

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TYRUS TUCKER and U.S. POSTAL SERVICE,
DETROIT BULK MAIL CENTER, Allen Park, Mich.

*Docket No. 96-305; Submitted on the Record;
Issued March 27, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's application for review was not timely filed and failed to present clear evidence of error.

On April 4, 1987 appellant sustained a temporary aggravation of arthritis of the right knee in the performance of duty and received appropriate compensation benefits.

By decision dated July 22, 1993, the Office terminated appellant's compensation benefits on the grounds that he had refused an offer of suitable work from the employing establishment. By decision dated September 1, 1993, the Office denied modification of its July 22, 1993 decision. On October 19, 1994 appellant requested reconsideration of the Office's September 1, 1993 decision. By decision dated July 10, 1995 the Office found appellant's request for reconsideration untimely and also found that the evidence submitted in support of the request for further merit review did not establish clear evidence of error in the Office's September 1, 1993 merit decision.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹ 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.² When an application for review is untimely, the Office undertakes a limited review to

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.138(b)(2). *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

determine whether the application presents clear evidence that the Office's final merit decision was in error.³

Since more than one year elapsed from the September 1, 1993 Office decision to appellant's October 19, 1994 application for review, the request for reconsideration is untimely.⁴ The evidence submitted by appellant does not raise a substantial question as to the correctness of the Office's last merit decision and is of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. Appellant submitted a June 5, 1994 report concerning a magnetic resonance imaging scan performed on his knee, a July 29, 1994 report from Dr. Laran Lerner, a Board-certified physiatrist, and an August 11, 1994 report from Dr. J.H. McCollough, a Board-certified orthopedic surgeon. In none of these reports was there any discussion concerning the issue of whether appellant refused an offer of suitable work, the issue which was the subject of the last merit decision on September 1, 1993.

As appellant has failed to submit evidence of clear error, the Office did not abuse its discretion in denying further merit review of the case.

The July 10, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
March 27, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

³ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁴ The Board notes that appellant sent a September 14, 1993 letter to the Office requesting further medical treatment for a claim for a back injury and authorization for continued treatment of the right knee injury, the injury which is the subject of the instant case, and he stated that he felt "there is enough medical evidence for reconsideration." He did not specify whether he wished reconsideration of the back injury decision or the right knee injury decision. By letter dated September 21, 1993, the Office requested that appellant clarify the actions that he was requesting because in his letter he had combined comments concerning two separate injuries. Appellant was advised to review the instructions regarding his appeal rights which had accompanied the decisions issued in regard to his two claims and then submit a request for a specific action along with supporting evidence. The instructions issued with the Office's September 1, 1993 decision clearly stated that a request for reconsideration must be filed within one year of the date of that decision, *i.e.*, by September 1, 1994.

A. Peter Kanjorski
Alternate Member