

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of PATRICIA M. PARKER and U.S. POSTAL SERVICE,  
POST OFFICE, St. Charles, Mo.

*Docket No. 97-1814; Submitted on the Record;  
Issued March 16, 1999*

---

DECISION and ORDER

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

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 her 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 and presented no clear evidence of error.

In the instant case, appellant filed a traumatic injury claim alleging that she sustained an injury to her lower back on October 29, 1991. By decision dated August 4, 1992, the Office denied appellant's claim on the grounds that fact of injury was not established. In a decision dated March 21, 1995, an Office hearing representative affirmed the August 4, 1992 decision. The hearing representative found that the evidence established that the incident on October 29, 1991 occurred as alleged but that the medical evidence was insufficient to support a medical condition or disability arising from the employment incident.

In a letter dated January 14, 1997, appellant requested reconsideration of the Office's March 21, 1995 decision and submitted additional evidence. In her letter of reconsideration, appellant stated that she had previously requested reconsideration in a 1996 letter, but that it had been lost. By decision dated March 31, 1997, the Office denied appellant's request for reconsideration after finding that it was untimely and did not establish clear evidence of error.

The only decision before the Board on this appeal is the Office's March 31, 1997 decision, denying appellant's request for a review on the merits of its March 21, 1995 decision, finding that appellant had not established an injury in the performance of duty on October 29, 1991. Because more than one year has elapsed between the issuance of the Office's March 21,

1995 decision and May 6, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the March 21, 1995 Office decision.<sup>1</sup>

The Office, through its 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>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>5</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>6</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>7</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>8</sup> This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>9</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.<sup>10</sup> The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>11</sup>

The Board finds that, since more than one year has elapsed since the date of issuance of the Office's March 21, 1995 merit decision and January 14, 1997, the date of appellant's request

---

<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).

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

<sup>5</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>6</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>7</sup> See *Jesus D. Sanchez*, *supra* note 4.

<sup>8</sup> See *Leona N. Travis*, *supra* note 6.

<sup>9</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>10</sup> *Id.*

<sup>11</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

for reconsideration, the Office properly found her request for reconsideration untimely.<sup>12</sup> The Board further finds that the evidence submitted by appellant in support of her request for reconsideration does not raise a substantial question as to the correctness of the Office's March 21, 1995 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

In support of her request for reconsideration, appellant submitted information from her employing establishment personnel file, a tape of a hearing regarding her entitlement to unemployment compensation, a decision finding she could receive unemployment compensation, medical bills and medical evidence either previously submitted or not relevant to her claim for an injury on October 29, 1991. As this evidence does not address the pertinent issue of whether appellant sustained an injury in the performance of duty on October 29, 1991 it is insufficient to raise a substantial question as to the correctness of the prior Office decision.

Appellant further submitted an office visit note and medical report dated June 30, 1995, from Dr. M. Keohane, a Board-certified orthopedic surgeon. Dr. Keohane stated that appellant complained of low back pain which "dates back to an injury that she sustained at work in 1991." He related that as appellant did not have back pain prior to her injury at work "it seems reasonable to presume that whatever current symptoms she had are related to her injury in 1991." However, the fact that appellant had no history of back symptoms prior to the incident in 1991 is insufficient reason to conclude that her back problems resulted from the incident. The Board has held that where an opinion supporting causal relationship is based solely on the lack of symptoms prior to an employment injury and the manifestation of symptoms after the employment injury, it is insufficient to establish the necessary causal relationship.<sup>13</sup> Thus, Dr. Keohane's opinion does not demonstrate any error in the March 21, 1995 decision of the Office.

The Board also finds that appellant's statements submitted with her reconsideration request, in which she addressed her treatment by the employing establishment, discussed the hearing representative's findings and listed the evidence she submitted upon reconsideration, are insufficient to raise a legal question warranting a merit review.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the above-detailed evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis. The Office, therefore, did not abuse its discretion in denying further review of the case.

---

<sup>12</sup> While appellant argued that she had previously requested reconsideration before the Office in 1996, she submitted no evidence to support her contention. In her appeal to the Board, appellant submitted new evidence relevant to this issue; however, the Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c). Appellant may submit this evidence to the Office, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.138(b).

<sup>13</sup> *See Thomas D. Petrylak*, 39 ECAB 276 (1987).

The decision of the Office of Workers' Compensation Programs dated March 31, 1997 is hereby affirmed.

Dated, Washington, D.C.  
March 16, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member