

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ARIZONA WILSON and DEPARTMENT OF DEFENSE,  
DEFENSE LOGISTIC AGENCY, Chicago, IL

*Docket No. 98-997; Submitted on the Record;  
Issued December 16, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on the grounds that it was untimely filed and failed to establish clear evidence of error.

The Board has duly reviewed the case on appeal and finds that the Office did not abuse its discretion by refusing to reopen appellant's claim.

The Office accepted that appellant sustained a back injury on April 8, 1988, which did not result in time lost for work. She filed a second claim alleging that on April 19, 1988 she was attacked by a coworker and again injured her back. The Office denied this claim by decision dated September 30, 1991 finding that appellant failed to establish a causal relationship between her accepted employment injury and her current condition. She requested an oral hearing and by decision dated April 7, 1994 and finalized April 8, 1994, the hearing representative affirmed the Office's September 30, 1991 decision. Appellant requested an appeal from the Board on April 11, 1995. By order dated May 30, 1997, the Board dismissed appellant's appeal as untimely filed.<sup>1</sup> She requested reconsideration of the Office's April 8, 1994 decision on October 24, 1997. By decision dated December 3, 1997, the Office denied appellant's request as untimely filed and found that she had not established clear evidence of error on the part of the Office.<sup>2</sup>

The only decision before the Board on this appeal is that of the Office dated December 3, 1997 in which it declined to reopen appellant's case on the merits because the request was not timely filed, and did not show clear evidence of error. Since more than one year elapsed from

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<sup>1</sup> Docket No. 95-1995.

<sup>2</sup> Appellant submitted additional new evidence on appeal. As the Office did not consider this evidence in reaching a final decision, the Board may not consider it for the first time on appeal. 20 C.F.R. § 501.2(c).

the date of issuance of the Office's April 8, 1994 merit decision to the date of the filing of appellant's appeal, on February 4, 1998, the Board lacks jurisdiction to review that decision.<sup>3</sup>

Appellant requested reconsideration of the Office's April 8, 1994 merit decision on October 24, 1997. By decision dated December 3, 1997, the Office declined to reopen appellant's claim for review of the merits on the grounds that her request was untimely filed and did not present clear evidence of error of the part of the Office.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>4</sup> 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> When an 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>6</sup>

Since more than one year elapsed from the April 8, 1994 decision to appellant's October 24, 1997 application for review, the request for reconsideration is untimely. In support of her request for reconsideration, appellant submitted additional new medical evidence from Dr. Raymond O. Pierce, Jr., a Board-certified orthopedic surgeon. In a note dated January 21, 1994, Dr. Pierce stated that appellant had been continually treated for her back condition. In a report dated April 12, 1994, he opined that appellant's condition was causally related to her employment. However, Dr. Pierce did not indicate whether he attributed appellant's condition to her April 8 or April 19, 1988 employment incidents. He provided appellant's work restrictions on September 12, 1997. On September 16, 1997 Dr. Pierce stated that appellant was still under his care. These medical reports do not provide the necessary rationalized medical opinion evidence to establish that appellant's condition on and after April 19, 1988 was causally related to that employment incident rather than her previous injury of April 8, 1988. Therefore the evidence submitted by appellant does not raise a substantial question as to the correctness of the Office's last merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. Therefore, this evidence cannot establish error on the part of the Office.

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<sup>3</sup> See 20 C.F.R § 501.3(d).

<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2). *Gregory Griffin*, 41 ECAB 186 (1989) *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>6</sup> *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

The decision of the Office of Workers' Compensation Programs dated December 3, 1997 is hereby affirmed.

Dated, Washington, D.C.  
December 16, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member