

aggravated the degenerative disc disease in his cervical spine.¹ He first realized on November 24, 1998 that his employment caused or aggravated this condition.

In a decision dated February 22, 1999, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office accepted that appellant experienced the claimed employment factors but denied his claim on the grounds that the evidence did not establish that a condition had been diagnosed in connection therewith. The Office noted that no medical evidence was received with appellant's initial claim and that the evidence of record remained insufficient to support the claim "because there was no medical evidence."

On February 22, 2000 appellant submitted medical evidence to support his claim. In a decision dated May 22, 2000, the Office denied a merit review of his claim on the grounds that the evidence was immaterial and did not support an employment-related injury. The Board affirmed, finding that none of the medical reports was relevant because none of the doctors offered an opinion on whether appellant's federal employment aggravated his cervical condition.²

On July 25, 2002 appellant requested that the Office allow him to submit new evidence in support of his claim. He stated that he was submitting new medical documentation to support a causal relationship to the duties of his position as a letter carrier. He submitted an emergency department discharge instruction sheet, signed on June 12, 2002, providing a discharge diagnosis of lower back pain, as well as discharge instructions and discharge medications. Appellant also submitted a February 28, 2003 progress note from Dr. Arthur O. Schilp, a Board-certified neurosurgeon, who reported that appellant underwent surgery in January 2003 for severe stenotic cervical myelopathy at C3-4. He noted a decision in February 1999 that appellant did not become myelopathic because of the work he did at the employing establishment. Dr. Schilp stated:

"I recommended to the patient [that] if he wants to pursue this any further, then he is to go to correspondence to get the copies of his records made and sent to the appropriate authorities. Since we are not in the business of workmen's compensation, I am not indicating that we expect even more positive response from the authorities."

On October 7, 2002 appellant sent a fax to the Office requesting reconsideration of his claim.

In a decision dated March 5, 2003, the Office denied appellant's October 7, 2002 request for reconsideration, finding that he advanced no argument of error in fact or law and that he submitted no new relevant medical evidence that would entitle him to a merit review. The Office noted that appellant submitted no additional evidence in support of his October 7, 2002

¹ Appellant was previously employed as a warehouseman for the U.S. Air Force, where he sustained an injury to his cervical spine. The Department of Veterans Affairs accepted the claim and found that he was entitled to a military service-connected disability of 60 percent.

² Docket No. 00-2126 (issued February 27, 2002), *petition for recon. denied* (issued July 12, 2002).

request but added: “I did review an unsigned, ‘unofficial -- not for medical record work copy’ authored by the VA Healthcare Network [Dr. Schilp]. This document is of no probative value as it does not speak to the incident of November 24, 1998.”³

On May 11, 2004 appellant again requested reconsideration. In support thereof, he submitted treatment notes from Dr. G.S. Prabhu, a general surgeon. In a November 24 1998 note, Dr. Prabhu stated that appellant was employed as a letter carrier “and the job entails lifting boxes 50 pounds 6 [to] 8 [hours] a day over varying distances as well as a letter bag hanging on his shoulder, weighing as much as 50 pounds at a time and walking considerable distances and over a prolonged period of time, apparently causing some pain and numbness over neck and back along with gradually increasing numbness and tingling in his arms and legs.” He gave the following impression: “[Appellant,] who is 39 years old, suddenly experienced radicular pains in his extremities on Nov[ember] 24, 1998, while on duty, presents essentially in status post acute spinal disorder involving neck and back.” In a January 27, 1999 note, Dr. Prabhu offered the following impression: “[Status post] cervical and lumbar spine strain most likely causal factor triggered by job-related activity. Once again have requested he seek orthopedic and neurosurgeon help.”

On June 6, 2004 appellant resubmitted his request for reconsideration and Dr. Prabhu’s treatment notes. On June 21, 2004 he resubmitted only his request for reconsideration.

In a decision dated September 17, 2004, the Office denied appellant’s June 6, 2004 request for reconsideration. The Office found that his request was untimely and failed to present clear evidence of error in the Office’s final merit decision.⁴

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees’ Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”⁵

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application

³ Appellant alleged an occupational disease or illness, not a traumatic injury occurring on November 24, 1998.

⁴ The Office forwarded a copy of this decision to appellant after learning that he had a new address.

⁵ 5 U.S.C. § 8128(a).

only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁶

ANALYSIS

The most recent merit decision in this case is the Office's February 22, 1999 decision denying appellant's claim for failure to a causal relationship between the accepted duties of his position as a city carrier and the cervical degenerative disc disease for which he seeks compensation. Appellant had one year from the date of that decision to request reconsideration. His May 11, 2004 request, coming more than five years after the Office's merit decision, is therefore untimely.⁷

Appellant may nonetheless be entitled to a merit review of his claim if his May 11, 2004 request for reconsideration demonstrates clear evidence of error on the part of the Office in its February 22, 1999 decision. The "clear evidence of error" standard for untimely requests is intended to be a difficult one.⁸ The request must establish, on its face, that the Office's February 22, 1999 decision was erroneous. The Board will first examine the basis of the Office's February 22, 1999 decision and then determine whether appellant's May 11, 2004 request for reconsideration demonstrates clear evidence of error on the part of the Office.

In its February 22, 1999 decision, the Office accepted as factual the employment factors alleged but denied compensation because appellant submitted no medical evidence, so there was no evidence to support that the accepted duties of his federal employment had caused any injury or medical condition. When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.⁹ Causal relationship is a medical issue,¹⁰ and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical

⁶ 20 C.F.R. § 10.607 (1999).

⁷ The Office determined timeliness based on a June 6, 2004 resubmission of appellant's May 11, 2004 request for reconsideration. Though it makes no difference, appellant should be given the benefit of the earlier date.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b (May 1991).

⁹ See *Walter D. Morehead*, 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury). See generally *John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ *Mary J. Briggs*, 37 ECAB 578 (1986).

background of the claimant,¹¹ must be one of reasonable medical certainty¹² and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.¹³

The Office properly advised appellant on January 4, 1999 that he needed to submit additional evidence to support his claim, including medical opinion evidence on the issue of causal relationship:

“Provide a comprehensive medical report from your treating physician which describes your symptoms; results of examinations and tests; diagnosis; the treatment provided; the effect of treatment; and the doctor’s opinion, with medical reasons, on the cause of your condition. Specifically, if your doctor feels that exposure or incidents in your federal employment contributed to your condition, an explanation of how such exposure contributed should be provided.”

A month and a half later, when appellant submitted no such evidence, the Office denied his claim for failure to establish the essential element of causal relationship.

The Board finds that appellant’s May 11, 2004 request for reconsideration does not establish, on its face, that the Office’s February 22, 1999 decision was erroneous. The late submission of medical evidence in no way shows error on the part of the Office. Dr. Prabhu’s treatment notes are contemporaneous to appellant’s December 4, 1998 claim for compensation, and they indicate that appellant’s cervical and lumbar spine strain was most likely triggered by job-related activity. But this evidence does not alter the reason the Office denied appellant’s claim. Appellant made no allegation, and the evidence he submitted to support his May 11, 2004 request for reconsideration gives no indication whatsoever, that he did in fact submit medical opinion evidence supporting causal relationship prior to the February 22, 1999 denial of benefits.

For this reason, the Board finds that appellant’s May 11, 2004 request for reconsideration does not demonstrate clear evidence of error on the part of the Office in its most recent merit decision. Appellant is therefore not entitled to a merit review of his claim.

CONCLUSION

The Board finds that the Office properly denied appellant’s May 11, 2004 request for reconsideration. The request was untimely and failed to establish, on its face, that the Office’s February 22, 1999 decision was erroneous.

¹¹ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

¹² *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

¹³ *See William E. Enright*, 31 ECAB 426, 430 (1980).

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 22, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member