

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES UPSHAW, JR. and DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD, Long Beach, Calif.

*Docket No. 97-1910; Submitted on the Record;
Issued June 10, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

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 contain 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.

This is the fifth appeal in this case. In its March 7, 1996 decision,¹ the Board found that appellant had no psychiatric disability on or after October 25, 1978 causally related to his December 10, 1976 employment injury. The facts and circumstances of the case as set out in the prior decisions are adopted herein by reference.² Following the Board's March 7, 1996 decision, appellant filed a petition for reconsideration with the Board. The Board denied appellant's petition for reconsideration by order dated June 21, 1996. Following this June 21, 1996 order, appellant requested reconsideration from the Office by letter dated April 17, 1997. By decision dated April 24, 1997, the Office denied appellant's request for reconsideration finding it was not timely filed and did not contain clear evidence of error.

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

¹ Docket No. 95-2750.

² In a previous decision dated January 14, 1992, Docket No. 81-1884, the Board found that the Office had properly terminated appellant's compensation benefits effective October 25, 1978.

³ 5 U.S.C. § 8128(a).

decision.⁴ 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.⁵

Appellant again requested reconsideration on April 17, 1997.⁶ Since more than one year elapsed from March 7, 1996 to appellant's April 17, 1997, 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 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 reports noting that he experienced arthritis in his hip and lumbosacral spine and that he had intermittent right shoulder pain. These reports did not provide an opinion on the causal relationship between appellant's diagnosed condition and his accepted employment injuries. Therefore, this evidence cannot establish error on the part of the Office. Furthermore, appellant's reconsideration did not contain any argument which would support his claim for error on the part of the Office.

The decision of the Office of Workers' Compensation Programs dated April 24, 1997 is hereby affirmed.

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

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

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

⁵ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁶ While appellant is allowed an opportunity by regulation to petition the Board for reconsideration, such petition for reconsideration, unless granted by the Board, does not extend the time for a merit review of the case. *Veletta C. Coleman*, 48 ECAB ___ (Docket No. 95-431, issued February 27, 1997).