

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PEARL L. CIRWITHIAN and U.S. POSTAL SERVICE,  
POST OFFICE, Washington, DC

*Docket No. 03-650; Submitted on the Record;  
Issued April 24, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On July 13, 1994 appellant, then a 40-year-old clerk, filed a claim for an injury occurring on July 8, 1994 in the performance of duty. The Office accepted appellant's claim for lumbar strain, thoracic strain, pelvic strain, a left shoulder strain and radiculitis of the left leg. Appellant stopped work on July 11, 1994 and returned to limited-duty employment on April 11, 1995 for four hours per day.

By decision dated March 28, 1996, the Office found that appellant's actual earnings as a modified distribution clerk effective April 11, 1995 fairly and reasonable represented her wage-earning capacity.<sup>1</sup>

On May 11, 2000 appellant filed a notice of recurrence of disability on May 5, 2000 causally related to her July 8, 1994 employment injury. Appellant stopped work following her alleged recurrence of disability on May 11, 2000.

By decision dated October 18, 2000, the Office denied appellant's claim for a recurrence of disability on the grounds that the evidence did not establish that she was disabled beginning May 11, 2000 due to her accepted employment injury.

On November 10, 2000 appellant requested a review of the written record. In a decision dated May 21, 2001, the hearing representative affirmed the Office's October 18, 2000 decision.<sup>2</sup>

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<sup>1</sup> In a decision dated January 13, 1997, the Office granted appellant a schedule award for a 10 percent permanent impairment of the right lower extremity.

<sup>2</sup> The hearing representative's decision does not appear to be in the record.

In a decision dated November 2, 2001, the Office denied modification of the prior merit decision. In a letter dated April 25, 2002, received by the Office on April 30, 2002, appellant requested reconsideration of her claim. By decision dated November 5, 2002, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitious and thus insufficient to warrant a merit review of her claim.

The Board finds that the Office improperly denied appellant's request for reconsideration under section 8128.

The only decision over which the Board has jurisdiction is the Office's November 5, 2002 decision denying appellant's request for a review of the merits of the case. Because more than one year has elapsed between the issuance of the Office's decision dated November 2, 2001 and January 21, 2003, the date appellant filed her appeal before the Board, the Board lacks jurisdiction to review the decision dated November 2, 2001.<sup>3</sup>

The Office's procedure manual provides: "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."<sup>4</sup>

In this case, the most recent merit decision is the Office's November 2, 2001 decision. Appellant requested reconsideration on April 25, 2002. The Office did not issue a decision on appellant's April 25, 2002 request for reconsideration until November 5, 2002. As this was more than a 90-day delay and it jeopardized appellant's right to have the Board review the merits of her claim, the Office should have issued a decision on the merits of her claim in conformance with its procedures.<sup>5</sup>

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<sup>3</sup> See 20 C.F.R. §§ 501.2(c); 501.3(d).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (June 2002).

<sup>5</sup> *Carlos Tola*, 42 ECAB 337 (1991).

The decision of the Office of Workers' Compensation Programs dated November 5, 2002 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC  
April 24, 2003

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member