

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK C. McKAIG and U.S. POSTAL SERVICE,
POST OFFICE, Edison, NJ

*Docket No. 02-562; Submitted on the Record;
Issued July 23, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's July 17, 2001 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 April 26, 1999 appellant, a 44-year-old letter carrier, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that he sustained a lower back injury in the performance of duty on April 15, 1999. He explained that he injured his back while unloading mail from the back of a truck. In support of his claim, appellant submitted a return to work slip dated May 7, 1999, which noted a diagnosis of lumbosacral sprain.

In a decision dated September 30, 1999, the Office denied appellant's claim on the basis that he failed to establish that he sustained an injury as alleged.

On July 17, 2001 appellant requested reconsideration and submitted additional medical evidence. By decision dated October 12, 2001, the Office denied appellant's request for reconsideration on the basis that the request was untimely and appellant failed to present clear evidence of error.

The Board finds that the Office properly denied appellant's July 17, 2001 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.¹ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.² The Office, through regulations, has imposed limitations on the exercise of its

¹ 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

² 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).

discretionary authority under section 8128(a).³ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which a review is sought.⁴ Appellant failed to meet this particular requirement in that the Office issued its last merit decision on September 30, 1999 and appellant's request for reconsideration was dated July 17, 2001.

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.⁵ 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.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.⁷ The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

On reconsideration appellant submitted a May 28, 2001 report from Dr. James E. Patti. The report is essentially a chronology of appellant's treatment during the period December 27, 1999 through December 15, 2000. At the outset, Dr. Patti described appellant as a "45[-]year[-] old gentleman who has had ongoing problems with his back and lower extremities going back 11 years when he was injured." Dr. Patti noted that appellant was employed as a "mail carrier" and that he "fell on the job when he's (sic) given a defective jeep." In a January 12, 2000 entry, appellant was described as "a 40-year-old ... electrician who sustained injury to his left wrist while at work in August of 1999." Appellant was purportedly "bending a heavy pipe" when his "wrist was suddenly hyperextended (sic)."

³ 20 C.F.R. § 10.607 (1999).

⁴ 20 C.F.R § 10.607(a) (1999).

⁵ 20 C.F.R § 10.607(b) (1999).

⁶ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁷ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁸ See *Leona N. Travis*, 43 ECAB 227 (1991).

⁹ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁰ See *Leona N. Travis*, *supra* note 8.

¹¹ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

Appellant was last seen on December 15, 2000, at which time Dr. Patti noted that a recent magnetic resonance imaging scan revealed disc degeneration and disc herniation at L4-5 and L5-S1.¹² Dr. Patti diagnosed lumbar radiculopathy with herniated nucleus pulposus and stated that appellant's injuries were related to the "accident of April 15, 1999."

Dr. Patti's May 28, 2001 report is of little probative value and insufficient to establish clear evidence of error on the part of the Office. Although he attributed appellant's condition to the April 15, 1999 "accident," Dr. Patti did not otherwise identify an employment incident that occurred on April 15, 1999. His statement attributing appellant's condition to the "accident of April 15, 1999" is the sole reference to an incident occurring on April 15, 1999. Moreover, Dr. Patti did not describe the "accident of April 15, 1999" as employment related. His opinion is further undermined by the fact that his May 28, 2001 report identified appellant as both a 44-year-old mail carrier with a back injury and a 40-year-old electrician with an injured left wrist.

Accordingly, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

The October 12, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 23, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹² Dr. Patti previously noted that a March 1999 MRI scan similarly showed a disc herniation at L5-S1.