

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DAVID BAXTER and DEPARTMENT OF THE ARMY,  
Fort Stewart, GA

*Docket No. 02-2012; Submitted on the Record;  
Issued April 22, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

On January 16, 2001 appellant, then a 40-year-old store worker, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1). He alleged that on January 12, 2001 he sustained an injury to his back, neck, chest, leg and arm while pulling a pallet in the performance of duty. The employing establishment controverted the claim and provided statements.

On February 12, 2001 the Office advised appellant of the additional factual and medical evidence needed to establish his claim and requested that he submit such. Appellant was advised that submitting a rationalized statement from his physician addressing any causal relationship between his claimed injury and factors of his federal employment was crucial. Appellant was allotted 30 days to submit the requested evidence.

On February 20, 2001 appellant responded to the Office's request for additional information. He indicated that on January 12, 2001 he was pulling loaded pallets when he felt a pain in his back, running into his neck, left arm and down into his right leg. Appellant stated that he could not get an appointment with his doctor right away, as he thought he might get better over the weekend; however, it did not and he went to his doctor as soon as possible. He indicated that he did not have any other injuries at that time. Further, appellant stated that he did have back problems in the past, although he stated that he had not told anyone at work or anywhere else, that he had fallen off his house. He enclosed additional documentation with his response.

In an April 3, 2001 decision, the Office denied appellant's claim for compensation, as he did not establish the fact of injury.

Subsequent to the Office's decision, additional evidence was received including several reports from Dr. Cliff L. Canon, Jr., a Board-certified neurological surgeon, dated: January 17; March 9; April 16; May 30 and July 11, 2001; and January 11, 2002; an operative report from St. Joseph's Candler Health System, dated March 9, 2001; a physical therapy report dated April 16, 2001; and requests for approval of attorney's fees.

By letter dated April 9, 2002 and received by the Office on April 11, 2002, appellant requested reconsideration.

By decision dated April 22, 2002, the Office denied appellant's reconsideration request as untimely and found that the statements appellant made in support of his request and the evidence submitted presented no clear evidence of error on the part of the Office.

The Board finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>1</sup> As appellant filed his appeal with the Board on June 4, 2002, the only decision properly before the Board is the April 22, 2002 decision.

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> 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's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).<sup>4</sup> This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing

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<sup>1</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *see John Reese*, 49 ECAB 397, 399 (1998).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Diane Matchem*, 48 ECAB 532-33 (1997), citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>5</sup>

The Board finds that, since more than one year has elapsed from the date of issuance of the Office's April 3, 2001 merit decision to the date that appellant's request for reconsideration was filed, April 9, 2002, appellant's request for reconsideration is untimely.

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>7</sup> The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.<sup>8</sup> 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>9</sup>

It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.<sup>10</sup>

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.<sup>11</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>12</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the

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<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> 20 C.F.R. § 10.607(b).

<sup>7</sup> *Nancy Marcano*, 50 ECAB 110, 114 (1998).

<sup>8</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>9</sup> *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

<sup>10</sup> *Annie Billingsley*, 50 ECAB 210, 212, n.12 (1998); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>11</sup> *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

<sup>12</sup> *Jimmy L. Day*, 48 ECAB 654, 656 (1997).

Office such that the Office abused its discretion in denying a merit review in the face of such evidence.<sup>13</sup>

In this case, the documents submitted by appellant do not establish clear evidence of error.

Appellant's claim was initially denied because the Office found that the evidence was insufficient to establish that appellant actually experienced an employment incident and, therefore, had not established fact of injury. The reports provided by appellant, subsequent to the Office's April 3, 2001 decision, contain no discussion regarding causal relationship. Dr. Canon's reports date from January 17, 2001 to January 11, 2002; however, he did not provide any opinion with respect to how appellant sustained his injuries or that appellant's condition was work related. Therefore, the medical reports are irrelevant and are not evidence that the Office erred in its decision.

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review.

The April 22, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
April 22, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>13</sup> *Id.*