

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES G. RUNYAN and TENNESSEE VALLEY AUTHORITY,  
WIDOWS CREEK FOSSIL PLANT, Stevenson, AL

*Docket No. 97-2570; Submitted on the Record;  
Issued October 25, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the record in this case and finds that the Office did not abuse its discretion in failing to reopen appellant's case for merit review.

The only decision before the Board in this appeal is the March 24, 1997 decision, in which the Office denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.<sup>1</sup> Since more than one year had elapsed between the date of the Office's most recent merit decision dated September 1, 1994 and the filing of appellant's appeal on September 2, 1997, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>2</sup>

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<sup>1</sup> On January 29, 1988 appellant, then a 31-year-old boilermaker helper, sustained an employment-related laceration of the lower lip, avulsion of incisors and cervical strain. He stopped work that day, worked for brief periods thereafter and received appropriate compensation. By decision dated May 7, 1991, the Office reduced appellant's compensation, based on his capacity to earn wages as a clerk. Following further development and proper notice, by decision dated May 18, 1993, the Office terminated appellant's compensation, based on the opinion of Dr. Robert L. Sendele, a Board-certified orthopedic surgeon, who had provided a second opinion evaluation for the Office. After requests from appellant, in decisions dated July 15, 1993 and September 1, 1994, the Office denied modification of its prior decisions. Appellant submitted four further requests for reconsideration which were denied by the Office in decisions dated May 17 and September 5, 1995, July 2, 1996 and March 24, 1997. The instant appeal follows.

<sup>2</sup> 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, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>3</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>4</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>5</sup>

The Board finds that as more than one year had elapsed from the date of issuance of the Office's September 1, 1994 merit decision and appellant's most recent request for reconsideration dated November 8, 1996, this request for reconsideration was untimely. The Board further finds that the arguments made by appellant in support of this request do not raise a substantial question as to the correctness of the Office's September 1, 1994 merit decision.

In support of his request, appellant submitted a September 10, 1996 report from Dr. Rickey Hutcheson, an orthopedic osteopathic physician. Dr. Hutcheson noted the history of injury and findings on examination. He stated that a magnetic resonance imaging (MRI) scan demonstrated herniated discs at T8-9 and L5-S1 and an MRI scan of the cervical spine was normal. Dr. Hutcheson diagnosed chronic pain syndrome, questionable chronic cervical strain and sprain, herniated discs at T8-9 and L5-S1, a component of depression associated with chronic pain syndrome and multiple areas of somatic dysfunction with trigger points. He noted symptom magnification and advised that he could not provide a definitive cause of appellant's herniated discs.

Office procedures provide that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error. Evidence such as a well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require review of the case.<sup>6</sup> In this case, Dr. Hutcheson advised that he could not provide a definitive cause of appellant's herniated discs. Therefore, as he has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's September 1, 1994 decision, appellant failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2); *see also Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

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

<sup>6</sup> *Jeanette Butler*, 47 ECAB 128 (1995).

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

Dated, Washington, D.C.  
October 25, 1999

Michael J. Walsh  
Chairman

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member