

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANCINE MALAVOLTA and U.S. POSTAL SERVICE,
POST OFFICE, Bellmawr, NJ

*Docket No. 01-1200; Submitted on the Record;
Issued January 22, 2002*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

On January 14, 1999 appellant, then a 47-year-old clerk, filed an occupational disease claim alleging that her left rotator cuff tear and impingement syndrome were caused by her employment.

In support of her claim, appellant submitted several reports from Dr. John K. Mariani, her treating osteopath. In a report dated May 5, 1998 and received by the Office on January 25, 1999, Dr. Mariani stated that appellant's symptoms were consistent with rotator cuff tendinitis or tearing. In a July 16, 1998 report, Dr. Mariani stated that appellant's condition could also be caused by an impingement syndrome in the left shoulder with supraspinatus tendinitis and possibly a cuff tear.

By letter dated February 11, 1999, the Office notified appellant that she needed to submit additional information to establish her claim. It asked appellant to explain why she filed her claim on December 20, 1998 when she was aware of her condition in March 1998.¹ The Office stated that it would hold her claim open for 30 days.

By decision dated April 26, 1999, the Office denied appellant's claim on the grounds that the medical evidence failed to establish that her claimed condition was related to factors of her federal employment. The Office enclosed a notice of appeal rights which included information on filing a request for reconsideration.

¹ Appellant's claim was dated January 14, 1999. However, she noted in her claim form that she was initially aware of her condition in March 1998 and that her condition was caused by her federal employment on December 20, 1998.

By letter dated February 15, 2000, appellant stated: “I am submitting this letter from my physician, Dr. Carl Vitola, an osteopath, because it contains information concerning my claim with workerman’s (sic) compensation. I hope you will find this information useful.”

Dr. Vitola’s letter, dated January 29, 2000, stated that appellant had tendinitis and rotator cuff tear as a result of her “repetitive keying and tossing mail into the machine, at a fast speed, 8 hours a day, 5 days a week....”

By letter dated October 18, 2000, Thomas R. Uliase, appellant’s counsel, stated that “My understanding is that the claimant requested reconsideration of your decision dated April 26, 1999.”

By decision dated December 28, 2000, the Office notified appellant that her October 18, 2000 request for reconsideration was filed more than a year from the Office’s April 26, 1999 merit decision and therefore was denied. The Office further noted that appellant’s February 15, 2000 letter did not constitute a petition for reconsideration because it failed to refer to the Office’s April 26, 1999 decision, indicate that it was a request for reconsideration or reference her claim number. The Office nonetheless conducted a limited review under 20 C.F.R. § 10.607(b) and determined that appellant did not present clear evidence that the Office’s decision was erroneous.

The Board finds that appellant’s request for reconsideration was untimely filed and failed to present clear evidence of error.

Section 10.607 of the Code of Federal Regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.²

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.³ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.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.⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁶ This entails a limited review by the Office of how the

² 20 C.F.R. § 10.607.

³ *Dean D. Beets*, 43 ECAB 1153 (1992).

⁴ *Leona N. Travis*, 43 ECAB 227 (1991).

⁵ *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁶ *Leona N. Travis*, *supra* note 4.

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.⁷

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but also 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.⁸ 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.⁹

The Office received appellant's request for reconsideration on October 18, 2000, more than a year from the date of the last merit decision on April 26, 1999. The question, therefore, is whether appellant's request establishes on its face that the Office's April 26, 1999 decision was erroneous. Appellant's reconsideration petition included an October 22, 2000 report from Dr. Vitola in which he stated that appellant had left cervical radiculopathy and facet syndrome and rotator cuff tendinitis, and that these conditions were causally related to appellant's employment as a flat sorter/machine operator.

While Dr. Vitola's report stated that appellant's conditions were caused by her employment, this opinion is not sufficiently probative to shift the weight of the evidence in appellant's favor. The evidence lacks a well-reasoned discussion, based on a complete and accurate history, explaining the medical basis for the opinion held. Thus, Dr. Vitola's report is insufficient to establish that the Office's April 19, 1999 decision, based on the reports of Dr. Mariani, was erroneous. The Board finds that appellant has failed to submit clear evidence of error such that the Office did not abuse its discretion in denying further merit review of his claim.¹⁰

On appeal appellant's counsel argued that appellant's letter dated February 15, 2000 constituted a timely petition for reconsideration. In that letter appellant stated that she was submitting a report from her osteopath and hoped that the Office "will find treatment history information useful."

While no special form is required, Office procedures provide that a reconsideration request must be in writing, must identify the decision and specific issue(s) for which reconsideration is being requested, and must be accompanied by relevant and pertinent new evidence or argument not previously considered.¹¹

⁷ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁸ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458, 466 (1990).

¹⁰ *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹¹ *Vincente P. Taimanglo*, 45 ECAB 504 (1994); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (May 1996); *see also* 20 C.F.R. § 10.606.

In this case, appellant's February 15, 2000 letter to the Office which included a report from her treating osteopath did not meet these criteria. Appellant did not indicate that her letter was a request for reconsideration, she did not indicate the number of the claim, and she did not specify the date of the decision for which she sought reconsideration.¹² The Board finds that the Office was not required to consider appellant's February 15, 2000 letter as a request for reconsideration.¹³

The December 28, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
January 22, 2002

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹² The Board notes that the Office's December 28, 2000 decision found that appellant's February 15, 2000 submission did not constitute a request for reconsideration. However, in her October 18, 2000 request for reconsideration, appellant's counsel did not argue specifically that the February 15, 2000 submission was a request for reconsideration. In that petition, counsel stated that: "My understanding is that the claimant has requested reconsideration of your decision dated April 26, 1999." In her appeal, appellant argued for the first time that the February 15, 2000 submission was a timely filed request for reconsideration.

¹³ The Board notes that appellant was provided with appropriate appeal rights accompanying the April 26, 1999 decision.