

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JERRY W. JONES and DEPARTMENT OF THE ARMY,  
Redstone Arsenal, AL

*Docket No. 03-572; Submitted on the Record;  
Issued May 2, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
A. PETER KANJORSKI

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 June 4, 1997 appellant, a 29-year-old engineering technician, filed a Form CA-2 claim for benefits based on occupational disease, alleging that he had sustained a coronary artery condition which was causally related to factors of his employment; *i.e.*, stress.

By decision dated August 18, 1997, the Office denied appellant's claim, finding that he failed to establish that he sustained a coronary artery condition in the performance of duty.

By letter dated September 14, 1997, appellant requested reconsideration.

By decision dated December 3, 1997, the Office vacated its prior decision of August 18, 1997 finding that appellant failed to establish fact of injury, but by decision of the same date denied the claim on the grounds that appellant did not present medical evidence sufficient to establish that the claimed coronary artery condition was causally related to factors of employment.

Appellant, by letter dated February 7, 2001, requested reconsideration and the Office performed a merit review of appellant's claim. By decision dated February 28, 2001, the Office denied modification of its previous decisions. Appellant requested reconsideration on March 6, 2001 and by a nonmerit decision dated June 28, 2001, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

By letter dated October 3, 2001, appellant requested reconsideration. Appellant submitted a November 1, 2001 report from Dr. Gordon H. Cash, Board-certified in internal medicine, and a September 28, 2001 report from Jack M. Englert, a specialist in family

practition. These reports, which had been previously considered by the Office, stated findings on examination, reviewed appellant's medical history and generally related his claimed coronary artery condition to factors of his employment.

By decision dated January 3, 2002, the Office denied reconsideration without a merit review, finding appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error. The Office therefore denied appellant's request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.607(b).

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<sup>1</sup> does not entitle an employee to a review of an Office decision as a matter of right.<sup>2</sup> This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“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, or increase the compensation previously awarded; or
- (2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>3</sup> 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>4</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).<sup>5</sup>

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>3</sup> Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a relevant legal argument not previously considered by the Office, or (3) constituting relevant and pertinent new evidence not previously considered by the Office. See 20 C.F.R. § 10.606(b).

<sup>4</sup> 20 C.F.R. § 10.607(b).

<sup>5</sup> See cases cited *supra* note 2.

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on March 27, 2000. Appellant requested reconsideration on October 3, 2001; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

In those cases where a request for reconsideration is not timely filed, the Board had 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>6</sup> Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.<sup>7</sup>

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>9</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>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<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> 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's decision.<sup>13</sup> The Board makes an independent determination of whether an appellant 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>14</sup>

The Board finds that appellant's October 3, 2001 request for reconsideration fails to show clear evidence of error. The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. In addition, appellant did not present any evidence of error on the part of the Office in his request

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<sup>6</sup> *Rex L. Weaver*, 44 ECAB 535 (1993).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>8</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> *See Jesus D. Sanchez*, *supra* note 2.

<sup>11</sup> *See Leona N. Travis*, *supra* note 9.

<sup>12</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Leon D. Faidley, Jr.*, *supra* note 2.

<sup>14</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41ECAB 458 (1990).

letter. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review.

The decision of the Office of Workers' Compensation Programs dated January 3, 2002 is hereby affirmed.

Dated, Washington, DC  
May 2, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member