

FACTUAL HISTORY

The case was previously before the Board. In an order dated November 26, 2012, the Board found that appellant had submitted an application for reconsideration dated October 26, 2011.³ The Board noted that, while reconsideration was untimely filed, as the last merit decision was dated October 22, 2008, an OWCP letter dated April 6, 2012 was an adverse final decision that failed to properly review appellant's application. The case was remanded for a proper decision with respect to the application for reconsideration.

With respect to the factual background of the case, appellant had a claim for a back injury on February 3, 1975 when he was pulling railroad ties and fell down a ditch. OWCP accepted the claim for a back strain and an L4-5 laminectomy surgery on February 21, 1975.

On September 18, 2006 appellant filed an occupational disease claim (Form CA-2) alleging that he had a back condition causally related to federal employment. On the claim form he referred to the February 3, 1975 injury, as well as stating that he injured his back in 1995, 1996 and 2004. Appellant submitted a narrative statement noting that he had worked for the prior 36 years at the employing establishment, resulting in "wear and tear" from riding lawn mowers over rough terrain and snow removal operations in cold conditions. The claims were administratively combined.

By decision dated December 14, 2006, OWCP denied the claim on the grounds that the medical evidence was insufficient to establish the claim. In a decision dated April 25, 2007, an OWCP hearing representative affirmed the December 14, 2006 decision. Appellant requested reconsideration. By decision dated May 28, 2008, OWCP reviewed the case on its merits and denied modification. By decision dated October 22, 2008, it again reviewed the case on its merits and denied modification. OWCP noted that an August 19, 2008 opinion of Dr. Eric Flores, a Board-certified neurosurgeon, was speculative with respect to causal relationship between a November 2007 surgery and the February 3, 1975 injury.

In a letter dated October 26, 2011, appellant requested reconsideration. He submitted a May 24, 2011 report from Dr. Edward Prostic, a Board-certified orthopedic surgeon, who listed a history noting the February 3, 1975 injury, with intermittent symptoms and an episode of acute low back pain in 2004. Dr. Prostic stated that appellant underwent a decompression and L4-5 arthrodesis on November 12, 2007. He provided results on examination. According to Dr. Prostic, "From progression of degeneration at L4-5, [appellant] developed central spinal stenosis for which he has good result of surgery" in November 2007. He opined that appellant had a 20 percent whole body permanent impairment.

In a brief report dated August 12, 2011, Dr. Prostic stated that the February 3, 1975 accident necessitated an L4-5 discectomy. He stated, "It is the progression of disease at this level that necessitated the decompression and arthrodesis in 2007, by Dr. Eric Flores. But for the requirement of the 1975 surgery, more probably than not, the 2007 surgery would not have been required."

³ Docket No. 12-1226 (issued November 26, 2012).

By decision dated December 26, 2012, OWCP found appellant's October 26, 2011 application for reconsideration was untimely. It denied the application on the grounds that it did not show clear evidence of error by OWCP.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.⁴ The employee shall exercise this right through a request to the district OWCP. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁵

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.⁶ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁷ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a) of FECA.⁸ 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 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 evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁹

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹⁰ Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² The Board makes an independent

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.605 (1999).

⁶ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *D.O.*, Docket No. 08-1057 (issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁰ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹¹ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹² *Id.*

determination as to whether a claimant has submitted clear evidence of error on the part of OWCP.¹³

ANALYSIS

The most recent decision to review the merits of the claim was dated October 22, 2008. Appellant's application for reconsideration was dated October 26, 2011. Since the application was filed was more than one year after the October 22, 2008 decision, it is untimely.

As an untimely reconsideration request, appellant must show clear evidence of error by OWCP to require reopening the case for merit review. He submitted reports from Dr. Prostic dated May 24 and August 8, 2011. The medical evidence submitted does not establish clear evidence of error in the denial of the claim. Appellant filed an occupational claim that alleged injury as a result of 36 years of federal employment with lawn mowers and snow removal equipment, as well as specific employment incidents. He also had a February 3, 1975 injury accepted for back strain and February 1975 surgery. In the May 24, 2011 report, Dr. Prostic referred to the February 3, 1975 incident in his history and briefly stated that there was a "progression" of L4-5 degenerative disc disease resulting in spinal stenosis, without further explanation. This opinion is of little probative value to the issue presented.

The August 8, 2011 report also refers to a "progression of disease," but relates the need for the November 2007 back surgery to the 1975 back surgery. Dr. Prostic did not provide any additional explanation or medical rationale and his report is of little probative value. As noted above, the evidence must be of such probative value that it is manifest on its face that OWCP committed error. It is not enough to show that the evidence could be construed to reach a different conclusion and even a detailed medical report that could have created a conflict in the medical evidence is not clear evidence of error.¹⁴

The Board finds the evidence of record does not show clear evidence of error. Since appellant's application for reconsideration was untimely, the Board finds that OWCP properly declined to reopen the case for further review of the merits of the claim.

On appeal, appellant reviewed the procedural history of the case and stated that he felt he did show clear evidence of error. For the reasons noted above, the Board finds that he did not establish clear evidence of error in this case.

CONCLUSION

The Board finds OWCP properly found the October 26, 2011 application for reconsideration was untimely and failed to show clear evidence of error.

¹³ *Thankamma Mathews*, 44 ECAB 765 (1993).

¹⁴ *See D.G.*, 59 ECAB 455, 460 (2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 26, 2012 is affirmed.

Issued: June 17, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board