

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARJORIE M. ALLUMS and U.S. POSTAL SERVICE,
WORLDWAY POSTAL CENTER, Los Angeles, CA

*Docket No. 02-469; Submitted on the Record;
Issued July 1, 2002*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 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.

This case is on appeal before the Board for the second time. By decision dated June 28, 2000, the Board affirmed the Office's April 8, 1999 decision terminating appellant's compensation on the basis that she had no further residuals of her September 9, 1990 work-related injury.¹ Appellant filed a petition for reconsideration, which the Board denied by order dated January 30, 2001.

On July 24, 2001 appellant requested reconsideration before the Office. By decision dated August 8, 2001, the Office denied appellant's request for reconsideration on the basis that the request was untimely filed and appellant failed to present clear evidence of error.

The Board finds that the Office properly denied appellant's July 24, 2001 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.⁴ The Office, through regulations, has imposed limitations on the exercise of its

¹ Docket No. 99-1761. The Board's June 28, 2000 decision is incorporated herein by reference.

² 5 U.S.C. § 8128(a).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of

discretionary authority under section 8128(a).⁵ 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.⁶

In this case, the one-year time limitation begins to toll the day following the issuance of the Board's June 28, 2000 decision, as this was the last merit decision in the case.⁷ As appellant's request for reconsideration was dated July 24, 2001, it was not made within one year of the June 28, 2000 decision and she is not entitled to review of her claim as a matter of right.⁸

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 in its "most recent merit decision."⁹ 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.¹⁰

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹¹ The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.¹² Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹³ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁴ 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

compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607 (1999).

⁶ 20 C.F.R. § 10.607(a) (1999).

⁷ Although the Board subsequently issued a January 30, 2001 order denying appellant's petition for reconsideration, the Board's January 30, 2001 order does not constitute a merit decision. *Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

⁸ While the Board's June 28, 2000 decision tolls the time period for purposes of determining whether appellant filed a timely request for reconsideration, the Office does not have authority to review the Board's June 28, 2000 decision. *See Theresa Johnason*, 50 ECAB 317, 318 (1999).

⁹ 20 C.F.R. § 10.607(b) (1999).

¹⁰ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹¹ *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹² *See Leona N. Travis*, 43 ECAB 227 (1991).

¹³ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁴ *See Leona N. Travis*, *supra* note 12.

favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹⁵

In the instant case, appellant failed to demonstrate clear evidence of error. The evidence that accompanied appellant's July 24, 2001 request for reconsideration consisted of a September 5, 2000 report from Dr. M. Michael Mahdad, a Board-certified neurologist. The report and accompanying diagnostic study indicated that appellant has lumbar discogenic disease with right lumbar radiculopathy at L5. Dr. Mahdad, however, did not attribute appellant's current condition to her September 9, 1990 work-related injury. Accordingly, Dr. Mahdad's recent report does not constitute rationalized medical opinion evidence.¹⁶ Appellant's counsel continues to challenge the sufficiency of the evidence relied upon by the Office to terminate benefits. The Board has previously reviewed the record in this case and the addition of Dr. Mahdad's recent report does not alter the fact that the weight of the medical evidence establishes that appellant no longer suffers from residuals of her September 9, 1990 work-related injury. As appellant failed to present clear evidence of error, the Office properly declined to reopen her case for merit review under section 8128(a) of the Act.

The August 8, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 1, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁵ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁶ *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (the Board found that a medical opinion not fortified by medical rationale is of little probative value).