

slipped and struck his back against the stand. The Office accepted appellant's claim for lumbar contusion.¹

On January 3, 1977 appellant then working as a machinist for the Department of the Navy at the Mare Island Naval Shipyard, sustained a cervical strain while working in an awkward position.² In a letter dated May 8, 1980, the employing establishment informed him that light duty was no longer available. Appellant did not return to work at the employing establishment and retired on disability effective February 9, 1982.

On August 13, 1982 the Office found that appellant failed to establish a recurrence of disability beginning May 8, 1980 causally related to either of his accepted employment injuries. On September 13, 1983 it denied modification of its decision.

On August 8, 1985 appellant filed a claim for an occupational disease, listing the nature of his disease as a back problem from his 1967 injury and indicating that he lost pay between May 10, 1980 and January 1982. In a decision dated September 8, 1993, the Office found that his current cervical problems were not causally related to his 1967 or 1977 work injuries: "There is no convincing medical evidence establishing that his two minor work injuries affected this [degenerative] process." On June 27, 2002 the Office found that the weight of the medical opinion evidence rested with the well-rationalized opinion of Dr. Frederick W. Tiley, an orthopedic surgeon and second opinion physician. It found that Dr. Tiley provided a proper factual and medical history and sound medical reasoning for his opinion. Dr. Tiley found no current relationship between the accepted employment injuries and appellant's current preexisting osteoarthritis. On February 14, 2003 an Office hearing representative affirmed the denial of appellant's claim.³

On August 22, 2006 appellant filed a recurrence claim alleging that his medical treatments since January 3, 1977 and his work stoppage in May 1980 were causally related to his back injury in 1967. He noted that he had back troubles ever since the 1967 accident. On December 15, 2006 the Office denied appellant's recurrence claim. It found that the medical evidence was insufficient to establish that, his current medical condition was due to the accepted work injury.

The Office reviewed the merits of appellant's case on March 15, 2007 but denied modification of its prior decision. It reviewed the opinion of Dr. Nancy Keller, who related his left-sided weakness to the 1967 injury. The Office found that Dr. Keller's opinion was speculative, based on an unsupported history of cervical complaints and hospitalization and inconsistent with x-rays and the findings of the initial treating physician. In an attached statement of appeal rights, the Office notified appellant that, if he disagreed with the decision, he had one calendar year of the date of that decision to request reconsideration.

¹ OWCP File No. xxxxxx380 (sub).

² OWCP File No. xxxxxx344 (sub).

³ OWCP File No. xxxxxx776 (master).

Appellant filed a timely reconsideration request on May 31, 2007. In a September 12, 2007 decision, the Office denied the request as insufficient to warrant further merit review of his case. Appellant asked the Board to review the Office's September 12, 2007 nonmerit decision but subsequently withdrew the appeal so he could submit additional medical evidence to the Office and request reconsideration. The Board granted his request and dismissed the appeal on August 25, 2008.⁴

On November 12, 2008 appellant requested reconsideration. He submitted evidence to show that his back had no fracture prior to his October 14, 1967 fall. In a November 25, 2008 decision, the Office denied reconsideration of appellant's case on the grounds that his request was more than a year after the Office's March 15, 2007 decision, which was the last merit review of his case. It further found that his untimely request did not show clear evidence of error in the Office's March 15, 2007 decision.

On December 8, 2008 appellant again requested reconsideration. He took issue with the Office's finding that his prior request was untimely. Together with a reconsideration request form, the Office received a January 15, 2009 report from Dr. Keller, who stated that appellant's original injury, with some interspinous ligament laxity from the tears, would promote the osteoarthritis from which he currently suffers. Dr. Keller stated:

"Since the fall, [appellant] has been in significant pain. He has had problems with his left side, left shoulder and left arm pain, probably radiculopathy from the original injury. With the ligaments pulled and the previous injuries, [appellant] has progressed to a traumatic osteoarthritis at multiple levels. At this point, the best thing to do is proceed with surgery. [Appellant] has had chronic weakness of his left side. I do not think that [i]s going to improve but basically he needs to proceed with surgery for pain control. [Appellant's] problem stems from his original injury in 1967."

In a decision dated March 10, 2009, the Office denied appellant's request for reconsideration. It found that the request was untimely and failed to show clear evidence of error in the last merit review of his case on March 15, 2007. The Office explained that Dr. Keller had previously advanced her opinion in a January 4, 2007 report, which the Office's March 15, 2007 decision had considered.

On appeal, appellant argues that he still has serious problems stemming from his accepted injuries. He submitted an August 30, 2007 medical report and copy of Dr. Keller's January 15, 2009 report.

⁴ See Docket No. 08-266 (issued August 25, 2008).

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 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

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 a mistake, 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.⁷ If clear evidence of error has not been presented, the Office should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.⁸

ANALYSIS

The Office reviewed the merits of appellant's case on March 15, 2007. It found that the medical evidence was insufficient to establish that his current medical condition was due to the accepted work injury. The appeal rights attached to that decision explained, if appellant disagreed, he had one calendar year or until March 15, 2008, to request reconsideration. Appellant's December 8, 2008 request for reconsideration is therefore untimely.

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004) (citing Board precedent).

⁸ *Id.*, Chapter 2.1602.3.d(1).

Appellant received other decisions after March 15, 2007, but none of those decisions reviewed the merits of his case or provided him another year in which to request reconsideration. The time period for requesting reconsideration expired on March 15, 2008.

Because appellant's December 8, 2008 request for reconsideration is untimely, it must present "clear evidence of error." This evidence must show on its face that the March 15, 2007 decision was erroneous. It cannot be a matter of opinion, where reasonable minds can disagree. It cannot be a matter of possibility. It must be a matter of positive proof, such as proof of a mathematical error. "Clear evidence of error" is intended to be a difficult standard to meet.

In his December 8, 2008 reconsideration request, appellant questioned how the Office could find his prior request untimely. However, this contention does not address the Office's finding that the medical evidence was insufficient to establish that his current medical condition was due to the accepted work injury. Arguments about the timeliness of later procedural requests do not show clear evidence of error in the Office's March 15, 2007 merit review of appellant's claim.

Appellant did submit a January 15, 2009 report from Dr. Keller, who again stated that his problem stemmed from his 1967 injury. However, this report adds very little to the opinion she previously expressed, which the Office considered and found was flawed for several reasons. Dr. Keller did not correct those deficiencies. Her opinion remains only weakly supportive of appellant's claim. As such, it falls far short of the type of evidence needed to establish clear error to reopen his case for another merit review.

Construed in the light most favorable to appellant, Dr. Keller's opinion may simply create a conflict with Dr. Tiley, the second-opinion orthopedic surgeon who found no causal relationship between the accepted employment injuries and appellant's current osteoarthritic condition. The Office found that Dr. Tiley's opinion stood as the weight of the medical evidence. The Board has held that 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, is not clear evidence of error.⁹

The Board finds that appellant's untimely reconsideration request fails to show clear evidence of error in the Office's March 15, 2007 merit decision. The Board will therefore affirm the Office's March 10, 2009 nonmerit decision denying that request.

On appeal, appellant contends that he has serious problems stemming from his accepted injuries. The issue of whether his current back condition is causally related to what happened on October 14, 1967 or January 3, 1977 is a matter of medical opinion. The Office has determined that the weight of the medical opinion rests with Dr. Tiley. On appeal, appellant submitted an August 30, 2007 medical report. However, he did not submit this evidence to support his December 8, 2008 request for reconsideration. The Board may not consider it for the first time on appeal.¹⁰

⁹ See *James R. Mirra*, 56 ECAB 738 (2005); *Pete F. Dorso*, 52 ECAB 424 (2001).

¹⁰ See 20 C.F.R. § 501.2(c)(1).

CONCLUSION

The Board finds that the Office properly denied appellant's December 8, 2008 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the March 10, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2010
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