

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RANDY E. HOLLOWAY and U.S. POSTAL SERVICE,  
MAIN POST OFFICE, Nashville, TN

*Docket No. 01-1008; Submitted on the Record;  
Issued May 10, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's November 20, 2000 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.

The Office accepted that appellant sustained an aggravation of lumbar disc disease in the performance of duty on March 31, 1989. Additionally, the Office accepted that on or about September 1, 1989 he sustained employment-related bilateral carpal tunnel syndrome. Appellant received appropriate wage-loss compensation for his accepted employment-related conditions.

On June 7, 1996 the employing establishment offered appellant a part-time, limited-duty position as a flexible distribution clerk, which he subsequently declined.

The Office informed appellant on November 1, 1996 that it found the offered position to be suitable for his work capabilities and that it was currently available.<sup>1</sup> The letter further explained that upon acceptance of the position, appellant would be paid compensation based on the difference, if any, between the pay of the offered position and the pay of his position on the date of injury. The Office also advised him that he had 30 days within which to either accept the position or provide an explanation for refusing the position.

Appellant did not subsequently accept the offered position or report for duty and therefore, by decision dated February 20, 1997, the Office terminated his compensation effective March 2, 1997 based upon his failure to accept suitable employment.

Appellant requested an oral hearing, which was denied as untimely. He subsequently requested reconsideration on November 11, 1997, which the Office denied on January 6, 1998

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<sup>1</sup> Appellant's treating physician, Dr. John W. Lamb, reviewed the position description and in a letter dated September 30, 1996 advised the Office that "it would be possible for [appellant] to work at that particular occupation without significant restrictions."

without addressing the merits of his claim. Appellant again requested reconsideration on February 18, 1998. In response, the Office reviewed the claim on the merits and denied modification by decision dated April 17, 1998. On July 20, 1999 appellant filed another requested reconsideration, which the Office denied on July 23, 1999.

On November 20, 2000 appellant requested reconsideration. By decision dated December 6, 2000, the Office denied his 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 November 20, 2000 request for reconsideration.

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 issued its last merit decision on April 17, 1998 and appellant's request for reconsideration is dated November 20, 2000.

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

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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 (1999).

<sup>6</sup> 20 C.F.R. § 10.607(a) (1999).

<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).

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>

In the instant case, appellant failed to demonstrate clear evidence of error. He did not submit any evidence with his November 20, 2000 request for reconsideration. Appellant reiterated an earlier assertion that he had in fact accepted the offered position on November 25, 1996.<sup>14</sup> The Office previously addressed this contention in its April 17, 1998 merit decision. Accordingly, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

The December 6, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
May 10, 2002

Michael J. Walsh  
Chairman

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

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<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).

<sup>14</sup> Appellant initially raised this argument in his February 18, 1998 request for reconsideration.