

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERYL L. FITCH and DEPARTMENT OF DEFENSE,
DEFENSE LOGISTICS AGENCY, FORT BRAGG, N.C.

*Docket No. 97-1882; Submitted on the Record;
Issued March 17, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of her claim under section 8128 of the Federal Employees' Compensation Act.

Appellant filed claims for an occupational disease and for a traumatic injury sustained on September 7, 1995 for the same conditions: burning pain of the shoulders, upper arms and back caused by scanning groceries in her employment as a sales store checker. The Office consolidated these claims, and denied them by a decision dated February 21, 1996, finding that the evidence failed to demonstrate a causal relation between appellant's claimed condition or disability and her employment. Appellant requested reconsideration, and the Office, by decision dated February 19, 1997, found that the additional evidence was not sufficient to warrant review of its prior decision.

The only Office decision before the Board on this appeal is the Office's February 19, 1997 decision, finding that appellant's application for review was not sufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent merit decision on February 21, 1996 and the filing of appellant's appeal on May 19, 1997, the Board lacks jurisdiction to review the merits of appellant's claim.¹

The Board finds that the Office improperly refused to reopen appellant's case for further review of the merits of her claim.

¹ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

The Office's procedure manual provides:

"The ECAB [Employees' Compensation Appeals Board] will accept appeals filed up to one year from the date of the last merit decision. If a reconsideration decision is delayed beyond one year, the claimant's right to review the original decision by the ECAB is abrogated. In *Tony J. Fosko*, 35 ECAB 644 [1984] the [Board] remanded the case for a review on the merits, ruling that when the [Office] took 10 months to deny an application for review, it had effectively used up the claimant's time to appeal to the Board.

"When a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to have review of the merits of the case by the Board, the [Office] should conduct a merit review. That is, the basis of the original decision and any new evidence should be considered and, if there is no basis to change the original decision, an order denying modification (rather than denying the application for review) should be prepared. There is no obligation to conduct a merit review on insufficient evidence if the maximum one-year time limit for requesting review by the Board will have expired within the 90-day period following the [Office's] receipt of the claimant's reconsideration request."²

In the present case, appellant requested reconsideration of the Office's February 21, 1996 decision by letter dated October 11, 1996³ and received by the Office on October 21, 1996, as evidenced by a return receipt for certified mail. Further corroborating that the request for reconsideration was made at that time are Office reports of telephone calls from appellant on November 18, 20, 21, 22 and 25, 1996 inquiring as to the status of her request for reconsideration that was received by the Office by certified mail on October 21, 1996. The evidence establishes that appellant's request for reconsideration was received by the Office on October 21, 1996.

Had the Office acted within 90 days, appellant would have been able to exercise her full appeal rights, including an appeal to the Board on the merits of her claim. As the Office's delay of over 90 days to issue a decision on appellant's request for reconsideration was not consistent with the Office's procedure manual, the case will be remanded to the Office for issuance of a decision on the merits of appellant's claim.⁴

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (May 1996).

³ After the Office advised appellant on December 2, 1996 that it was unable to locate her request for reconsideration, appellant submitted a copy of her October 11, 1996 letter requesting reconsideration. This copy was received by the Office on December 26, 1996.

⁴ See *Debra E. Stoler*, 43 ECAB 561 (1992); *Carlos Tola*, 42 ECAB 337 (1991).

The decision of the Office of Workers' Compensation Programs dated February 19, 1997 is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, D.C.
March 17, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member