

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TERRI L. NICHOLS and U.S. POSTAL SERVICE,  
POST OFFICE, Mount Airy, NC

*Docket No. 00-99; Submitted on the Record;  
Issued September 26, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
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.

On August 21, 1997 appellant, then a 41-year-old letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she sustained a back injury in the performance of duty. She described the nature of her condition as a disc herniation with calcification and further noted that she had undergone a laminectomy and discectomy at L5-S1. Appellant identified July 10, 1995 as the date she first became aware of her illness and she identified September 21, 1995, as the date she realized her claimed condition was employment related.<sup>1</sup>

After further development of the record, the Office denied appellant's claim in a decision dated December 15, 1997. The Office found that appellant failed to establish that she sustained a herniated disc in July 1995 as a result of her work activities.

On April 30, 1999 appellant requested reconsideration. By decision dated May 10, 1999, the Office denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and failed to present clear evidence of error.

The Board finds that the Office properly denied appellant's April 30, 1999 request for reconsideration.

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<sup>1</sup> Appellant also explained that she had previously sustained injuries to her left hip and lower back in the performance of duty on January 22, 1991. This claim (A6-507072) was accepted for left hip contusion only. Appellant further indicated that she had filed a claim for recurrence of disability on or about September 21, 1995, causally related to her January 22, 1991 employment injury. The Office, however, denied appellant's claim for recurrence of disability on the basis that appellant failed to establish a causal relationship between her claimed back condition and the accepted employment injury of January 21, 1991.

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.<sup>4</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>5</sup> One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>6</sup> Appellant failed to meet this particular requirement in that the Office's most recent merit decision was issued on December 15, 1997 and appellant filed her request for reconsideration more than a year later on April 30, 1999.

In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office.<sup>7</sup> In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>9</sup> The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.<sup>10</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>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</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>13</sup>

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</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>5</sup> 20 C.F.R. § 10.607.

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> 20 C.F.R. § 10.607(b).

<sup>8</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>9</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>10</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>11</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>12</sup> See *Leona N. Travis*, *supra* note 10.

<sup>13</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

In the instant case, appellant failed to demonstrate clear evidence of error. Although appellant indicated in her April 30, 1999 request for reconsideration that she previously submitted additional medical evidence on December 4, 1998, the Office correctly advised appellant that the record did not reflect receipt of such evidence. Consequently, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.<sup>14</sup>

The May 10, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
September 26, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>14</sup> The record includes evidence that was received by the Office subsequent to the issuance of its May 10, 1999 decision. Inasmuch as the Board's review is limited to the evidence of record that was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).