

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JEAN H. BULLARD and U.S. POSTAL SERVICE,  
POST OFFICE, Charlotte, NC

*Docket No. 97-2262; Submitted on the Record;  
Issued October 26, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record and finds that the Office did not abuse its discretion in failing to reopen appellant's case for merit review.

The facts in this case indicate that on February 18, 1994 appellant, then a 53-year-old rural carrier, filed a Form CA-1, notice of traumatic injury and claim for compensation, alleging that, after a two-week history of back pain on February 15, 1994 she had a spasm in her back while lifting flats and casing mail. She stopped work that day. On May 21, 1994 she filed a recurrence claim, stating that on February 15, 1994 she had a recurrence of disability of an August 27, 1990 employment injury.<sup>1</sup> By decision dated June 30, 1994, the Office denied the claim, finding that appellant failed to establish fact of injury. Appellant requested a hearing that was held on

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<sup>1</sup> It is noted that the record contains the case files for three Office file numbers. In the instant case, appellant is appealing a June 24, 1997 Office decision, which deals solely with a claimed February 15, 1994 injury, which was adjudicated by the Office under file number A06-590641. Under file number A06-0497652, the Office accepted that appellant sustained a low back strain on August 27, 1990, after which she returned to regular duty on September 17, 1990. Lastly, the record contains a claim for an injury that occurred on June 29, 1995 which was adjudicated under file number, A06-628877. By decision dated June 13, 1996, an Office hearing representative accepted that appellant sustained a low back strain on June 28, 1995 and remanded the case to the Office for appropriate compensation and for a rationalized medical opinion regarding the extent and duration of residuals due to this employment injury. These three claims were consolidated on July 17, 1996.

February 21, 1996. In a May 2, 1996 decision, an Office hearing representative affirmed the prior decision, finding the evidence insufficient to support her claim.<sup>2</sup> By letter dated May 9, 1997, an attorney, Daniel F. Read, requested reconsideration and submitted additional evidence. In a June 24, 1997 decision, the Office denied appellant's request finding that, pursuant to 20 C.F.R. § 10.138(b)(2), it had not been filed within one year of the May 2, 1996 decision and did not show clear evidence of error pursuant to 20 C.F.R. § 10.138(a). The Office stated that Mr. Read was not authorized to represent appellant, noting that Michael J. Watson was her authorized representative. The instant appeal follows.

The only decision before the Board is the Office's June 24, 1997 decision denying appellant's request for reconsideration of the May 2, 1996 decision. Because more than one year had elapsed between the issuance of this decision and July 2, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the May 2, 1996 Office decision.<sup>3</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>4</sup> The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>5</sup> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.<sup>6</sup>

The Board finds that as more than one year had elapsed from the date of issuance of the Office's May 2, 1996 merit decision and appellant's request for reconsideration dated May 9, 1997, her request for reconsideration was untimely. The Board further finds that the arguments made by appellant in support of this request do not raise a substantial question as to the correctness of the Office's May 2, 1996 merit decision.

Initially, the Board notes that, while the record does not contain a signed authorization indicating that Mr. Read is appellant's authorized representative, in a May 10, 1996 affidavit, appellant recognized that he was her lawyer. As this was dated one day after Mr. Read requested

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<sup>2</sup> The hearing representative noted, *inter alia*, that Dr. Winifred Pack, a Board-certified internist who examined appellant on February 15, 1994, the date of the claimed injury, did not mention an employment incident but made reference to appellant's report of two weeks of pain and a 1990 injury. The hearing representative also noted that Dr. Carol Wadon, a Board-certified neurosurgeon, who provided an April 12, 1994 report, did not mention an employment incident on February 15, 1994. Lastly, the hearing representative advised that while Dr. Larry C. Kilgore, a Board-certified family practitioner, opined that appellant's back condition was due to a February 15, 1994 employment incident and the August 27, 1990 employment injury, he did not examine appellant until several months after the claimed injury.

<sup>3</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2); see also *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied* 41 ECAB 458 (1990).

<sup>6</sup> *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

reconsideration before the Office, he was not an authorized representative at the time he submitted the request.<sup>7</sup>

In support of her request, appellant submitted<sup>8</sup> a May 24, 1996 report from Dr. Kilgore, her treating Board-certified family practitioner, who stated:

“On February 15, 1994 Dr. Winifred Pack and I worked in the same medical clinic. [Appellant] had been an established patient of mine for almost two years at that time, but on the date she presented for emergency examination concerning her back injury, I was not available to provide emergency care. Shortly after [appellant’s] emergency visit, I conferred with Dr. Pack concerning the details of the injury and her assessment of the patient’s condition as well as factors causing the injury. During our discussions of the patient’s condition, I became aware that [appellant] had been lifting, handling and flipping trays of mail when the back injury occurred. The information I received from Dr. Pack, as well as my own examination of the patient formed the initial basis for my diagnosis and treatment of [appellant’s] condition.”

Office procedures provide that the term “clear evidence of error” is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error. Evidence such as a well-rationalized medical report which, if submitted prior to the Office’s denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require review of the case.<sup>9</sup> In this case, while, in his May 24, 1996 report, Dr. Kilgore advised that shortly after the claimed February 15, 1994 injury, he became aware of the employment factors alleged by appellant to have caused her back condition, the Board finds that this is insufficient to establish clear evidence of error on the part of the Office.<sup>10</sup> Therefore, as she has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office’s May 2, 1996 decision, she has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of her claim.

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<sup>7</sup> See *Ira D. Gray*, 45 ECAB 445 (1994).

<sup>8</sup> The Board notes that on June 26, 1997 the Office received a June 9, 1997 report from Dr. Winifred Pack. The Board, however, cannot consider this evidence as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

<sup>9</sup> *Jeanette Butler*, 47 ECAB 128 (1995).

<sup>10</sup> See *Larry J. Lilton*, 44 ECAB 243 (1992).

The decision of the Office of Workers' Compensation Programs dated June 24, 1997 is hereby affirmed.

Dated, Washington, D.C.  
October 26, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom  
Alternate Member