



## **FACTUAL HISTORY**

In the prior appeal,<sup>3</sup> the Board noted that on November 27, 1998 appellant, a 45-year-old letter carrier, sustained a thoracic back strain in the performance of duty while carrying a heavy box. OWCP later accepted the claim for a herniated disc at C5-6. Appellant received a schedule award for an 11 percent left upper extremity impairment. On December 30, 2003 he underwent an anterior cervical discectomy and fusion.

On July 21, 2004 OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits on the grounds that he refused an offer of suitable work. It weighed the reports of Dr. Thomas J. Arkins, who was appellant's neurosurgeon, and Dr. Robert Berland, the second-opinion neurologist. OWCP determined that the weight of the medical evidence rested with Dr. Berland, as his report was thorough, unequivocal and based on all the relevant evidence. It also appeared to be in agreement with Dr. Arkins, who remained silent on when appellant could begin working eight hours a day with restrictions.

Appellant requested reconsideration. The Board found that the request was untimely and failed to demonstrate clear evidence of error in OWCP's July 21, 2004 decision. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

On November 17, 2010 appellant again requested reconsideration. He argued that OWCP failed to accept as compensable all injuries and conditions sustained as a result of the November 27, 1998 employment injury. Appellant argued that the medical evidence unequivocally demonstrated that he was disabled as a result of injuries and conditions causally related to the incident and not capable of performing the duties of the offered position. He argued OWCP did not meet its burden to terminate compensation because a conflict in medical opinion remained unresolved. Appellant argued that the second-opinion physician upon whom OWCP relied had an inaccurate history, as he based his opinion only on the injuries and conditions OWCP had accepted and not the more significant injuries diagnosed by the treating physician. He submitted a September 1, 2010 medical opinion from Dr. Arkins to support that he was not capable of performing the full duties of the offered position at the time OWCP terminated his benefits on July 21, 2004.

In a decision dated February 16, 2011, OWCP denied appellant's November 17, 2010 reconsideration request. It found that the request was untimely and failed to present clear evidence of error.

On appeal, appellant argues that his reconsideration request unequivocally established clear evidence of error warranting a merit review of his claim.

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<sup>3</sup> Docket No. 08-696 (issued July 11, 2008).

## LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP 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.”<sup>4</sup>

OWCP, 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 OWCP’s decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>5</sup>

The term “clear evidence of error” is intended to represent a difficult standard.<sup>6</sup> If clear evidence of error has not been presented, OWCP 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.<sup>7</sup>

## ANALYSIS

Appellant’s November 17, 2010 reconsideration request comes six years after OWCP’s July 21, 2004 merit decision to terminate his wage-loss and schedule award benefits for refusing an offer of suitable work. The request is therefore untimely. The question is whether this request shows, on its face, that the July 21, 2004 decision was erroneous.

Appellant’s request relies on argument and a medical report. He contends that OWCP failed to accept as compensable all injuries and conditions sustained as a result of the November 27, 1998 employment injury. Whether other medical conditions resulted from the employment injury is a medical issue, one that requires a physician’s judgment and rationalized opinion. Whether that medical opinion is sufficiently probative to establish the critical element of causal relationship is a question that, in turn, requires an exercise of judgment on the part of OWCP. Appellant’s November 17, 2010 reconsideration request alleges, but does not prove, that OWCP erroneously failed to accept as compensable other medical conditions.

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.607.

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

<sup>7</sup> *Id.* at Chapter 2.1602.3.d(1).

To the extent that appellant's request depends on an expansion of his claim to include heretofore unaccepted medical conditions, he has not shown clear evidence of error in OWCP's July 21, 2004 decision. His request does not establish that Dr. Berland, the second opinion physician, had an inaccurate history in this regard.

Appellant argued that a conflict remained unresolved. As the July 21, 2004 decision makes clear, however, OWCP determined that there was no conflict. It weighed the reports of Dr. Arkins and Dr. Berland and gave the weight of the medical evidence to the latter. That appellant would have judged the matter differently is no proof that OWCP's decision was erroneous.

Dr. Arkins' current opinion that appellant was incapable of performing the full duties of his job at the time OWCP terminated his benefits could, at best, create a conflict with the 2004 opinion given by Dr. Berland. Such a conflict, however, would not establish clear evidence of error. As OWCP procedures explain:

"The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate. 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."

The Board finds that appellant's November 17, 2010 reconsideration request fails to demonstrate clear evidence of error on the part of OWCP in its July 21, 2004 decision. The Board will therefore affirm OWCP's February 16, 2011 decision denying that request.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's November 17, 2010 reconsideration request.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 16, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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