examiner which was also sent to his address of record. Appellant offered insufficient evidence to rebut the assumption of receipt of the January 28, 2003 decision.

Subsequent to the January 28, 2003 decision, appellant submitted notes dated March 11 to November 21, 2002 from Dr. Blanda.⁵ The March 11 and September 19, 2002 notes involved a right elbow condition.⁶

By letter dated March 9, 2004, received by the Office on March 11, 2004, appellant indicated that he wished further merit review of his claim.

By decision dated March 24, 2004, the Office denied appellant's request for further merit review on the grounds that it was untimely and failed to show clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁷ does not entitle a claimant to a review of an Office decision as a matter of right.⁸ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁹ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the request for reconsideration is filed within one year of the date of that decision.¹⁰ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).¹¹

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the application for reconsideration to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.¹² The Office's regulations state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹³ In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁴

⁵ Some of the notes from Dr. Blanda were previously of record.

⁶ Appellant did not claim that his elbow condition was work related.

⁷ 5 U.S.C. § 8128(a).

⁸ *Thankamma Mathews*, 44 ECAB 765 (1993).

⁹ *Id.* at 768.

¹⁰ 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

¹¹ *Thankamma Mathews*, *supra* note 8 at 769.

¹² *Alberta Dukes*, *supra* note 10.

¹³ *See Gladys Mercado*, 52 ECAB 255 (2001).

¹⁴ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁶ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish 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 To show 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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.¹⁹ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.²⁰

ANALYSIS

Since more than one year elapsed between the January 28, 2003 Office decision and appellant's March 9, 2004 reconsideration request, the request for reconsideration was untimely. Consequently, he must demonstrate "clear evidence of error" by the Office in denying his claim for compensation.²¹

The evidence submitted by appellant in his untimely request for reconsideration does not raise a substantial question as to the correctness of the Office's last merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in his favor.

Appellant submitted copies of medical notes from Dr. Blanda dated March 11 to November 21, 2002. However, these notes did not address the issue of causal relationship between his foot fracture and factors of his employment. His claim was denied due to insufficient medical evidence on the issue of causal relationship. The Board finds that the evidence submitted by appellant did not raise a substantial question as to the correctness of the Office's January 28, 2003 decision. Therefore, the Office properly denied his request for reconsideration.

¹⁵ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁶ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁷ *Darletha Coleman*, 55 ECAB ____ (Docket No. 03-868, issued November 10, 2003).

¹⁸ *Leona N. Travis*, *supra* note 16.

¹⁹ *Darletha Coleman*, *supra* note 17.

²⁰ *Pete F. Dorso*, 52 ECAB 424 (2001).

²¹ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

CONCLUSION

The Board finds that the Office properly denied further merit review of appellant's claim on the grounds that his request for reconsideration was untimely and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 24, 2004 is affirmed.

Issued: July 1, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member