

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to show clear evidence of error in the denial of her claim.

FACTUAL HISTORY

This case has previously been before the Board.³ The Office accepted that appellant sustained cervical and lumbar strains on May 5, 1995 when a drafting table collapsed. Following referral to an impartial medical specialist, it terminated her compensation benefits in a March 24, 1997 decision. The Office subsequently reopened the case as appellant was involved in a third-party action involving the original impartial medical specialist. On September 29, 2003 appellant was referred to Dr. Mark S. Klein, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. After obtaining several supplemental reports from Dr. Klein, the Office denied her claim of residual disability after March 24, 1997 in a June 7, 2007 merit decision. In an August 15, 2008 decision, the Board found that appellant failed to establish that she had any work-related disability or residuals after March 24, 1997. It found that the opinion of Dr. Klein was well rationalized and entitled to the special weight of an impartial medical specialist.⁴ The facts of the case, as set forth in the Board's prior decision, are incorporated herein by reference.

On November 24, 2009 appellant, through her representative, requested reconsideration. Counsel requested that the Office reexamine the record, contending that the Office had an obligation to contact Dr. Joel L. Falik, a Board-certified orthopedic surgeon, to correct information regarding the injury date and circumstances of the injury.⁵ Appellant submitted an August 31, 2009 letter from Dr. Falik, who stated that he had reviewed the Board's decision and his prior correspondence to the Office. Dr. Falik noted that his April 7, 2003 letter to the Office was "not nonresponsive to the Office's request for a supplemental report but rather responsive to [the Office's] inaccuracies and uncertainties which I posed." He stated that it was his opinion that appellant sustained an aggravation of a preexisting medical condition when a drafting table collapsed on May 5, 1995 and that he disagreed with the opinion of Dr. Klein that the aggravation was temporary rather than permanent.

In an April 12, 2010 decision, the Office denied appellant's request for reconsideration. It found that the request was not filed within one year of the Board's August 15, 2008 merit decision and that the evidence did not manifest clear error on the part of the Office in the denial of her claim. The Office found that the 2009 letter of Dr. Falik referenced procedural issues in the case and he had been replaced as the impartial medical specialist of record.

³ Docket No. 08-288 (issued August 15, 2008).

⁴ At footnote 7, the Board addressed the Office's referral to other designated impartial medical examiners and the reasons for their disqualification prior to the selection of Dr. Klein.

⁵ Appellant was referred to Dr. Falik for an impartial medical examination prior to the referral to Dr. Klein.

On appeal, appellant's representative contends that the weight of medical opinion should be with Dr. Falik and that the Office engaged in doctor shopping to obtain a friendly opinion.

LEGAL PRECEDENT

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.⁶ The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in the most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁷

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.⁸ When an application for review is not timely filed, the Office must undertake a limited review to determine whether the application establishes clear evidence of error.⁹ 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.¹⁰ 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.¹¹

⁶ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including those of the Board. See *Robert F. Stone*, 57 ECAB 292 (2005).

⁷ 20 C.F.R. § 10.607.

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

⁹ See 20 C.F.R. § 10.607(b); *D.D.*, 58 ECAB 206 (2006); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹⁰ *Id.*; 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.

¹¹ *Robert F. Stone*, *supra* note 6; *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. Appellant's November 24, 2009 request for reconsideration was filed more than one year following the Board's August 15, 2008 decision, the most recent merit decision on the issues. Therefore, it was untimely and she must demonstrate clear evidence of error by the Office in denying her claim for benefits after March 24, 1997.

In alleging clear evidence or error, appellant contends that the Office engaged in doctor shopping when it selected Dr. Klein to be an impartial medical referee following her examination by Dr. Falik in 2001. She presented an August 31, 2009 letter from Dr. Falik, who stated his disagreement with the Board's characterization of his status as an impartial medical specialist, the responsiveness of his reports to the Office, and advised that he disagreed with Dr. Klein as to the nature of the aggravation of appellant's back condition.

The record reflects that appellant was referred to Dr. Falik, as an impartial medical specialist on August 22, 2001. Dr. Falik provided a September 27, 2001 report in which he noted a "long history of multiple neck and spine problems beginning in 1985 when she was involved in an automobile accident." He listed appellant's fall in a hotel on August 31, 1996 and her total disability status following a May 5, 1995 fall at work. In addressing his findings, Dr. Falik noted that she did not sustain any permanent damage as a result of the August 31, 1996 fall as there was no objective evidence to substantiate any specific injury with the exception of a self-limiting back sprain. He opined that appellant would have reached maximum medical improvement six months after the accident and advised that no additional treatment was recommended. Absent the 1996 slip and fall, Dr. Falik noted that she would have the same current clinical neurological status. In reviewing this report, the Office disqualified him as the impartial specialist as his opinion focused on the August 31, 1996 nonemployment-related fall at a hotel and not the accepted 1995 injury at work. Further, Dr. Falik was not responsive to the Office's request for clarification. In this regard, his April 7, 2003 letter to the Office advised that he had evaluated appellant "for an injury she sustained while at a hotel lobby on August 31, 1996. At that time, [appellant] had a slip and fall." Dr. Falik stated that the Office's letter to him referred to an accident dated "August 28, 1995," a reference to a date of injury other than the May 5, 1995 injury accepted in this case. "If you can clear up the confusion and make specific reference to a January 1995 accident with medical records, I would be happy to reevaluate the patient." The Board's prior decision affirmed the Office in disqualifying Dr. Falik as the impartial medical specialist.

This limited review establishes that Dr. Falik provided reports that addressed causal relation with regard to appellant's August 31, 1996 slip and fall in a hotel. While he stated on August 31, 2009 that his 2001 report had "carefully reviewed" her entire medical history as summarized, this is not reflected in the report of record. The additional evidence submitted from Dr. Falik is not sufficient to establish that the Office engaged in doctor shopping. The reports of Dr. Falik were considered by the Office and the Board and found deficient for the reasons stated. Appellant has not established clear error by the Office in subsequently referring her for a new impartial medical evaluation by Dr. Klein. As noted, the term "clear evidence of error" is intended to represent a difficult standard. The evidence submitted on reconsideration does not raise a substantial question concerning the correctness of the Office's decision denying benefits

after March 24, 1997 or shift the weight of evidence in appellant's favor. The 2009 letter from Dr. Falik does not manifest that the Office committed error in referring appellant for a new impartial medical evaluation after consideration of his reports of 2001 and 2003.

CONCLUSION

The Board finds that appellant's November 24, 2009 request for reconsideration was untimely and failed to establish clear evidence of error by the Office in the denial of her claim for compensation after March 24, 1997.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 17, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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