

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BORNAZA L. DUNNING and U.S. POSTAL SERVICE,
ATLANTA PROCESSING & DISTRIBUTION CENTER, Atlanta, Ga.

*Docket No. 97-364; Submitted on the Record;
Issued November 13, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case with respect to the issue in question and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

On August 31, 1994 appellant filed a claim for a traumatic injury to the right elbow area which occurred on that date when the gate on an all-purpose container hit his right arm. The Office accepted appellant's claim for a contusion of the right arm. Appellant submitted a claim for compensation on the account of traumatic injury or occupational disease requesting compensation from August 31, 1994 onward. He submitted medical bills documenting his treatment for low back pain in support of his claim. By letter dated December 29, 1994, the Office informed appellant that he had not indicated that he sustained a back injury due to his August 31, 1994 injury and requested that he submit a detailed statement and medical reports from his attending physicians.

By decision dated March 22, 1995, the Office denied appellant's claim on the grounds that the evidence did not establish that he had any disability on or after August 31, 1994 causally related to his accepted employment injury. In a letter to his congressman, appellant indicated that the Office, in the memorandum to the Director accompanying the March 22, 1995 decision, had mistakenly discussed an employment injury to the left rather than the right arm. The Office, in a letter dated July 11, 1995, informed appellant's congressman that the reference to appellant's left rather than right arm was a typographical error. In order to correct the error and protect appellant's appeal rights, the Office reissued the decision denying appellant's claim on August 3, 1995. On October 10, 1996 the Office received a letter dated July 19, 1996 which

appellant had sent to his congressman in which he expressed disagreement with the Office's decision denying his claim. By decision dated October 11, 1996, the Office found appellant's request for reconsideration untimely and that the request did not establish clear evidence of error.

The only decision before the Board on this appeal is the Office's October 11, 1996 decision denying appellant's request for a review on the merits of its August 3, 1995 decision denying his claim for compensation on or after August 31, 1994. Because more than one year has elapsed between the issuance of the Office's August 3, 1995 decision and October 23, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the August 3, 1995 Office decision.¹

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² 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.³ 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.⁴

In its October 11, 1996 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on August 3, 1995 and appellant's request for reconsideration was received by the Office on October 10, 1996 which was more than one year after August 3, 1995.

In the present case, the Office indicated that it had conducted a limited review of the evidence submitted by appellant in support of his application for review. While the Office found that appellant did not submit any new supporting evidence, it appears from a review of the record that he submitted a mostly illegible discharge summary which contains a diagnosis of lumbar strain. However, any error by the Office in failing to specifically review this evidence is harmless as the report does not address the August 31, 1994 employment injury and thus is not relevant in determining whether appellant has established clear evidence of error by the Office in its prior decision.

The Board also finds that appellant's reconsideration request, in which he indicated his disagreement with the Office's decision, is of no probative value on the issue in the instant case, which is whether appellant sustained disability due to his August 31, 1994 employment injury. The issue of causal relationship is medical in nature and can be established only by medical evidence.⁵

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.138(b)(2).

⁴ See *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁵ *Mary J. Briggs*, 37 ECAB 578 (1986).

The evidence submitted by appellant in support of his request for reconsideration does not raise a substantial question as to the correctness of the Office's August 3, 1995 decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. He has thus failed to establish clear evidence of error, and the Office did not abuse its discretion in denying further review of the case.

The decision of the Office of Workers' Compensation Programs dated October 11, 1996 is hereby affirmed.

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

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member