

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRY C. GONZALES and DEPARTMENT OF THE AIR FORCE,
RANDOLPH AIR FORCE BASE, San Antonio, Tex.

*Docket No. 97-8; Submitted on the Record;
Issued November 13, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

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

The Office accepted appellant's claim for herniated disc at L4-5 and a lumbar laminectomy performed on December 6, 1982. Appellant was paid compensation for intermittent periods of time through October 16, 1993. He returned to part-time work as a security guard on January 4, 1994, stopped working on September 1, 1994 and on September 8, 1994 filed a notice of a recurrence of disability. In its January 10, 1995 decision, the Office denied appellant's claim, stating that the evidence of record failed to establish that the claimed recurrence of disability on or after January 4, 1994 was causally related to the May 2, 1979 employment injury. Appellant requested reconsideration of the decision which was denied in a decision dated April 5, 1995. Appellant requested another reconsideration of the decision which was denied on May 16, 1995.

The Office, through its 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 benefits 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 takes a limited review to

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.138(b)(2). *See also 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 The timeliness of the application for review is determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself is used.⁴ If there is no date on the letter, the date the letter was stamped received by the Office establishes the date of filing.⁵

The Office's last merit decision was issued on May 16, 1995. In an undated letter, date stamped by the Office on May 24, 1996, appellant requested reconsideration of the Office's decision. Appellant submitted a medical report from Dr. Rafael Parra, a Board-Certified neurological surgeon, dated April 26, 1995 which had previously been submitted and considered in the Office's May 16, 1995 decision.

By decision dated June 4, 1996, the Office denied appellant's request for reconsideration, noting that appellant's reconsideration was received by the Office on May 24, 1996 which was more than a year after the Office's May 16, 1995 decision. The Office also found that the additional evidence appellant submitted with his request did not establish clear evidence of error.

Since appellant's letter requesting reconsideration was not dated and the envelope bearing the postmark date is not in the record, the date stamp on the letter, May 24, 1996, is the date the request was filed. The Board therefore finds that more than one year has elapsed since the date of issuance of the Office's May 16, 1995 merit decision to the date that appellant's request for reconsideration was filed, May 24, 1996, and that appellant's request for reconsideration is untimely. The Board further finds that the evidence submitted by appellant in support of his reconsideration request does not raise a substantial question as to the correctness of the Office's May 16, 1995 decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. As noted above, Dr. Parra's April 26, 1995 report had been previously submitted and considered by the Office in its April 5, 1995 decision. In his report, Dr. Parra opined that appellant was unable to work and had an acceleration in his symptoms since the May 2, 1979 employment injury to the point where he would require further surgery. His opinion does not demonstrate any clear evidence of error by the Office in denying appellant's claim for additional compensation.

As appellant has not, by the submission of medical evidence, raised a substantial question as to the correctness of the Office's May 16, 1995 decision, he has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.

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

⁴ *Gloria J. Catchings*, 43 ECAB 242, 244 (1991).

⁵ *See Donna A. Christley*, 41 ECAB 90, 91 (1989); *Delphine L. Scott*, 41 ECAB 799, 803 (1990).

The decision of the Office of Workers' Compensation Programs dated June 4, 1996 is hereby affirmed.

Dated, Washington, D.C.
November 13, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member