

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EVA NELL ROGERS and U.S. POSTAL SERVICE,  
BULK MAIL CENTER, Dallas, TX

*Docket No. 99-385; Submitted on the Record;  
Issued August 29, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and failed to present clear evidence of error.

This case has been on appeal before the Board on two prior occasions.<sup>1</sup> On September 27, 1980 appellant sustained an employment-related back injury, which the Office accepted for lumbosacral strain.<sup>2</sup> The Office later determined that, as of May 18, 1990, appellant no longer had residuals of her September 27, 1980 employment injury. In a decision dated August 11, 1993, the Board affirmed the Office's determination that appellant failed to establish that she continued to have residuals of her September 27, 1980 employment injury. Appellant subsequently filed a petition for reconsideration, which the Board denied on November 3, 1993. The history of the case as set forth in the Boards prior decisions are incorporated herein by reference.

On July 23, 1998 appellant requested reconsideration from the Office and she submitted additional evidence. By decision dated October 9, 1998, the Office denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The Board finds that the Office properly denied appellant's July 23, 1998 request for reconsideration.

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<sup>1</sup> Docket Nos. 92-1750 and 90-1478.

<sup>2</sup> Additionally, the record established that appellant had a preexisting condition of degenerative disc disease.

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.<sup>5</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>6</sup> One such limitation, is that a claimant must file his or her application for review within one year of the date of the decision denying or terminating benefits.<sup>7</sup> The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).<sup>8</sup> Appellant failed to meet this requirement in that her July 23, 1998 request for reconsideration post-dates the last decision on her claim, issued by the Board in 1993, by more than four and a half years.

The Office, however, may not deny a request for reconsideration solely on the grounds that the application was not timely filed. In those instances where a request for reconsideration is not timely filed, the Board has held that the Office must nonetheless undertake a limited review to determine whether the application presents "clear evidence that the Office's final merit decision was erroneous."<sup>9</sup> Consistent with Board precedent, Office procedures provide that the Office will reopen a claim for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the 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 it must be apparent 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

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>6</sup> *See* 20 C.F.R. § 10.138.

<sup>7</sup> 20 C.F.R. § 10.138(b)(2).

<sup>8</sup> *See Leon D. Faidley, Jr.*, *supra* note 4.

<sup>9</sup> *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

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

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

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

<sup>13</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

construed so as to produce a contrary conclusion.<sup>14</sup> 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>15</sup> In determining whether a claimant has demonstrated clear evidence of error, the Office is required to undertake a limited review of how the newly submitted evidence bears on the prior evidence of record.<sup>16</sup> The Board, in addressing whether the Office abused its discretion in denying merit review, makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.<sup>17</sup>

On reconsideration appellant submitted the treatment records of Dr. Robert J. Henderson, a Board-certified surgeon specializing in spinal surgery and occupational medicine, who began treating appellant in June 1997 for degenerative disc disease at L4-5, L5-S1. He subsequently performed lumbar disc fusion in August 1997 and again in February 1998.

None of the information submitted on reconsideration is of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant. Dr. Henderson's operative reports and treatment notes do not address the causal relationship between appellant's current back condition and her accepted employment injury of September 27, 1980. In fact, other than noting a brief history of an employment-related back injury, Dr. Henderson did not offer an opinion on causal relationship. The Office properly concluded that appellant failed to present clear evidence of error on the part of the Office in determining that appellant failed to establish that she continued to have residuals of her September 27, 1980 employment injury. Consequently, the Office properly declined to reopen appellant's claim for merit review under section 8128(a) of the Act.

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

<sup>15</sup> *Thankamma Mathews*, 44 ECAB 765 (1993); *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>16</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>17</sup> *Thankamma Mathews*, *supra* note 15; *Gregory Griffin*, 41 ECAB 458 (1990).

The October 9, 1998 decision of the Office of Workers' Compensation Programs is, hereby, affirmed.

Dated, Washington, D.C.  
August 29, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member