

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH A. ESTES, SR. and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Nashville, TN

*Docket No. 99-986; Submitted on the Record;
Issued July 12, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

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 case record and finds that the Office did not abuse its discretion in failing to reopen appellant's case for merit review.

On April 17, 1996 appellant, then a 49-year-old flat sorter machine operator, filed a Form CA-1, notice of traumatic injury and claim for compensation, alleging that on that day he sustained a spinal injury. He stopped work that day and returned to limited duty in May 1996. By letter dated May 20, 1996, the Office informed appellant of the type evidence needed to support his claim, and he submitted medical evidence and statements indicating that on April 17, 1996 he was lifting mail flats when he noticed a severe pain in the right groin area. He stated that he finished his workday but was unable to work the following day due to severe pain in the lower back.

By decision dated August 23, 1996, the Office denied the claim on the grounds that appellant had not established fact of injury. On September 10, 1996 appellant requested a hearing that was held on January 14, 1997. In a May 2, 1996 decision, an Office hearing representative found the April 17, 1996 lifting incident established but that appellant failed to establish that his low back condition was causally related to the lifting incident. On April 4, 1997 appellant requested reconsideration and submitted additional evidence. By decision dated May 1, 1997, the Office denied appellant's request on the grounds that the evidence submitted was repetitious, irrelevant and immaterial. On September 9, 1998 appellant again requested reconsideration and submitted an August 26, 1996 electromyography (EMG) report, a September 5, 1997 report from Dr. Clifton K. Meador, a Board-certified internist and an Office form report dated July 23, 1998 from Dr. Roy O. Elam, III, appellant's treating Board-certified internist. In an October 29, 1998 decision, the Office denied appellant's request finding that,

pursuant to 20 C.F.R. § 10.138(b)(2), it had not been filed within one year of the March 14, 1997 merit decision and did not show clear evidence of error pursuant to 20 C.F.R. § 10.138(a). The instant appeal follows.

The only decision before the Board is the Office's October 29, 1998 decision denying appellant's request for reconsideration of the March 14, 1997 decision. Because more than one year had elapsed between the issuance of this decision and December 22, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the March 14, 1997 Office decision.¹

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² 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.³ 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.⁴

The Board finds that, as more than one year had elapsed from the date of issuance of the Office's March 14, 1997 merit decision and appellant's request for reconsideration dated September 9, 1998, his 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 March 14, 1997 merit decision.

Regarding the evidence submitted by appellant in support of his September 9, 1998 reconsideration request, the EMG report dated August 26, 1996 demonstrated a mild chronic reinnervation change in a pattern suggesting old "healed" or chronic right S1 and left L5 radiculopathy. In a September 5, 1997 report, Dr. Meador stated that appellant "presented me a classic story of an abrupt nerve root compression syndrome occurring at work with pain developing in the right groin" and described the relationship between groin pain and the back. He advised that appellant's findings were consistent with spinal stenosis in the region of L2-3 and opined that appellant could not work. In an Office form report dated July 23, 1998, Dr. Elam appellant's treating Board-certified internist, diagnosed spinal stenosis that was aggravated by the April 1996 lifting incident. He advised that appellant could not work, indicating that he could not kneel, bend, stoop, twist, pull or push.

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

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. § 8128(a).

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

⁴ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

development, is not clear evidence of error and would not require review of the case.⁵ In this case, while appellant submitted medical evidence with his request, the Board finds it insufficient to establish clear evidence of error on the part of the Office.⁶ The EMG report provides no cause of appellant's condition. Dr. Elam's report is duplicative of many such reports he had previously submitted and which the Office had previously considered. Furthermore, while Dr. Meador described a "nerve root compression syndrome occurring at work," he did not provide medical rationale explaining how the lifting incident of April 17, 1996 caused this condition. Therefore, as appellant did not, by the submission of factual and medical evidence, raise a substantial question as to the correctness of the Office's March 14, 1997 decision, he has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.

The decision of the Office of Workers' Compensation Programs dated October 29, 1998 is hereby affirmed.

Dated, Washington, D.C.
July 12, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁵ *Jeanette Butler*, 47 ECAB 128 (1995).

⁶ *See Larry J. Lilton*, 44 ECAB 243 (1992).