

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARB K. WITHEY and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Seattle, WA

*Docket No. 00-758; Submitted on the Record;
Issued September 26, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On February 4, 1985, August 5, 1986 and June 20, 1991 appellant, an Equal Employment Opportunity specialist, sustained employment-related low back strains. Appellant also had a nonwork-related injury in 1977 when she fell through a ceiling wallboard and sustained hematoma and fibrosis of her left leg which left her with a permanent impairment of the left lower extremity. She stopped work at the employing establishment on February 4, 1994.

The Office, on July 8, 1994, referred appellant to Dr. Loy E. Cramer, a Board-certified orthopedic surgeon, for a second opinion evaluation. Based on the opinion of Dr. Cramer, on August 30, 1994 the Office proposed to terminate appellant's compensation. In response, appellant submitted additional medical evidence, and the Office secured a supplementary report from Dr. Cramer.

By decision dated November 10, 1994, the Office finalized the termination, effective that day. On December 7, 1994 appellant requested a hearing and submitted additional medical evidence. At the hearing on June 14, 1995, she testified regarding her employment injuries and current symptoms and submitted additional medical evidence. In an August 28, 1995 decision, an Office hearing representative affirmed the prior decision.

On August 21, 1996 appellant requested reconsideration and submitted additional medical evidence. By decision dated October 1, 1997, the Office denied modification of the prior decision. On April 28, 1998 appellant again requested reconsideration and submitted additional medical evidence. In an August 18, 1998 decision, the Office denied modification of

the prior decision. On June 12, 1999 appellant requested reconsideration¹ and submitted additional medical evidence. By decision dated November 15, 1999, the Office denied appellant's reconsideration request, finding the evidence immaterial.

The Board finds that the Office acted within its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the November 15, 1999 one in which the Office denied appellant's application for review. Since more than one year had elapsed between the date of the Office's most recent merit decision dated August 18, 1998 and the filing of appellant's appeal on December 10, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.²

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).³ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.⁴ Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁵

In this case, appellant submitted a letter dated June 7, 1999 in which her treating Board-certified psychiatrist, Dr. Stanley Herring, advised that he had been treating appellant since 1986, that she had injured her leg in 1977 and that she had four injuries related to federal employment.

¹ The record indicates that the Office did not receive this request. On October 6, 1999 appellant's attorney provided a copy of this request and the attached medical evidence. The Board has held that, 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. *Anthony A. DeGenaro*, 44 ECAB 230 (1992). There is, however, no obligation to conduct a merit review of 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. *Carlos Tola*, 42 ECAB 337 (1991). Thus, even had appellant mailed the reconsideration request on June 12, 1999, the one-year time limit would have expired on August 18, 1999, within 90 days of a June 12, 1999 request.

² 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. Section 501.2 provides that the Board's review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision. The Board is unable to consider evidence for the first time on appeal; see *Marlene K. Cline*, 43 ECAB 580 (1992).

³ 20 C.F.R. § 10.608(a) (1999).

⁴ 20 C.F.R. § 10.608(b)(1) and (2) (1999).

⁵ 20 C.F.R. § 10.608(b) (1999).

Dr. Herring concluded: “In my medical opinion, the four accepted federal claims for this patient’s injuries have contributed to her current medical condition.”

On appeal, counsel argues that the Office should have granted merit review, contending that a conflict in the medical evidence exists between the opinions of Dr. Herring and Dr. Cramer who provided a second opinion evaluation for the Office. The record in this case indicates that Dr. Herring has provided numerous reports to the Office that have been considered previously.

In fact, in the most recent merit decision, that of August 18, 1998 the Office considered a much more thorough January 26, 1998 report from Dr. Herring. In the August 18, 1998 decision, the Office found Dr. Herring’s January 26, 1998 report insufficient to modify the previous decisions in part because he failed to discuss the 1977 nonfederal employment injury. While Dr. Herring mentioned this injury in the June 7, 1999 letter, he merely stated:

“I am aware that [appellant] had an injury to her leg in 1977. I am also aware that she received a settlement from the state of Washington under her Labor and Industries claim for that 1977 leg injury.”

The Board finds that this report is insufficient to warrant merit review. Dr. Herring, while aware of the 1977 injury, did not address the circumstances of the injury and did not provide any opinion regarding the contribution of that injury to appellant’s current condition. The Office, therefore, properly denied appellant’s request for reconsideration as this report does not constitute relevant or pertinent evidence not considered by the Office.

The November 15, 1999 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 26, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member