

accepted appellant's claim for low back strain and herniated nucleus pulposus at L4-5. Concurrent conditions noted to be preexisting and not work related included obesity and degenerative disc disease at C5-6.

In a decision dated December 29, 1998, OWCP terminated compensation for the accepted medical conditions. It found that the opinion of Dr. D. William Zaayer, a Board-certified orthopedic surgeon and impartial medical specialist selected to resolve a conflict, constituted the weight of the medical evidence and established that the accepted medical conditions had resolved.

Dr. Zaayer reported that appellant's injury in 1978 was likely just a very mild back strain without any neurological aspects. There was every indication this symptom passed very rapidly and was not a problem. Asked if there was a herniated nucleus pulposus, Dr. Zaayer responded that appellant's current magnetic resonance imaging (MRI) scan did not support a herniated nucleus pulposus. There was a bulging annulus but no extrusion, and nothing in the tests had shown any evidence of nerve root impingement or radiculopathy in the usual sense.

Dr. Zaayer stated that, if an MRI scan had been taken in December 1978, it likely would have shown some disc bulging at L4-5. X-rays showed slight disc space narrowing and minimal osteophyte formation. As time goes on, Dr. Zaayer explained, this degenerative process continues to grow and mature and advance, and this is exactly what happened in appellant's low back. He noted that appellant had disc problems in his neck and low back and had osteoarthritis in virtually every area that was x-rayed. This represented the ongoing progression of the degenerative process in appellant's back, which existed prior to the 1978 work incident. This was his current picture, together with flat feet and abundantly tight hamstring muscles, all of which aggravated a mechanical low back situation without significant neurological aspects.

Dr. Zaayer explained that the very simple, mild back sprain did not aggravate anything in appellant's back, as no single event of this type would have any effect upon the ongoing degenerative process, which, he added, would have become symptomatic absent the 1978 work incident. "It is this ongoing degenerative process aggravated by tight hamstring muscles and flat feet that is driving this whole case at this time. It has nothing to do with the December 27, 1978 incident in any way, whatsoever." When one looks at all of the medical examinations that have been performed, he observed, one does not find any evidence of the December 27, 1978 incident. The only objective evidence, unrelated to that incident, was profound osteoarthritic changes, bulging annulus and spinal stenosis at L4-5.

In February 17, 2000 an OWCP hearing representative affirmed. Numerous merit reviews, denials of reconsideration and appeals to the Board followed.²

² The Board reversed the termination in Docket No. 96-1544 (issued June 15, 1998); and affirmed the denials of reconsideration in Docket No. 06-746 (issued September 7, 2006), *petition for recon. denied*, Docket No. 06-746 (issued February 7, 2007); Docket No. 09-23 (issued June 16, 2009); and Docket No. 10-206 (issued February 26, 2010), *petition for recon. denied*, Docket No. 10-206 (issued June 30, 2010). The Board also dismissed the appeal for lack of jurisdiction in Docket No. 10-2346 (issued June 27, 2011).

In a decision dated June 29, 2012, OWCP reviewed the merits of appellant's case but denied modification of its decision to terminate compensation for the accepted medical conditions. It found that the April 19, 2012 report of Dr. James Bryan Cooper, a Board-certified neurologist, provided an inaccurate history of injury and failed to provide medical reasoning to support the opinion provided.

In a letter dated July 30, 2013 and received by OWCP on August 2, 2013, appellant, through his representative, requested reconsideration. He submitted an additional report from Dr. Cooper. Appellant's representative added that the medical opinion upon which OWCP relied did not address the impact of the work injury on his overall conditioning, and how that sustained his condition and continued his disability. The termination, he argued, was based on a brief interview by a second opinion examiner, and as such, OWCP's decision was clearly erroneous.

In a July 24, 2013 report, Dr. Cooper offered his credentials and noted that he had followed appellant for several years. He explained that the degree of appellant's rupture and degeneration were beyond what would have been expected without his injury. Appellant had become deconditioned due to pain, limiting his activity, due to the 1978 injury. This caused him to become quite obese and has caused further deconditioning, making it harder for him to maintain normal function. "In my professional opinion, his current state of obesity is caused wholly or significantly by chronic back pain which originated from the injury in 1978. This in turn has caused his dis[c] herniation to continue to be painful and disabling, unable to tolerate physical therapy, and may be in need of surgery. The facet disease and degenerative dis[c] disease worsen each other."

Dr. Cooper noted that appellant had disc degeneration and facet disease that was very advanced for a 67 year old. In his experience, appellant's degenerative disc disease was much more severe than he would expect. Based on the history, the disc herniation did not happen just because appellant grew older; it popped up during the accident and has never gone into a healthier condition. Further, additional loading due to obesity and deconditioning had accelerated appellant's severe facet disease. Dr. Cooper continued:

"Although it cannot be said with 100 percent certainty that his current condition is the result of the accident in 1978; however, given the absence of prior clinical history, it is my opinion with greater than a reasonable degree of certainty that his current condition is due to the work-related incident in 1978. He is still suffering the effects of the injury and in my opinion he is totally disabled.

"To say that the effects of the injury ceased and then his current problems are strictly results of aging are wrong in my opinion. It ignores the history of pain since the accident and persistence of dis[c] herniation and worsening of the facet arthropathy. It is my opinion that the injury resulting from the 1978 lifting accident has caused wholly or significantly his current situation and I believe he is totally and permanently disabled."

In a decision dated December 5, 2013, OWCP denied appellant's reconsideration request. It found the request untimely and did not present clear evidence of error in the termination of the accepted medical conditions. OWCP noted that the weight of the medical evidence rested with

an impartial medical specialist, not a second opinion physician. It added that new medical evidence from Dr. Cooper did not support that the termination decision was incorrect at the time it was issued.

Appellant's representative argues that appellant's disc herniation has never gone away, that OWCP failed to consider appellant's facet disease or his obesity. He contends that OWCP's decision denying reconsideration must be set aside and the case remanded for a *de novo* decision on whether appellant still has residuals of his 1978 injury, whether he suffers from morbid obesity as a direct and natural consequence of the original injury and whether he is totally disabled.

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.”³

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 received by OWCP within one year of the date of the 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 application must establish, on its face, that such decision was erroneous.⁴

The term “clear evidence of error” is intended to represent a difficult standard.⁵ 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.⁶

ANALYSIS

The most recent review of the merits of appellant's case is OWCP's June 29, 2012 decision. It found the April 19, 2012 report of Dr. Cooper was insufficient to warrant

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5.a (October 2011).

⁶ *Id.* at Chapter 2.1602.5.b.

modification of the decision terminating compensation for the accepted medical conditions. Appellant had one calendar year, or until June 29, 2013, to submit to OWCP a timely reconsideration request. His July 30, 2014 request, received by OWCP on August 2, 2013, was untimely by about a month.

The question for determination is whether this untimely request demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. As the Board has explained in previous appeals of this case, and above, “clear evidence of error” is intended to represent a difficult standard. The reconsideration request or application must establish, on its face, that the termination decision was erroneous.

When OWCP terminated compensation on December 29, 1998, it terminated the compensation that was payable for the accepted medical conditions of low back strain and herniated nucleus pulposus at the L4-5 level. It accepted that the December 27, 1978 work incident caused those two medical conditions, and paid compensation to appellant on that basis. The opinion of Dr. Zaayer, the orthopedic surgeon and impartial medical specialist, found that the low back strain in 1978 had resolved, and the current MRI scan showed no herniated disc, only a bulging annulus with no extrusion. Further testing showed no evidence of nerve root impingement or radiculopathy in the usual sense. As there was no longer any medical justification for continuing compensation for the accepted low back strain and herniated nucleus pulposus at L4-5, OWCP terminated that compensation.

Whether appellant currently suffers from other medical conditions is not material to the prior termination, as he never received compensation on the basis of other medical conditions. Appellant’s representative argues that OWCP failed to consider facet disease and obesity, but it was never accepted that these medical conditions were causally related to the December 27, 1978 work injury.

Moreover, OWCP based its termination of compensation on the well-reasoned opinion of an impartial medical specialist, which is entitled to special weight.⁷ If, in an untimely request for reconsideration, appellant were to submit a well-reasoned medical opinion to the contrary, one that explicitly rebutted Dr. Zaayer’s findings and rationale, the result might be another conflict. In other words, there might be a disagreement between physicians on whether appellant continued to suffer from the low back strain that occurred on December 27, 1978, or whether he continued to suffer from a herniated nucleus pulposus at L4-5 due to that same incident. Such an unresolved conflict, however, does not establish clear evidence of error in the termination of compensation. Appellant’s burden is not simply to raise an uncertainty. He must provide positive proof that the termination of compensation was, in fact, erroneous. An unresolved conflict in medical opinion only leaves the question open. It does not establish that Dr. Zaayer was clearly wrong.

⁷ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

The FECA procedure manual addresses this point directly. Citing Board precedent, the procedure manual explains that the claimant must present evidence which on its face shows that OWCP made an error:

“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.”⁸

To support his untimely reconsideration request, appellant submitted the July 24, 2013 report of Dr. Cooper, the neurologist, who did not directly argue that appellant continued to suffer from the soft tissue injury he sustained 35 years earlier. Dr. Cooper did mention a rupture and the persistence of disc herniation, which continued to be painful and disabling due to appellant’s current state of obesity, which in turn was caused wholly or significantly by chronic back pain originating from the injury in 1978. He added that the disc herniation popped up during the accident and never went into a healthier state.

Without weighing the probative value of Dr. Cooper’s opinion, as this is a nonmerit review, the Board notes that, if Dr. Cooper disagrees with Dr. Zaayer on whether appellant continues to suffer from the accepted medical conditions of low back strain or herniated nucleus pulposus at L4-5, the resulting unresolved conflict in medical opinion would not prove that OWCP made an error in terminating the compensation for those medical conditions.

Dr. Cooper’s opinion on the issue of facet arthropathy, degenerative disc disease, obesity and deconditioning is immaterial to the termination of compensation appellant was receiving for the accepted conditions of low back strain and herniated disc at L4-5.

As for the argument that OWCP based the termination on a brief interview by a second opinion examiner, the record shows otherwise. OWCP based the termination on the opinion offered by an impartial medical specialist selected pursuant to 5 U.S.C. § 8123(a) to resolve a conflict in the medical evidence.

The Board finds that appellant’s July 30, 2013 reconsideration request is untimely and fails to show clear evidence of error in the termination of compensation for the accepted medical conditions. As OWCP properly denied that request, the Board will affirm OWCP’s December 5, 2013 decision.

CONCLUSION

The Board finds that OWCP properly denied appellant’s July 30, 2013 reconsideration request as untimely filed and failing to show clear evidence of error.

⁸ *Supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 14, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board