

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ANTHONY CEFALU and NATIONAL CREDIT UNION  
ADMINISTRATION, WASHINGTON AVENUE EXTENSION,  
Albany, NY

*Docket No. 98-2011; Submitted on the Record;  
Issued May 1, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Office, through regulations has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>1</sup> The Office will not review a decision denying or terminating a benefits unless the application for review is filed within on year of the date of the decision.<sup>2</sup> When the 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>3</sup>

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> 20 C.F.R. § 10.138(b)(2).

<sup>3</sup> *Thankamma Matthews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

The Board finds that, since more than one year has elapsed from the date of issuance of the Office's December 16, 1993 merit decision to the date that appellant's request for reconsideration was filed, January 22, 1998, appellant's request for reconsideration is untimely.<sup>4</sup> The Board further finds that the evidence submitted by appellant in support of such request does not raise a substantial question as to the correction of the Office's December 16, 1993 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

In his request for reconsideration and on appeal, appellant contended that the medical reports dated February 8, May 25 and September 28, 1993 from his treating physician, Dr. Joseph L. Paul, a Board-certified orthopedic surgeon with a specialty in anesthesiology, establish that he sustained a recurrence of disability, commencing on June 1, 1993, causally related to the March 27, 1992 employment injury. Appellant stated that his February 8, 1993 report was in the record prior to the Office's December 16, 1993 decision and the Office erred in failing to consider it. Appellant contended that new evidence not previously considered by the Office consisting of Dr. Paul's June 23, 1997 report also establishes that appellant sustained a recurrence of disability, as alleged. Further, appellant submitted statements from a few of his coworkers describing difficulty he had with his back while working in December 1993 and January 1994.

The reports from Dr. Paul dated May 25 and September 28, 1993 are attending physician's supplemental reports, Forms CA-20as, in which Dr. Paul diagnosed central herniated disc at L2-3 and L4-5 and arthritis of the "L-spinal" with radiculopathy. He checked the "yes" box that these conditions were related to the March 27, 1992 employment injury and that appellant was unable to work. The Office considered Dr. Paul's May 25 and September 28, 1993 reports in its December 16, 1993 decision. The Office did not address his September 28, 1993 narrative report. In his report, Dr. Paul released appellant to return to part-time work on February 15, 1993 with lifting and driving limitations. He stated that "[s]hould the patient be unable to perform his light duties satisfactorily, disability retirement is recommended."

In the June 23, 1997 report, Dr. Paul additionally diagnosed herniated discs from C3 through C7 based on a magnetic resonance imaging (MRI) scan performed on December 28, 1992. He stated that the March 27, 1992 employment injury caused the herniations, that appellant was disabled and his conditions were permanent. Dr. Paul stated that appellant attempted to return to work in February 1993 and experienced a "recurrence of the system." He stated:

"It is clear that the patient's pain from returning to work is directly related to the [March 27, 1992 employment injury]. The patient's condition is chronic per nature, and while the pain might subside for a time, any kind of activity may reaggravate the injury. Movements can cause posterior motion of the

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<sup>4</sup> Although appellant contended that the late filing was due to his prior attorney's negligence, the Board has held that section 10.138(b)(2) is "unequivocal in setting forth the time limitation period and does not indicate that late filing may be excused by extenuating circumstances." See *Donald Jones-Booker*, 47 ECAB 785, 787-88 (1996); *Charles J. Prudencio*, 41 ECAB 499, 502 (1996). Therefore, appellant's late filing of his reconsideration request may not be excused.

intervertebral disc and pain in the lower back and in the legs would result....  
[B]ecause of the severity of the claimant's radiculopathy, any kind of strenuous activity will aggravate the condition."

By decision dated April 2, 1998, the Office denied appellant's request for reconsideration on the grounds that the request was untimely filed and failed to present clear evidence of error by the Office in its December 16, 1993 decision.

While Dr. Paul's June 23, 1997 report is supportive that appellant's current condition is causally related to the March 27, 1992 employment injury, he did not provide a sufficiently rationalized opinion to establish that appellant sustained a recurrence of disability causally related to the March 1992 employment injury.<sup>5</sup> His opinion does not establish that appellant's return to work resulted in a change in the nature and extent of appellant's back condition.<sup>6</sup> Further, the fear of a new injury or a recurrence of disability is not a basis for the payment of compensation.<sup>7</sup> Dr. Paul's February 8, 1993 report is insufficient to establish that appellant sustained a recurrence of disability as it does not address causation. The witnesses' statements appellant submitted are not medical evidence and therefore are not probative in establishing a recurrence of disability.<sup>8</sup> Appellant has not shown by the evidence he submitted in support his request for reconsideration that the Office clearly erred when it denied appellant's recurrence of disability.

For these reasons, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application was not timely filed and failed to present clear evidence of error.

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<sup>5</sup> See *Carolyn F. Allen*, 47 ECAB 240, 244-45 (1995).

<sup>6</sup> See *Richard E. Konnen*, 47 ECAB 388, 389-90 (1996).

<sup>7</sup> See *Louise G. Malloy*, 45 ECAB 613, 617 (1994).

<sup>8</sup> *Carolyn F. Allen*, *supra* note 5 at 246.

The decision of the Office of Workers' Compensation Programs dated April 2, 1998 is hereby affirmed.

Dated, Washington, D.C.  
May 1, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member