



It later accepted an aggravation of degenerative disc disease. On September 14, 2005 the Office accepted appellant's April 19, 2005 recurrence claim and he was placed on the periodic rolls.

Appellant's treating physicians, Dr. Ronald B. Neal, a Board-certified urologist, and Dr. Najmeddin Beyranvand, a Board-certified anesthesiologist specializing in pain medicine, opined that he was totally disabled due to his accepted employment injury. In a January 10, 2006 second opinion report, Dr. Edward Forman, a Board-certified osteopath, specializing in orthopedic surgery, found that appellant had no residuals related to the accepted injury. He opined that appellant was able to return to his date-of-injury position. Dr. Forman stated that appellant's preexisting degenerative disc disease of the lumbar spine was exacerbated by his occupational injury, but that the condition should have resolved within three to four months.

In order to resolve the conflict in medical opinion between appellant's treating physicians and the Office's second opinion physician, the Office referred appellant to Dr. Jaroslaw B. Dzwinyk, a Board-certified orthopedic surgeon, who was asked to address whether appellant continued to have residuals of his accepted condition and, if so, whether he remained disabled. In an April 3, 2006 report, Dr. Dzwinyk stated that appellant had sustained a temporary aggravation of a preexisting degenerative lumbar disc disease, which should have resolved within three months. Appellant's present symptoms were not related to the accepted injury, but rather to the preexisting condition. Dr. Dzwinyk opined that appellant had no residuals from the accepted condition.

In a September 7, 2006 notice, the Office informed appellant that it proposed to terminate his wage-loss and medical benefits based upon Dr. Dzwinyk's opinion. Appellant was given 30 days to submit evidence or argument.

By decision dated December 5, 2005, the Office terminated appellant's medical and compensation benefits, on the grounds that he no longer had any disability or residuals due to his work-related condition.

The record contains an April 21, 2006 report from Dr. Beyranvand, reflecting that he performed a lumbar epidural steroid injection on that date. On May 5, 2006 he diagnosed low pain and foot numbness and lumbar degenerative disc disease at L4-5 and L5-S1. On January 14, 2008 Dr. Dzwinyk opined that appellant had a 50 percent impairment of the lower extremity due to pain, sensory deficit and decreased strength.

On March 5, 2008 appellant requested reconsideration. He submitted a January 4, 2008 work capacity evaluation prepared by Michael Hornbuckle, a physical therapist, who opined that appellant was able to lift up to 23 pounds and met the requirements of light PDC strength capabilities, with some medium PDC capabilities for occasional lifting. Appellant also provided a January 14, 2008 report from Dr. Gerard Dysico, a treating physician, who stated that, based on the January 4, 2008 work capacity evaluation, appellant was able to lift only 50 percent of the weight required by his job description.

By decision dated April 3, 2008, the Office denied appellant's request for reconsideration, on the grounds that it was untimely and failed to establish clear evidence of error.

## LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.<sup>1</sup> It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>2</sup>

When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."<sup>3</sup> Office regulations and procedure provide 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>4</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>5</sup>

The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, 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 on the director's own motion.<sup>6</sup>

## ANALYSIS

The Board finds that the Office properly determined that appellant failed to file a timely application for review. Office procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.<sup>7</sup> It issued its last

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 20 C.F.R. § 10.607; *see also* *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>3</sup> *See id.* at § 10.607(b); *D.D.*, 58 ECAB \_\_\_ (Docket No. 06-1148, November 30, 2006); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>4</sup> *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(d) (January 2004). Office procedure further provides, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made an error (for example, proof that a schedule award was miscalculated). 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." *Id.* at Chapter 2.1602.3c.

<sup>5</sup> *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991).

<sup>7</sup> 20 C.F.R. § 10.607(a).

merit decision in this case on December 5, 2006. As appellant's March 5, 2008 request for reconsideration was submitted more than one year after the last merit decision of record, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.<sup>8</sup>

Medical evidence submitted subsequent to the December 5, 2006 decision consists of reports from Dr. Beyranvand dated April 21, 2006 to January 14, 2008; a January 4, 2008 work capacity evaluation; and a January 14, 2008 report from Dr. Dysico. None of these reports are sufficient to establish clear evidence of error on the part of the Office.

Dr. Beyranvand performed and lumbar epidural steroid injection and diagnosed low pain and foot numbness with lumbar degenerative disc disease at L4-5 and L5-S1. On January 14, 2008 he opined that appellant had a 50 percent permanent impairment of the lower extremity due to pain, sensory deficit and decreased strength. Dr. Beyranvand did not address whether appellant was disable or express any opinion as to whether there was a causal relationship between his current condition and the accepted injury. Therefore, his reports are not sufficient to establish error on the part of the Office.

Dr. Dysico stated that, based on a January 4, 2008 work capacity evaluation, appellant was able to lift only 50 percent of the weight required by his job description. The January 4, 2008 work capacity evaluation reflected that appellant was able to lift up to 23 pounds and met the requirements of light PDC strength capabilities, with some medium PDC capabilities for occasional lifting. Neither Dr. Dysico's report nor the work capacity evaluation contains an opinion on the relevant issue of whether appellant was disabled or had residuals from his accepted condition.<sup>9</sup> Therefore, the reports do not establish clear evidence of error on the part of the Office.

The term "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 denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>10</sup> The evidence must *prima facie* shift the weight of the evidence in favor of appellant.<sup>11</sup> None of the medical reports submitted manifests on its face that the Office committed an error in terminating appellant's compensation and medical benefits effective December 5, 2006. Thus, the reports are insufficient to establish clear evidence of error.

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<sup>8</sup> *Id.* at § 10.607(b); see *Debra McDavid*, 57 ECAB 149 (2005).

<sup>9</sup> Where the Office meets its burden of proof in justifying termination of compensation benefits, the burden is on the employee to establish that any subsequent disability is causally related to an accepted employment injury. *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006); see *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

<sup>10</sup> *Joseph R. Santos*, 57 ECAB 554 (2006).

<sup>11</sup> See *Darletha Coleman*, *supra* note 5.

As the evidence submitted by appellant is insufficient to *prima facie* shift the weight of evidence in favor of him and raise a substantial question as to the correctness of the Office's last merit decision, he has not established clear evidence of error.<sup>12</sup>

**CONCLUSION**

The Board finds that the Office properly determined that appellant's request for reconsideration dated March 5, 2008 was untimely filed and did not demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 3, 2008 is affirmed.

Issued: November 24, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>12</sup> See *Veletta C. Coleman*, 48 ECAB 367 (1997).