

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HARRIETTE WILSON and U.S. POSTAL SERVICE,  
POST OFFICE, Miami, FL

*Docket No. 02-134; Submitted on the Record;  
Issued May 24, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's August 15, 2001 request for reconsideration.

This case is on appeal before the Board for the second time. By decision dated August 11, 2000, the Board affirmed the March 22, 1999 and June 2, 1998 decisions of the Office. The Board exercised jurisdiction over the merits of appellant's October 5, 1995 occupational disease claim, and found that she failed to establish a causal relationship between her claimed condition and her employment. Accordingly, the Board affirmed the Office's June 2, 1998 merit decision. Additionally, the Board affirmed the Office's March 22, 1999 nonmerit decision denying appellant's February 5, 1999 request for reconsideration.<sup>1</sup>

On August 15, 2001 appellant requested reconsideration. By decision dated September 6, 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 August 15, 2001 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

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<sup>1</sup> Docket No. 99-1797. The Board's August 11, 2000 decision is incorporated herein by reference.

<sup>2</sup> 5 U.S.C. § 8128(a).

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

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>

In this particular case, the one-year time limitation begins to toll the day following the issuance of the Board's August 11, 2000 decision. As appellant's request for reconsideration is dated August 15, 2001, she is not entitled to review of her claim as a matter of right.<sup>7</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 in its "most recent merit decision."<sup>8</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>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error.<sup>11</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>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</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>14</sup>

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<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> Although the Board's August 11, 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 August 11, 2000 decision. See *Theresa Johnason*, 50 ECAB 317, 318 (1999).

<sup>8</sup> 20 C.F.R. § 10.607(b) (1999).

<sup>9</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>10</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>12</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>13</sup> See *Leona N. Travis*, *supra* note 11.

<sup>14</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

In the instant case, appellant failed to demonstrate clear evidence of error. As previously noted, the Board affirmed the Office's most recent merit decision dated June 2, 1998. The Office denied appellant's October 5, 1995 claim because she failed to establish that her claimed condition was causally related to her employment, and the Board concurred with this determination.

Appellant's August 15, 2001 request for reconsideration was accompanied by a May 29, 2001 report from Dr. Stephen S. Wender. While Dr. Wender previously attributed appellant's condition to her January 22, 1990 employment-related traumatic injury, his most recent report indicated that appellant's shoulder problem was "clearly due to ... excessive casing and delivering of mail, as it is more likely than not an overuse-type syndrome."<sup>15</sup>

Dr. Wender's May 29, 2001 report is of limited probative value and insufficient to establish clear evidence of error on the part of the Office. He merely offered a conclusion without any discussion of the basis for his opinion. Additionally, Dr. Wender offered no explanation for his recent change of opinion regarding the cause of appellant's condition. Thus, he has offered conflicting reports regarding the cause of appellant's condition and has provided no additional information upon which to reconcile the conflict. Accordingly, the Office properly declined to reopen appellant's case for merit review under section 8128(a) of the Act.

The September 6, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
May 24, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>15</sup> Appellant also submitted a recent magnetic resonance imaging scan of her right shoulder and upper extremity nerve conduction studies administered September 26, 1997 and March 20, 1998. This evidence, however, is of limited probative value, as it does not address the cause of appellant's current condition.