

not return. In a January 26, 2004 report, Dr. Michael A. Pappas, a Board-certified orthopedic surgeon, diagnosed a left mid-foot crush injury. In a March 4, 2004 duty status report, he indicated that appellant had sustained multiple fractures in her left foot and was totally disabled. The Office accepted appellant's claim for left foot crush injury and paid appropriate compensation.

In a March 10, 2004 note, Dr. Pappas advised that appellant could return to work on April 21, 2004. On April 1, 2004 the employing establishment explained that appellant would work in a limited-duty capacity, performing data entry and clerical tasks and answering telephones. Appellant was scheduled to return to duty effective April 23, 2004. She reported to the employing establishment on April 23, 2004, where she fell and claimed to have reinjured her left ankle before she was able to return to duty. In an April 24, 2004 witness statement, Willard Peek, appellant's supervisor, stated that, prior to her fall, she told him she did not feel able to return to work at that time. In an April 27, 2004 work capacity evaluation, Dr. Pappas recommended that appellant remain off work until her next appointment on April 29, 2004. On April 29, 2004 he stated that appellant was to remain off work for six weeks.

On May 17, 2004 appellant filed a claim for recurrence of disability beginning April 23, 2004. On June 9, 2004 Dr. Pappas recommended that she remain off work until August 1, 2004. He noted the results of a June 7, 2004 magnetic resonance imaging (MRI) scan and found swelling around the lateral aspect of the ankle. Dr. Pappas reiterated that appellant's condition was due to a reinjury of her left ankle after her accepted crush injury.

On June 16, 2004 the Office referred appellant to Dr. John P. Sandifer, a Board-certified orthopedic surgeon, for a second opinion. In a July 13, 2004 report, Dr. Sandifer noted appellant's complaints of severe pain and swelling. He stated that she reported difficulty ambulating and that she was unable to wear anything but a very soft shoe or slipper on her left foot. On physical examination, Dr. Sandifer noted marked tenderness and swelling over several aspects of the left foot and ankle. He diagnosed status post crush injury of the left foot and ankle with chronic pain and swelling, as well as probable reflex sympathetic dystrophy of the left foot and ankle. Dr. Sandifer concluded that, due to appellant's chronic pain and swelling, she was unable to return to her original job as a packer. However, he determined that she was able to perform sedentary or very light work for eight hours per day, so long as she was able to change positions frequently and keep her foot and ankle elevated. On a July 13, 2004 work capacity evaluation, Dr. Sandifer advised that appellant was completely restricted from operating a motor vehicle either at work or to and from work. He recommended that appellant work under restrictions for six months.

In August 30, 2004 form reports, Dr. Pappas disagreed with Dr. Sandifer's assessment and recommended that appellant remain off work for another two to four months. On August 31, 2004 the Office found a conflict in medical opinion between Dr. Pappas and Dr. Sandifer concerning appellant's capacity for work. On September 13, 2004 the Office referred appellant to Dr. John Sklar, a Board-certified physiatrist, for an impartial medical examination to resolve the conflict.

In a September 30, 2004 report, Dr. Pappas recommended that appellant remain off work pending a follow-up appointment in six weeks, at which time she would either have an impairment rating or take medical retirement.

In an October 6, 2004 report, Dr. Sklar noted that appellant reported significant pain since her January 23 and April 23, 2004 injuries, but had not sought much medical treatment. On physical examination, he found some swelling and restricted motion around the left ankle and noted that she reported an inability to ambulate without assistance. Dr. Sklar diagnosed left foot crush injury, resolved and left ankle strain, resolving slowly. He noted that appellant's pain complaints appeared disproportionate to the physical examination findings. Dr. Sklar concluded that appellant appeared to be in significant pain and could not return to regular-duty work, but that she could return to light-duty work. He explained that returning to work should be considered part of appellant's treatment, as it would help her to build up her activity tolerance over time. In an October 6, 2004 work capacity evaluation, Dr. Sklar indicated that appellant was completely restricted from operating a motor vehicle while at work, but did not prohibit her from driving to and from work. He recommended that she return to light-duty work for four hours per day for one month, then increase her workload to six hours per day for a second month and finally to eight hours per day by the third month.

By correspondence dated November 18, 2004, the employing establishment offered appellant a light-duty job based on Dr. Sklar's report. On November 19, 2004 the Office informed appellant that it found the offered light-duty position suitable and accorded her 30 days to either accept the position or provide an explanation of her reasons for refusing it. In a telephone conference on the same day, appellant informed the Office that she was unable to accept the offered light-duty position because she was taking pain medication three times per day and was unable to drive to and from work.

In a November 19, 2004 letter, the Office advised appellant that it found the position to be suitable and that she had 30 days to accept the position or to provide reasons for refusing the position. In a November 17, 2004 report, Dr. Pappas advised that appellant had continuing hypersensitivity of the left foot and ankle and was unable to touch her feet without hurting them. In a December 20, 2004 letter, the Office advised appellant that she had not provided acceptable reasons for refusing suitable work and allowed her 15 days to accept the position.

By decision dated January 4, 2005, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work.

Thereafter, appellant provided a December 29, 2004 report from Dr. Pappas advising that her condition had significantly improved. In a March 28, 2005 report, Dr. Pappas indicated that, although appellant's swelling had receded and her motion had increased, she was still unable to ambulate for long distances. On June 30, 2005 Dr. Richard B. Sharp, a Board-certified physiatrist in Dr. Pappas' practice, noted appellant's complaints of chronic pain and advised that she ambulated with a brace at home and used a wheelchair for long distances. He diagnosed left mid-foot ankle injury with persistent pain and loss of range of motion.

By correspondence dated March 8, 2007, appellant requested reconsideration of the Office's January 4, 2005 decision. She contended that the Office's decision showed clear

evidence of error as she had articulated a reason for refusing the light-duty job offer, that she was unable to drive to and from work and the Office failed to develop the issue. Appellant contended that Dr. Sklar's report was incomplete as it prohibited her from driving at work but did not address driving to and from work.

In a February 26, 2007 report, Dr. Pappas stated that appellant reinjured her foot on January 31, 2007 when she fell into a hole and twisted her ankle. On April 2, 2007 he noted that, although an MRI scan showed no acute findings, appellant still had tenderness around the medial side and the posterior tibial tendon. On May 16, 2007 Dr. Pappas advised that, although appellant had only occasional swelling, her left ankle injury remained acute and chronic.

By decision dated August 15, 2007, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to review of an Office decision as a matter of right.² The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.³ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁴ Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was erroneous on its face.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁷ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so

¹ 5 U.S.C. § 8128(a).

² *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1990).

³ 20 C.F.R. § 10.607(a).

⁴ *See Leon D. Faidley, Jr.*, *supra* note 2.

⁵ 20 C.F.R. § 10.607(b).

⁶ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁷ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁸ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

as to produce a contrary conclusion.⁹ This entails a limited review by the Office 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 the Office.¹⁰ The evidence submitted must not only be of sufficient probative value as to create a conflict in medical opinion or to 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.¹¹ The Board makes an independent determination of whether a claimant has established 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.¹²

ANALYSIS

The Board finds that the Office properly denied appellant's request for reconsideration as untimely. The implementing federal regulations provides that a request for reconsideration must be filed within one year from the date of the Office decision for which review is sought. The most recent merit decision was the Office's January 4, 2005 decision terminating appellant's compensation benefits effective the same day. As appellant's March 8, 2007 reconsideration request was made more than one year following the Office's January 4, 2005 decision, the Board finds that appellant's request was untimely filed. Consequently, to have her claim reopened, appellant must show clear evidence of error by the Office in its January 4, 2005 decision.

The Office relied upon Dr. Sklar's October 6, 2006 impartial medical report in finding that the employing establishment's offered light-duty position to be suitable and within appellant's restrictions. Appellant asserted that the Office's reliance upon Dr. Sklar's report was clearly erroneous because he did not restrict her from driving to and from work. She contends that the report was incomplete and that the Office erred in failing to seek clarification from Dr. Sklar. However, appellant's contentions do not establish clear error on the part of the Office. The fact that Dr. Sklar chose not to impose any restrictions on driving to or from work is insufficient to show clear error by the Office with regard to not seeking a supplemental report. Appellant did not submit any medical evidence establishing that she was unable to commute to work prior to the Office's termination of her compensation. The Board notes that the Office followed its procedures with regard to finding the light-duty position suitable¹³ and appellant has not submitted adequate evidence or argument to raise a substantial question as to the correctness of the Office's decision.

In her request for reconsideration, appellant also argued that the Office clearly erred by not further developing the issue of her capacity to return to work because she was taking pain medication three times per day and was unable to drive. However, the evidence indicates that

⁹ *Leona N. Travis, supra* note 7.

¹⁰ *See Nelson T. Thompson, 43 ECAB 919 (1992).*

¹¹ *Veletta C. Coleman, 48 ECAB 367, 370 (1997).*

¹² *Thankamma Mathews, 44 ECAB 765, 770 (1993).*

¹³ *See Maggie L. Moore, 43 ECAB 818 (1992).*

the Office considered the reasons appellant provided for refusing suitable work but found them unacceptable. As noted, the medical evidence of record at the time of the Office's termination decision did not establish that appellant was unable to commute to work. Rather, Dr. Sklar found that appellant could perform the duties of the offered position. Subsequent to the decision termination, appellant also did not provide any reasoned medical evidence explaining why she was unable to commute to work due to medication. Although Dr. Sandifer indicated that appellant was unable to drive to and from work, this is insufficient to show that the Office clearly erred in terminating appellant's compensation after she refused the employing establishment's offer of a light-duty position in November 2004. Dr. Sandifer was merely on one side of a medical conflict that was later resolved by Dr. Sklar.¹⁴ The term "clear evidence of error" is intended to represent a difficult standard. For example, 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 and would not require a review of the case.¹⁵

The Board finds that appellant has not raised a substantial question as to the correctness of the Office's January 4, 2005 decision and has not established clear evidence of error.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration without conducting a merit review, on the grounds that it was untimely filed and did not establish clear evidence of error.

¹⁴ See *Darlene R. Kennedy*, 57 ECAB 414 (2006) (provides that the opinion of an impartial specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight).

¹⁵ See *Joseph R. Santos*, 57 ECAB 554 (2006); citing Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

ORDER

IT IS HEREBY ORDERED THAT the August 15, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 1, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board