

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERYL L. WILKINS and U.S. POSTAL SERVICE,
POST OFFICE, Lancaster, Pa.

*Docket No. 97-1027; Submitted on the Record;
Issued February 5, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for review of the merits, on the grounds that it was not timely filed and did not present clear evidence of error.

The Board has duly reviewed the case on appeal and finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

Appellant filed a claim on February 2, 1994 alleging that she injured her neck and upper shoulder in the performance of duty. The Office accepted her claim for cervical and lumbar strains. Appellant claimed a recurrence of disability on July 21, 1994. The Office denied this claim on October 19, 1994 finding that appellant had not submitted the necessary factual and medical evidence to meet her burden of proof to establish a causal relationship between her current condition and her accepted employment injury. Appellant requested a review of the written record on May 8, 1995. The Office's Branch of Hearings and Review denied this request on May 22, 1995 noting that it was not timely filed. Appellant requested reconsideration of the October 19, 1994 decision, on May 30, 1996. By decision dated September 26, 1996, the Office denied appellant's claim noting that her request was not timely filed and did not present clear evidence of error.¹

The Board finds that the Office properly determined that appellant's application for review was not timely filed and failed to present clear evidence of error.

Appellant requested reconsideration of the Office's January 6, 1993 merit decision, on November 11, 1994. By decision dated December 20, 1994, the Office declined to reopen

¹ Following the Office's September 26, 1996 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal. 20 C.F.R. § 501.3(d)(2).

appellant's claim for review of the merits on the grounds that her request was untimely filed and did not present clear evidence of error of the part of the Office.

The Office, through 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

Since more than one year elapsed from the October 19, 1994 decision, to appellant's June 26, 1996 application for review, the request for reconsideration is untimely. 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 insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. Appellant submitted a series of medical reports and notes from Dr. Bruce D. Kaskin, an osteopath, listing the treatment provided. Dr. Kaskin did not provide a clear opinion on the causal relationship between appellant's accepted employment injury and her diagnosed condition. Appellant also submitted form reports from Dr. James DiSalvo, a physician,⁵ diagnosing chronic cervical strain and cervical strain, recurrent. These reports do not provide a clear opinion on the causal relationship between appellant's diagnosed condition and her accepted employment injury. The employing establishment submitted a report from Dr. Thomas K. Howard, a Board-certified orthopedic surgeon, opining that appellant's current condition and disability were not due to her accepted employment injury. Appellant also submitted a narrative statement describing her recurrence of disability.

While the evidence submitted is relevant to appellant's claim, it does not present clear evidence that the Office erred in denying appellant's claim in its October 19, 1994 decision. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for consideration of the merits.

² 5 U.S.C. § 8128(a).

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

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

⁵ Dr. DiSalvo was not listed in the physician reference guides.

The decision of the Office of Workers' Compensation Programs dated September 26, 1996 is hereby affirmed.

Dated, Washington, D.C.
February 5, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member