

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DELILA K. REYNOLDS and U.S. POSTAL SERVICE,  
POST OFFICE, Denison, TX

*Docket No. 00-189; Submitted on the Record;  
Issued May 14, 2001*

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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.

Appellant, a distribution clerk, sustained a traumatic injury to her lower back while in the performance of duty on January 26, 1988. The Office accepted appellant's claim for low back strain and herniated disc at L4-5. Appellant returned to work in a limited-duty capacity and she received appropriate wage-loss compensation for various periods of temporary total disability. Additionally, appellant underwent a lumbar microscopic discectomy at L4-5 on October 5, 1992. Following her surgery, appellant resumed her limited-duty assignment on December 12, 1992. Thereafter, she continued to receive wage-loss compensation for intermittent periods of temporary total disability.

On April 3, 1996 appellant filed a claim for compensation on account of disability (Form CA-8) for the period March 16 through 29, 1996. By decision dated July 19, 1996, the Office denied appellant's claim for temporary total disability on the basis that the medical evidence failed to establish total disability due to the accepted injuries of January 26, 1988.

On May 26, 1999 the Office received an undated request for reconsideration accompanied by additional medical evidence. In a decision dated June 1, 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 May 26, 1999 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act<sup>1</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>2</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.<sup>3</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>4</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>5</sup> Appellant failed to meet this particular requirement in that the Office's most recent merit decision was issued on July 19, 1996 and the Office received appellant's request for reconsideration more than a year later on May 26, 1999.<sup>6</sup>

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

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>3</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>4</sup> 20 C.F.R. § 10.607 (1999).

<sup>5</sup> 20 C.F.R. § 10.607(a) (1999).

<sup>6</sup> Although appellant alleged that she filed a request for reconsideration in 1997, the record does not include a prior request for reconsideration and appellant has not offered any evidence to substantiate her allegation that she previously filed a timely request for reconsideration.

<sup>7</sup> 20 C.F.R. § 10.607(b) (1999).

<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.

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>

In the instant case, appellant failed to demonstrate clear evidence of error. While the record includes numerous exhibits that post-date the Office's July 19, 1996 decision denying compensation, the overwhelming majority of this evidence has no bearing on the issue of whether appellant was totally disabled for the period March 16 through 29, 1996. In recent reports dated March 30 and May 7, 1999, appellant's treating physician, Dr. Werner H. Frietsch, referred to a time in 1996 when appellant was suffering from multilevel lumbar degenerative disc disease and lumbar radiculopathy that interfered with her performing full-time work. Dr. Frietsch, however, did not specifically identify the time period in 1996 when appellant was disabled due to her back condition. Furthermore, the Office did not accept appellant's claim for either degenerative disc disease or lumbar radiculopathy. Inasmuch as the newly submitted medical evidence does not specifically address the issue on reconsideration, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

The June 1, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
May 14, 2001

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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