

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OLESTINE BROWN and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Baltimore, Md.

*Docket No. 97-1271; Submitted on the Record;
Issued February 10, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) 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 she failed to submit relevant new evidence; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for review of the merits on the grounds that her request was not timely filed and failed to 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 on the grounds that she failed to submit relevant new evidence.

Appellant filed a claim on November 4, 1991 alleging on October 4, 1991 she realized that she had developed a hand condition causally related to factors of her federal employment. The Office denied appellant's claim by decision dated March 25, 1992. Appellant requested an oral hearing and by decision dated December 10, 1993 and finalized December 13, 1993, the Office's Branch of Hearings and Review affirmed the March 25, 1992 decision. Appellant requested reconsideration on several occasions and the Office denied appellant's request for merit review on May 12, September 30, 1994 and October 10, 1995. The Office denied modification of its March 25, 1992 decision on March 24, 1994 and May 5, 1995. Appellant requested reconsideration on January 29, 1996 and by decision dated May 16, 1996, the Office declined to reopen appellant's claim for review of the merits on the grounds that she failed to submit relevant new evidence. Appellant requested review from the Board on June 6, 1996. However, appellant's representative requested that the Board dismiss the appeal on November 14, 1996 in lieu of reconsideration by the Office. The Board dismissed the appeal by order dated December 18, 1996.¹ By decision dated February 13, 1997, the Office denied appellant's November 14, 1996 request for reconsideration as it was not timely filed and did not present clear evidence of error.

¹ Docket No. 96-2044.

As the last merit decision, the May 5, 1995 decision, was issued more than one year prior to the date of appellant's appeal to the Board on February 24, 1997, the Board lacks jurisdiction to review the merits of appellant's claim.² The only decisions before the Board on appeal are the May 16, 1996 and February 13, 1997 nonmerit decisions.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.³ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without review the merits of the claim.

In this case, appellant requested reconsideration on January 29, 1996 and in support of her request submitted a report dated November 11, 1994 from Dr. Steven F. Manekin, a Board-certified neurologist. The record previously contained a copy of this report. However, the report submitted with appellant's January 29, 1996 reconsideration request had a slight modification. In the initial November 11, 1994 report, Dr. Manekin stated that appellant's injuries were work related. In the more recent copy of the report he stated, "Please note that the patient sustained an injury in the course of her employment on October 4, 1991. The disability of the patient is causally related to her accident of October 4, 1992."

The Office had previously denied appellant's claim for an occupational disease as the medical evidence was not sufficiently well rationalized to establish a causal relationship between her diagnosed conditions and her accepted employment exposures. Dr. Manekin's statement indicates that appellant sustained a traumatic injury. This new allegation is not relevant to her claim for an occupational disease. Without supportive factual information from appellant, given her prior statements that she developed her conditions due to cumulative trauma, Dr. Manekin's report and addendum are not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on February 13, 1997 as her request was not timely filed and did not contain clear evidence of error.

Appellant, through her attorney, requested that the Board dismiss appellant's appeal on November 14, 1996. He stated that the Board should remand the case to the Office for consideration of new and additional evidence. Therefore, appellant requested reconsideration of the Office's January 6, 1993 merit decision on November 14, 1994. By decision dated December 20, 1994, the Office declined to reopen appellant's claim for review of the merits on the grounds that his request was untimely filed and did not present clear evidence of error of the part of the Office.

² 20 C.F.R. § 501.2(c).

³ 20 C.F.R. § 10.138(b)(1).

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴ 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.⁵ 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.⁶

Since more than one year elapsed from the May 5, 1995 merit decision to appellant's November 14, 1996 application for review, the request for reconsideration is untimely. Appellant did not submit any new evidence in support of the application for review. As the evidence submitted in support of the request for review is repetitious, it 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. Therefore, there is no evidence error on the part of the Office. Furthermore, appellant's reconsideration request did not contain any argument which would support her claim for error on the part of the Office.

The decisions of the Office of Workers' Compensation Programs dated February 13, 1997 and May 16, 1996 are hereby affirmed.

Dated, Washington, D.C.
February 10, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁴ 5 U.S.C. § 8128(a).

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

⁶ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).