

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of STEVEN K. DRAKE and U.S. POSTAL SERVICE,  
POST OFFICE, Niles, IL

*Docket No. 01-769; Submitted on the Record;  
Issued November 8, 2001*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

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 November 20, 1996 appellant, then a 46-year-old letter carrier, filed an occupational disease claim alleging that on July 24, 1996 he first realized that his spinal stenosis was due to his employment. The Office accepted the claim for aggravation of spinal stenosis.

On October 28, 1997 the Office issued a proposed notice of rescission of acceptance of his claim. The Office rescinded acceptance of appellant's claim by decision dated January 13, 1998 on the basis that the medical evidence of record established that appellant's condition was not due to his federal employment.

Appellant requested a written review of the record by a May 1, 1998 letter.

By decision dated September 14, 1998, an Office hearing representative affirmed the Office's decision to rescind acceptance of appellant's claim for aggravation of his spinal stenosis.

Appellant requested reconsideration on October 27, 1998.

In a November 3, 1998 nonmerit decision, the Office denied appellant's reconsideration request.

Appellant requested reconsideration in a November 20, 1998 letter and submitted a November 20, 1998 report by Dr. J.A. Rolls and a November 18, 1998 note by Dr. Julie M. Wehner, a Board-certified orthopedic surgeon, in support of his request.

The Office denied appellant's modification request by merit decision dated December 22, 1998.

Appellant requested reconsideration on January 1, 1999, which the Office denied in a nonmerit decision dated February 17, 1999.

Appellant requested reconsideration dated September 3, 1999 and submitted an August 5, 1999 report by Dr. F. Todd Wetzel, an attending Board-certified orthopedic surgeon, in support of his request.

By merit decision dated September 28, 1999, the Office denied appellant's request for modification of its December 22, 1998 decision.

Appellant submitted a letter dated September 27, 2000 noting he was responding to the September 28, 1999 letter which he did not receive until August 1, 2000.

By letter dated September 28, 2000, the Office acknowledged receipt of appellant's September 27, 2000 letter and requested clarification from appellant on what he was requesting. The Office informed appellant that, if he wanted to request reconsideration of the September 28, 1999 decision, his request must be received by the Office within 10 days of September 28, 2000.

By letter dated October 26, 2000, appellant requested reconsideration of his claim and noted that his agency address was in Chicago, Illinois not Carol Stream, Illinois.

By decision dated November 1, 2000, the Office found that appellant's reconsideration request was untimely filed and did not establish clear evidence that the Office's final decision was erroneous.

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The only decision before the Board in this appeal is the November 1, 2000 decision, in which the Office denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. Since more than one year has elapsed between the date of the Office's merit decision dated September 28, 1999 and the filing of appellant's appeal on January 19, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>1</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office's regulations provide that a claimant's application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes

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<sup>1</sup> 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. §§ 8101-8193. 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 application." 5 U.S.C. § 8128(a).

relevant and pertinent new evidence not previously considered by the Office.” To be entitled to a merit review of an Office decision denying or terminating a benefit, an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>3</sup> The Office will consider an untimely application for reconsideration 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.<sup>4</sup>

In its November 1, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. Appellant was issued appeal rights with the September 28, 1999 decision, which stated that, if he requested reconsideration of the decision, such request must be made in writing to the Office within one year of the date of the decision. Furthermore, the Office, in its September 27, 2000 letter requesting clarification of appellant’s intent, afforded appellant an additional 10 days to submit a reconsideration request. Because appellant’s October 28, 2000 reconsideration request was outside the one-year time limit, which began the day after September 26, 1998, appellant’s application for review was untimely.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether the application establishes “clear evidence of error.” The Office will reopen a claimant’s case for merit review notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant’s application for review shows clear evidence of error on the part of the Office.<sup>5</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>6</sup> The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.<sup>7</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>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>9</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>10</sup>

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<sup>3</sup> 20 C.F.R. § 10.606(a).

<sup>4</sup> 20 C.F.R. §10.607(b).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>7</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>8</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>9</sup> See *Leona N. Travis*, *supra* note 7.

<sup>10</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

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>11</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>12</sup>

The critical issue in the case at the time the Office issued its April 16, 1997 decision was whether the Office properly rescinded its acceptance of appellant's claim for aggravation of spinal stenosis.

In this case, appellant's October 26, 1999 letter requests reconsideration and states that he has submitted all the necessary evidence to support his claim. In the absence of evidence that is of such probative value that it shifts the weight of the evidence in favor of the claimant and raises a substantial question as to the correctness of the Office decision, the Board finds that the Office properly denied the request for reconsideration in this case.

The decision of the Office of Workers' Compensation Programs dated November 1, 2000 is hereby affirmed.

Dated, Washington, DC  
November 8, 2001

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member

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<sup>11</sup> See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>12</sup> See *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied* 41 ECAB 458 (1990).