

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SUSAN R. WESLEY and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Salisbury, NC

*Docket No. 02-1116; Submitted on the Record;  
Issued November 22, 2002*

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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 determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

On July 2, 1999 appellant, then a 50-year-old staff nurse, filed a traumatic injury claim alleging that on June 30, 1999 she sustained low back strain while attempting to catch a falling patient. She lost no time from work.

By decision dated April 11, 2000, the Office denied the claim on the grounds that appellant failed to submit evidence which diagnosed a condition causally related to the claimed employment factor.

In a letter dated May 5, 2000, appellant requested that the Office conduct a review of the written record. She subsequently submitted medical evidence for review. By decision dated August 30, 2000, the Office reviewed the record and found that appellant submitted medical evidence, which failed to explain with sound medical reasoning how her diagnosis of lumbosacral strain and degenerative disc disease were causally related to the employment incident.

In a letter dated January 4, 2002, received by the Office on January 15, 2002, appellant inquired about an earlier request for reconsideration. She argued that she had filed an earlier request for reconsideration on November 6, 2000, however, noted that the Office had informed her that it had no record of her request. Appellant also submitted a copy of the November 6, 2000 request letter and a receipt for certified mail, which indicated that she mailed a parcel to her regional Office, which was signed for as received on November 16, 2000. Appellant's inquiry regarding her earlier request for reconsideration was also accompanied by a report, which she

argued had previously been submitted from Dr. Michael Dockery, a Board-certified orthopedic surgeon, dated October 4, 2000. In the report the physician stated:

“I am writing in regard to [appellant] who has come under our care secondary to an injury on June 30, 1999 in which she caught a patient weighing approximately 200 pounds. Since that time she has had persistent low back pain with transient radiation into her legs. We feel that her injuries from June 30, 1999 did aggravate her degenerative disc disease and has resulted in SI dysfunction as per Dr. Zuhosky’s note. Again, we do feel that this is an aggravation of the degenerative disc disease and was caused by the precipitating injury of June 30, 1999.”

By decision dated February 4, 2002, the Office declined to reopen appellant’s claim for consideration of the merits on the grounds that her January 4, 2002 request for reconsideration was not timely filed and did not contain clear evidence of error.

The only decision before the Board in this appeal is the February 4, 2002 Office decision, regarding its finding that appellant filed an untimely request for reconsideration. Since more than one year has elapsed between the date of the Office’s merit decisions dated April 11 and August 31, 2000 and the filing of appellant’s appeal on April 2, 2002, the Board lacks jurisdiction to review the merits of appellant’s claim.<sup>1</sup>

The Board finds that the case is not in posture for decision regarding the refusal of the Office to reopen appellant’s case for merit review.

Section 8128(a) of the Federal Employees’ Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>4</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that 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>5</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>6</sup>

In those cases where requests for reconsideration are not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether

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<sup>1</sup> 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>4</sup> *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>5</sup> 20 C.F.R. § 10.607. The Board has concurred in the Office’s limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>6</sup> *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

there is clear evidence of error pursuant to the untimely request.<sup>7</sup> Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.<sup>8</sup>

In this case, appellant submitted a January 4, 2002 letter to the Office inquiring about a November 6, 2000 request for reconsideration, which she argued, had been previously submitted. Accompanying the letter was a copy of her November 6, 2000 request for reconsideration, a medical report from Dr. Dockery dated October 4, 2000 and a certificate of mailing to appellant's regional office with a delivery date of November 16, 2000. The Office, in its decision dated February 4, 2002, considered appellant's January 4, 2002 inquiry letter as a reconsideration request itself and applied the "clear evidence of error" standard in denying it as untimely filed. The Office's February 4, 2002 decision does not address at all the information contained in the January 4, 2002 inquiry letter, regarding appellant's November 6, 2000 request for reconsideration or the supporting documentation submitted with the January 4, 2002 letter. The Board, therefore, finds that the case should be remanded to the Office for consideration of appellant's November 6, 2000 reconsideration request under the appropriate standards for reconsideration requests to be followed by an appropriate decision.

The decision of the Office dated February 4, 2002 is set aside and case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC  
November 22, 2002

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>7</sup> *Thankamma Mathews*, *supra* note 3 at 770.

<sup>8</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reconsiderations*, Chapter 2.1602.3(c) (May 1996).