

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MAX LAURORE and DEPARTMENT OF STATE,  
U.S. EMBASSY, Port Au Prince, Haiti

*Docket No. 00-1970; Submitted on the Record;  
Issued May 10, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's December 3, 1999 request for reconsideration as untimely and failing to demonstrate clear evidence of error.

On August 4, 1980 appellant, then a 35-year-old chauffeur, filed a notice of injury or occupational disease alleging that on July 25, 1980 he was injured when the back door of a truck fell and hit his head. By letter dated July 30, 1996, the Office accepted appellant's claim for hemtoma of the scalp.

In a decision dated August 20, 1997, the Office denied appellant's claim for an injury to his neck and shoulder as a result of this accident, finding that the medical evidence failed to establish that these conditions were related to the July 25, 1980 injury. The Office noted that there was no contemporaneous medical evidence of file to support that appellant received treatment for a neck and shoulder injury at the time of the July 25, 1980 incident. Moreover, the reports of the physicians contained conflicting histories regarding the relationship of appellant's neck and shoulder condition to his employment injury.

By letter dated September 11, 1997, appellant requested an oral hearing, which was held on June 24, 1998.

By decision dated August 27, 1998, the hearing representative affirmed the Office's August 20, 1997 decision. The hearing representative found that there was no evidence contemporaneous to the July 25, 1980 work incident which showed that appellant sustained a medical condition to his neck and shoulder as a result of the accident. He noted that the only report that did address the causal relationship was the November 11, 1996 report of Dr. Dana Rotundo, a chiropractor, and that Dr. Rotundo's report did not provide any explanation or rationale supportive of a causal relationship between appellant's July 25, 1980 work incident and the condition of his neck and shoulder.

By letter dated December 3, 1999, appellant requested reconsideration of the August 27, 1998 hearing representative decision. In support thereof, appellant submitted a medical report by Dr. K. Michael Davidson, a Board-certified orthopedic surgeon, dated November 12, 1999. Dr. Davidson noted that appellant had an old history of skull and cervical spine injury while working for the employing establishment in 1980, that he had progressive cervical spine changes in discs and degenerative changes of vertebral bodies and narrowing due to these changes and increasing cervical spine then extremity deterioration as progressed in time from 1980. Dr. Davidson noted that appellant had progressively lost his ability to walk, and that by the time of the surgery a few months ago, he was almost completely wheelchair bound. Dr. Davidson noted that appellant can now walk about 10 feet with help from physical therapy. He noted that appellant still has significant atrophy and weakness and pain on testing of the lower extremities and trunk. Dr. Davidson opined that appellant was "100 percent disabled."

By decision dated February 23, 2000, the Office denied appellant's request for reconsideration, finding that it was not timely filed and failed to establish clear evidence of error.

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

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>1</sup>

The Office, 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(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. As appellant filed his request for reconsideration on December 3, 1999, over one year after the August 27, 1998 decision of the hearing representative, appellant's petition for reconsideration was not timely filed.

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.<sup>2</sup> 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 be manifest on its face that the Office committed an error.<sup>3</sup> Evidence that does not raise a substantial question concerning the

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> 20 C.F.R. § 10.607(b).

<sup>3</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>4</sup> It is not merely enough to show that the evidence could be construed so as to produce a contrary conclusion.<sup>5</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>6</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 a merit review in the face of such evidence.<sup>7</sup>

On reconsideration, appellant submitted new medical evidence from Dr. Davidson. However, Dr. Davidson's report is not sufficient to establish clear evidence of error. Dr. Davidson does not provide a rationalized opinion linking appellant's cervical and shoulder injuries to his August 4, 1980 work accident. He merely reiterated the history that appellant gave to him, and then states at the end of his report that appellant was "wrongfully" denied benefits. Furthermore, Dr. Davidson examined appellant over 19 years after the accident. There is still no medical evidence contemporaneous to the incident showing injury to the neck and shoulder regions.

As appellant's untimely request for reconsideration failed to establish clear evidence of error in the Office's denial of benefits due to appellant's shoulder and neck condition, the Board finds that the Office properly denied the request.

The decision of the Office of Workers' Compensation Programs dated February 23, 2000 is hereby affirmed.

Dated, Washington, DC  
May 10, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

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<sup>4</sup> *Jimmy L. Day*, 48 ECAB 654 (1997).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Thankamma Mathews*, 44 ECAB 775, 770 (1993).