

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LISA WHITWORTH and U.S. POSTAL SERVICE,
POST OFFICE, Louisville, KY

*Docket No. 00-977; Submitted on the Record;
Issued February 20, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record and finds that the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The only decisions before the Board on this appeal are the Office's April 26 and October 22, 1999 decisions, denying appellant's request for a review on the merits of its June 16, 1997 decision. Because more than one year has elapsed between the issuance of the Office's June 16, 1997 decision, the last merit review of record and January 24, 2000, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the Office's June 16, 1997 decision and other prior decisions.¹

The Office, through its 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 takes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁴

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

In her request for reconsideration dated March 25, 1999, appellant stated that her claim for a work-related injury occurring on May 23, 1995 and related conditions for slipped discs at T11-12, a right knee tear, rotator cuff tendinitis and peritendinitis, and aggravation of low back pain should be accepted. Appellant also contended that her thoracic outlet and carpal tunnel syndrome worsened from performing her duties at work. Appellant submitted 14 documents to support her contentions.

By decision dated April 26, 1999, the Office denied appellant's reconsideration request, stating that the evidence was untimely and did not show clear evidence of error.

By letter dated July 21, 1999, appellant requested reconsideration of the Office's June 16, 1997 decision, reiterated her earlier arguments concerning acceptance of her numerous physical conditions and urged that the Office review all the medical evidence from May 30, 1995 through March 23, 1999. Appellant's request included an outline of the decisions issued in the case and specified why she disagreed with them.

By decision dated October 22, 1999, the Office denied appellant's request for reconsideration, stating that it was untimely and failed to establish clear evidence of error.

The Board finds that, since more than one year has elapsed from the date of issuance of the Office's June 16, 1997 merit decision to the date that appellant's requests for reconsideration were filed, March 25 and July 21, 1999, appellant's requests for reconsideration are untimely. The Board further finds that the evidence submitted by appellant in support of her requests does not raise a substantial question as to the correctness of the Office's June 16, 1997 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

In her March 25, 1999 request for reconsideration, appellant submitted reports and forms from her treating physician, Dr. Erdogan Atasoy, a Board-certified surgeon with a specialty in hand surgery; the reports of Dr. Suzanne E. Fix, a Board-certified general surgeon; and a November 16, 1995 letter from Dr. George C. Stege, a Board-certified family practitioner.

In his July 18, 1995 report, Dr. Atasoy stated that appellant's thoracic outlet compression and associated myofascitis were work related and that some of the spinal disc problems could be contributing to her thoracic outlet syndrome. He, however, provided no rationalized medical explanation for his opinion on the work relatedness of her condition and, therefore, his opinion is not probative.⁵ Dr. Atasoy's forms dated March 23, 1999, which provide diagnoses of appellant's conditions and assess restrictions, are duplicative of forms dated February 11, 1997, which were previously submitted.

In her March 20, 1996 report, Dr. Fix reviewed the magnetic resonance imaging (MRI) scan of appellant's right shoulder and diagnosed no rotator cuff tear but severe tendinitis and peritendinitis. In her January 14, 1998 progress notes, Dr. Fix stated that appellant was injured in a couple of falls while pushing a cart at work and had interscapular and upper back pain from

⁵ See Mark A. Cacchione, 46 ECAB 148, 152-51 (1994).

that. Dr. Fix's March 20, 1996 report does not relate appellant's condition to her employment and her January 14, 1998 report does not mention a specific date of injury. Dr. Fix's January 14, 1998 report also does not contain a rationalized medical opinion explaining how appellant's back condition resulted from her employment. Her opinion is, therefore, not probative.⁶

In his November 16, 1995 report, Dr. Stege stated that Dr. Atasoy was treating appellant for thoracic outlet syndrome and another doctor was evaluating her for possible carpal tunnel syndrome. His report does not address the cause of appellant's physical condition and is not probative.

Other new evidence appellant submitted was progress notes dated March 8, 1999 from Dr. Scott Dube, who diagnosed that appellant had rotator cuff tendinitis, progress notes from the Ortho Trauma Associates dated March 26, 1996, which diagnosed shoulder impingement syndrome; and the December 18, 1996 MRI scan of her right knee showing increased signal in the anterior medial meniscus and indicating that a tiny meniscal tear could not be excluded.

None of this evidence, however, addresses the cause of appellant's physical condition and, therefore, is not probative. Moreover, appellant did not submit new evidence with her July 21, 1999 request for reconsideration but identified problems in the Office's prior decisions. Her arguments, however, do not present clear evidence of error. Appellant has, therefore, not shown by the evidence she submitted in support of her requests for reconsideration that the Office clearly erred when it found that she had not established a fact of injury.

For these reasons, the Office acted within its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a).

⁶ See *Linda I. Sprague*, 48 ECAB 386, 390 n. 11 (1997).

The decisions of the Office of Workers' Compensation Programs dated October 22 and April 26, 1999 are hereby affirmed.

Dated, Washington, DC
February 20, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member