



## **FACTUAL HISTORY**

On April 16, 1991 the employee, then a 54-year-old automotive mechanic, filed a claim alleging that he injured his back while performing his duties as a mechanic. The Office accepted the employee's claim for a low back sprain and later expanded this to include lumbosacral strain and a herniated nucleus pulposus (HNP) at L4-5, permanent aggravation of lumbar disc disease at multiple levels, impotence of organic origin and narcotic dependency.<sup>1</sup> The Office authorized spinal surgery on December 29, 1988. The employee was placed on temporary total disability on December 4, 1990 and never returned to work.<sup>2</sup>

Thereafter, in the course of developing the claim, the Office referred the employee to several second opinion physicians.

On April 21, 1998 the Office referred the employee for vocational rehabilitation. In reports dated July 23, 1998 to February 5, 1999, the vocational rehabilitation specialist determined that it was unfeasible for the employee to return to the competitive labor market and recommended closure of the rehabilitation file. On March 2, 1999 the Office closed the rehabilitation file.

On November 27, 2001 appellant submitted a claim for compensation by widow, Form CA-5, alleging that her husband's October 12, 2001 death was causally related to his employment. In support of her claim appellant submitted a death certificate signed by Dr. Joseph L. Galletta, a Board-certified family practitioner and the employee's treating physician, who noted the cause of death as cardio respiratory failure, broncho pneumonitis and nonsmall cell cancer of the lung and contributing conditions to death as chronic obstructive pulmonary disease and open biopsy of the mediastinum on July 12, 2001. The physician further noted that the time of death was 2:06 p.m. and that no autopsy was performed. Appellant also submitted an attending physicians report from Dr. Galletta dated November 29, 2001, who noted a history of the employee's work-related injuries of August 16, 1988 and November 21, 1990 and diagnosed chronic low back pain. He noted that the direct cause of the employee's death was nonsmall cell carcinoma of the lung and that the contributory cause of death was chronic obstructive pulmonary disease.

In a decision dated December 21, 2001, the Office rejected appellant's claim on the basis that she failed to establish that the employee's death was causally related to his employment.

In a letter dated September 25, 2003, appellant requested reconsideration of the Office decision and asserted that her husband died due to his work-related injuries. She noted that she submitted sufficient proof of the causal relationship of her husband's death to his work-related injuries and advised that the Department of Veterans Affairs accepted this information as satisfactory proof and subsequently paid benefits. She attached a copy of her previously

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<sup>1</sup> The record reveals that the employee filed a claim for a back injury which occurred on August 16, 1988 which was accepted by the Office. This claim was consolidated with the present claim before the Board on this appeal.

<sup>2</sup> The record reveals that the employee died on October 12, 2001 and the cause of death was listed as cardio respiratory failure, broncho pneumonitis and nonsmall cell cancer of the lung.

submitted letter dated January 24, 2003, requesting compensation benefits from the Office due to the employee's death. In further support of her claim she submitted a letter dated May 24, 2002 from the Department of Veterans Affairs, finding that there was a military service connection for the cause of death and awarded appellant benefits commencing November 1, 2001.

By decision dated December 22, 2003, the Office found that appellant's request for reconsideration was not timely filed and did not present clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act vests the Office 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>3</sup>

The Office, through regulation, 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(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.<sup>4</sup>

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that 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.<sup>5</sup>

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 *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's decision.<sup>6</sup>

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

<sup>5</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

<sup>6</sup> *Annie L. Billingsley*, *supra* note 4.

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>7</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>8</sup> This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>9</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office.<sup>10</sup>

### ANALYSIS

In its December 22, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on December 21, 2001 and appellant's request for reconsideration was dated September 25, 2003 which was more than one year after December 21, 2001. Accordingly, appellant's request for reconsideration was not timely filed.

Moreover, the Board has reviewed the evidence submitted with appellant's most recent reconsideration request and concludes that appellant has not established clear evidence of error in this case. In this regard, appellant submitted two narrative statements dated January 24 and September 25, 2003 and a May 24, 2002 letter from the Department of Veterans Affairs. However, the issue in this case is strictly a medical one. Appellant submitted no medical evidence to address this issue when she made her September 25, 2003 request for reconsideration. Nothing in appellant's September 25, 2003 request for reconsideration shifts the weight of the evidence to suggest that the Office's December 21, 2001 decision was erroneous in finding that causal relationship was not established. Therefore, this evidence is insufficient to show that the Office erred in denying appellant's claim on the grounds that she failed to meet her burden of proof to establish an injury due to the claimed employment factors. With regard to the letter from the Department of Veterans Affairs dated May 24, 2002 which advised that there was a military service connection for the employee's cause of death and awarded benefits commencing November 1, 2001, the Board finds that this information does not establish that the employee died as a result of his work-related injuries, rather it appears to support that he died at least partially due to his service-related injuries. Additionally, the Board notes that determinations made by other courts or agencies, pursuant to other statutory schemes are instructive; however, they are in no way binding on the Board.<sup>11</sup> However, it cannot be said that these reports raise a substantial question as to the correctness of the Office's prior decisions.<sup>12</sup> The Board therefore finds these records are insufficient to raise a substantial question as to the

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<sup>7</sup> *Jimmy L. Day*, 48 ECAB 652 (1997).

<sup>8</sup> *Id.*

<sup>9</sup> *See Jimmy L. Day*, *supra* note 7.

<sup>10</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765,770 (1993).

<sup>11</sup> *See Stephen R. Lubin*, 43 ECAB 564 (1992); *Hazelee K. Anderson*, 37 ECAB 277 (1986).

<sup>12</sup> *Id.*

correctness of the Office's merit decision and the Office properly denied appellant's reconsideration request.<sup>13</sup>

**CONCLUSION**

The Board therefore finds that the Office properly determined that appellant's request for reconsideration dated September 25, 2003 was untimely filed and did not demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 22, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 12, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

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<sup>13</sup> See *Jimmy L. Day*, *supra* note 7.