

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ALVIN FIELDS and DEPARTMENT OF THE ARMY,  
RED RIVER ARMY DEPOT, Texarkana, Tex.

*Docket No. 97-745; Submitted on the Record;  
Issued February 24, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
WILLIE T.C. THOMAS

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 appellant sustained employment-related chondromalacia of the patella, for which he received appropriate compensation. Following proper notice, by decision dated March 5, 1993, the Office terminated appellant's benefits, effective March 7, 1993. Appellant then requested a hearing and, in an October 4, 1993 decision, an Office hearing representative remanded the case to the Office for further development. Appellant's benefits were reinstated, and the Office referred appellant to Dr. Benzel C. MacMaster, a Board-certified orthopedic surgeon, for a second opinion evaluation. Based on Dr. MacMaster's report, on January 27, 1994 the Office issued a notice of proposed termination and by decision dated March 22, 1994, terminated appellant's benefits, effective April 3, 1994.

On April 18, 1994 appellant, through counsel, requested reconsideration and submitted a report from Dr. Robert E. Goodman, his treating Board-certified rheumatologist. Following an Office determination that a conflict in the medical evidence existed, appellant was referred to Dr. Norris C. Knight, Jr., a Board-certified orthopedic surgeon, for an impartial medical evaluation. Based on Dr. Knight's opinion that appellant's employment-related disability had ceased, by decision dated September 30, 1994, the Office denied modification of the prior decision. In an undated letter that was stamped received by the Office on September 29, 1995, appellant requested reconsideration. By decision dated September 29, 1995, the Office denied appellant's request. On September 26, 1996 appellant, through counsel, requested reconsideration and submitted treatment notes from Dr. Roshan Sharma, appellant's treating

Board-certified physiatrist. In an October 8, 1996 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 September 30, 1994 decision and did not show clear evidence of error pursuant to 20 C.F.R. § 10.138(a). The Office further found that the evidence submitted merely contained updates on appellant's condition and that appellant did not state an arguable case that error had been made in the September 30, 1994 decision. The instant appeal follows.

The only decision before the Board is the Office's October 8, 1996 decision, denying appellant's request for reconsideration of the September 30, 1994 decision. Because more than one year had elapsed between the issuance of this decision and December 10, 1996, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the December 10, 1994 Office decision.<sup>1</sup>

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

The Board finds that as more than one year had elapsed from the date of issuance of the Office's September 30, 1994 merit decision and appellant's request for reconsideration dated September 26, 1996, his 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 September 30, 1994 merit decision. While he submitted additional medical evidence in support of his claim, the Board finds that the evidence does not address whether appellant has an employment-related disability. In treatment notes dated from July 7, 1995 to August 15, 1996, Dr. Sharma merely notes appellant's complaints and findings on examination. Appellant further contended that Dr. Knight's opinion should not be credited. Dr. Knight, however, based his opinion on a review of the complete medical record and a statement of accepted facts that included a description of the physical requirements of appellant's job and his examination of appellant. In a fully-rationalized report, he advised that, while appellant had a trace of osteoarthritis of the right knee, he could return to work.<sup>5</sup>

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<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</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>4</sup> *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>5</sup> Dr. Knight noted that, while appellant voluntarily refused to extend the knee, when he got up on the examination table from a standing to a lying position, he extended the knee "fully and actively" without any problem.

It is well established that in situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background as in this case, must be given special weight.<sup>6</sup> Therefore, as appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's September 30, 1994 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. The Board finds that this evidence does not raise a substantial question as to the correctness of the Office's prior decision, and that, therefore, this evidence does not constitute clear evidence of error.<sup>7</sup>

The decision of the Office of Workers' Compensation Programs dated October 8, 1996 is hereby affirmed.

Dated, Washington, D.C.  
February 24, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>6</sup> See *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

<sup>7</sup> The Board notes that appellant submitted evidence to the Board with his appeal. The Board cannot consider this evidence, however, as the Board's 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).