

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ALEX MERGILLANO and DEPARTMENT OF DEFENSE,  
NAS LEMOORE COMMISSARY, Nas LeMoore, CA

*Docket No. 01-973; Submitted on the Record;  
Issued December 6, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On September 3, 1999 appellant, then a 52-year-old meat cutter, filed a notice of occupational disease alleging that on June 17, 1999, while lifting boxes of meat in the meat department, he felt a slight pain in his back. Appellant stated that as time went on the pain increased in his lower back and that he had numbness in his left foot and numbness in his body and fingers.

Appellant submitted an attending physician's report from Dr. Karl Nicholes dated August 23, 1999, diagnosing "cervical stenosis, cervical cord impingement, cervical disc bulging C3-4, C4-5, disc L4-5 and neuronal encroachment L3-4, L4-5." Dr. Nicholes indicated that the condition of appellant's back would have been "made worse" by "hard work lifting." Appellant also submitted an attending physician's report from Dr. Michael N. Baker dated September 1, 1999, diagnosing him with "mechanical low back pain, disc disease L4-5 and cervical spinal stenosis." Also, in a report dated October 11, 1999 from Dr. Fred C. Williams, appellant was diagnosed with "cervical stenosis with spinal cord impression" and Dr. Williams recommended that appellant remain off work for at least three months.

By letter dated October 27, 1999, the Office requested that appellant submit additional information to support his claim.

Appellant responded by describing the employment-related activities that he believed contributed to his condition. He stated that his job involved lifting boxes of meat to be cut and trimmed, bending while cutting, trimming and wrapping meat using an automatic wrapping machine and moving meat products from delivery vehicles to a storage area.

By decision dated December 3, 1999, the Office denied appellant's claim as the medical evidence was not sufficient to establish causal relationship between appellant's diagnosed condition and his federal employment.

Appellant underwent a cervical laminectomy on November 29, 1999 and an anterior cervical microdiscectomy on December 3, 1999.

By letter dated December 22, 2000 and received by the Office on January 2, 2001, appellant requested reconsideration. In support of his request, appellant submitted a report from Dr. Williams dated October 11, 1999, a report from Dr. Thomas P. Nowak, a Board-certified neurological surgeon, dated August 7, 2000 and progress notes from Dr. Nicholes. Appellant also submitted a follow-up report from Dr. Williams dated September 12, 2000, in which he stated that appellant was disabled and would no longer be able to perform his regular duties as a butcher. Dr. Williams indicated that appellant still suffered from back problems even after the surgeries. He, however, did not discuss causal relationship.

By decision dated January 29, 2001, the Office denied appellant's request for reconsideration as untimely and insufficient to establish clear evidence of error.

The only decision before the Board on this appeal is the January 29, 2001 decision denying appellant's request for reconsideration. Since more than one year has elapsed between the date of the Office's most recent merit decision on December 3, 1999, denying appellant's claim based on causal relationship and the filing of appellant's appeal on January 2, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>1</sup>

The Board finds that the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>2</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted to the Office under 5 U.S.C. § 8128(a).<sup>3</sup>

The Office properly found, by its January 29, 2001 decision, that the one-year time limit for filing a request for reconsideration of the Office's December 3, 1999 decision expired on December 3, 2000 and that the request for reconsideration dated December 22, 2000 was untimely.

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<sup>1</sup> 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

<sup>2</sup> 20 C.F.R. § 10.607(a).

<sup>3</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.<sup>4</sup> Office procedures state 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, if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>5</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>6</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>7</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>9</sup> This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>10</sup>

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.<sup>11</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>12</sup>

In this case, appellant submitted medical evidence in support of his December 22, 2000 request for reconsideration. The October 11, 1999 report appellant submitted from Dr. Williams briefly addresses the issue of causal relationship, yet does not show that the Office committed an error. The evidence merely attempts to establish causal relationship between appellant's diagnosed condition and his employment and does not raise a substantial question as to the correctness of the Office's January 29, 2001 decision.

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<sup>4</sup> *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>6</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>7</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>8</sup> *Jesus D. Sanchez*, *supra* note 3.

<sup>9</sup> *Leona N. Travis*, *supra* note 7.

<sup>10</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>11</sup> *Leon D. Faidley, Jr.*, *supra* note 3.

<sup>12</sup> *Gregory Griffin*, *supra* note 4.

As appellant's request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied it.

The January 29, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
December 6, 2001

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member