

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FRANCINE BIBBS and U.S. POSTAL SERVICE,  
MAIN POST OFFICE, Chicago, IL

*Docket No. 03-416; Submitted on the Record;  
Issued March 26, 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 determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On April 17, 1991 appellant, then a 50-year-old letter carrier, filed a notice of occupational disease alleging that, on or after January 24, 1989, she developed arthritis in her shoulders, back, legs and arms as a result of her federal employment. On June 18, 1991 Dr. Raymond H. Pierson, a Board-certified orthopedic surgeon, diagnosed appellant with bilateral avascular necrosis of the shoulders and indicated that she would undergo right and left total shoulder replacement. Appellant submitted emergency room notes and nursing progress notes indicating that she also had a history of asthma, hypertension and gastritis.

By letter dated July 31, 1991, the Office requested that appellant provide additional factual and medical information to support her claim. By report dated July 9, 1991, Dr. Pierson indicated that x-rays showed advanced degenerative arthritis of both shoulders and a computerized tomography (CT) scan confirmed the degree of osteoarthritis.

By decision dated February 14, 1992, the Office denied appellant's claim for compensation since the evidence of file did not demonstrate that the claimed medical condition was causally related to the injury.

By letter dated April 14, 1999, appellant stated that she would like her case reopened. Appellant wrote again on June 16, 1999 and stated that she had not received a response to her April 14, 1999 letter. By letter dated August 19, 1999, the Office forwarded appellant a copy of the February 14, 1992 decision denying her claim for compensation.

By letter dated July 8, 2002, appellant again indicated that she wanted her case reopened because of her asthma, arthritis and osteoporosis, claiming that these conditions were due to her position as a letter carrier. She noted that she had arthritis in 85 percent of her body and had

three surgeries between 1995 and 2000. In a report dated July 2, 2002, Dr. Jennifer Earvolino, a Board-certified internist, indicated that appellant suffered from generalized advanced osteoarthritis, asthma, gastroesophageal reflux disease and hypertension and found that she was totally disabled from work.

By letter dated July 16, 2002, the Office acknowledged the receipt of appellant's correspondence dated April 14 and June 16, 1999 and July 8, 2002, and stated that she must follow the appeal rights, which accompanied the February 14, 1992 decision.

By letter dated August 1, 2002, appellant requested reconsideration and an oral hearing. She indicated in her letter that her address had changed. In support she resubmitted Dr. Earvolino's July 2, 2002 report and her July 8, 2002 letter.

By decision dated October 23, 2002, the Office denied appellant's request for reconsideration of the February 14, 1992 decision, as the request was not filed within one year of that decision and did not demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the October 23, 2002 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 February 14, 1992, denying appellant's occupational disease claim for arthritis and the filing of appellant's appeal on July 28, 2002,<sup>1</sup> the Board lacks jurisdiction to review the merits of appellant's claim.<sup>2</sup>

The Board finds that the Office acted within its discretion in denying 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>3</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>4</sup>

The Office properly found, by its October 23, 2002 decision, that the one-year time limit for filing a request for reconsideration of the Office's February 14, 1992 decision expired on February 14, 1993 and that the request for reconsideration dated July 28, 2002 was untimely.

By letter dated August 1, 2002, appellant requested reconsideration, more than 10 years after the Office's last decision. In certain cases the Board has held that a letter may constitute a

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<sup>1</sup> Appellant requested reconsideration in two different letters, one dated July 28, 2002 and one dated August 1, 2002. The Office chose the July 28, 2002 as the date appellant filed his appeal.

<sup>2</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 final decision being appealed.

<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

request for reconsideration even though the letter did not mention the word “reconsideration.” In *Vincent P. Taimanglo*<sup>5</sup> and *Jeanette Butler*,<sup>6</sup> the Board found that letters written by appellants did constitute requests for reconsideration even though they did not mention the word “reconsideration.” *Taimanglo* stated that, “while no special form is required, the request must be made in writing, identify the decision and the specific issue(s), for which reconsideration is being requested and be accompanied by relevant and pertinent new evidence or argument not considered previously.”<sup>7</sup> In *Taimanglo*, appellant identified the Office decision in his letter, indicated that additional medical evidence had been submitted and stated that he was waiting for a response. In *Butler*, appellant sent a letter requesting that the Office reopen her case and included the case number and medical evidence with her letter. In this case, appellant sent earlier letters to the Office dated April 14 and June 16, 1999 stating that she would like her case reopened. The Board finds, however, that appellant’s letters did not constitute requests for reconsideration and do not fall under the precedent of *Taimanglo* and *Butler*. In the April 14, 1999 letter, appellant stated that she would like her case reopened and noted the case number; however, she did not identify the decision being appealed or state the specific issues she was contesting. She also did not submit any new evidence or raise any legal arguments previously not considered by the Office. In the June 16, 1999 letter, appellant stated that she would like her case to be recovered from the record center and noted the case number. She described her current medical condition and stated that it was due to her position as a letter carrier. This letter also does not constitute a request for reconsideration under *Taimanglo* or *Butler*, since appellant did not mention the date of the decision she was appealing and did not submit any new evidence or raise any new legal arguments. In *Taimanglo*, appellant identified the date of the decision he was appealing and submitted new evidence. In *Butler*, she identified the case number and submitted medical evidence with her letter. In this case, appellant’s letters do not contain enough information to be considered as requests for reconsideration. The Board notes, even if appellant’s letters were to constitute letters requesting reconsideration, her requests would still be untimely as they were received more than 10 years after the Office’s last decision.<sup>8</sup>

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>9</sup> Office procedures state that the Office will reopen a claimant’s case for merit review, notwithstanding the one-year

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<sup>5</sup> *Vincent P. Taimanglo*, 45 ECAB 504 (1994).

<sup>6</sup> *Jeanette Butler*, 47 ECAB 128 (1995).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (May 1991); *Vincent P. Taimanglo*, *supra* note 5.

<sup>8</sup> Appellant also alleged, in this case, that she did not receive certain letters from the Office because they were sent to the wrong address. She did not specify to which letters she was referring. The record indicates that appellant only informed the Office in her July 28 and August 1, 2002 letters that her address had changed, which the Office received on August 6, 2002.

<sup>9</sup> *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

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>10</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>11</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>12</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>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</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>15</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>16</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>17</sup>

In this case, appellant's July 28, 2002 request for reconsideration was untimely since it was received over 10 years after the Office's last decision. Dr. Earvolino discussed appellant's osteoarthritis and stated that appellant's generalized arthritis was slowly progressing and significantly impaired her ability to walk and use her hands for fine manipulations. She found that appellant was totally disabled and that her conditions were permanent. Dr. Earvolino did not discuss appellant's employment duties and did not provide an opinion on the cause of appellant's condition. The issue in this case was medical in nature. Appellant's claim was denied on February 14, 1992 because she did not submit rationalized medical evidence establishing a causal relationship between her conditions of osteoporosis and arthritis and her employment duties. Even though Dr. Earvolino's report may be relevant to the issue decided by the Office, it does not contain medical rationale to establish causal relationship and does not show that the Office erred in denying appellant's claim. The Board also notes that appellant did not allege in her July 28, 2002 letter that the Office committed an error in their decision. Appellant did not

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>11</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>12</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>13</sup> *Jesus D. Sanchez*, *supra* note 4.

<sup>14</sup> *Leona N. Travis*, *supra* note 12.

<sup>15</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>16</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>17</sup> *Gregory Griffin*, *supra* note 9.

submit any other evidence, which raised a question concerning the correctness of the Office's decision.

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

The October 23, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
March 26, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member