

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JERRY J. BARRON and TENNESSEE VALLEY AUTHORITY,  
WIDOWS CREEK STEAM PLANT, Stevenson, AL

*Docket No. 98-539; Submitted on the Record;  
Issued February 7, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
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 the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record and finds that the Office did not abuse its discretion in failing to reopen appellant's case for merit review.

This case has been before the Board previously. By decision dated July 25, 1989, the Board reversed a March 7, 1988 decision in which the Office terminated appellant's benefits, effective January 16, 1988.<sup>1</sup> The Board restored compensation retroactive to the termination date. The facts and background of the case contained in the prior decision are incorporated herein by reference.

In 1990 appellant was referred for vocational rehabilitation and he began work with a private employer on January 22, 1991 as an inventory clerk. By decision dated February 20, 1991, his compensation was reduced accordingly. He stopped work on March 15, 1991. On August 13, 1993 he filed a recurrence claim, alleging that as of March 15, 1991 he was unable to work because of excessive pain and stiffness due to the September 4, 1980 employment injury. By decision dated June 19, 1996, the Office denied the claim, finding that appellant failed to establish a recurrence of disability. On August 25, 1997 appellant requested reconsideration and submitted a copy of a letter requesting reconsideration dated August 23, 1996, purporting that he had mailed this to the Office the previous year. He also submitted a report dated August 8, 1996 from his treating Board-certified orthopedic surgeon, Dr. George Z. Seiters. In an October 20, 1997 decision, the Office denied appellant's request finding that, pursuant to 20 C.F.R. § 10.138(b)(2), it had not been filed within one year of the June 19, 1996 decision and did not

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<sup>1</sup> Docket No. 89-731. The facts indicate that on September 4, 1980 appellant sustained an employment-related herniated disc at L5-S1.

show clear evidence of error pursuant to 20 C.F.R. § 10.138(a). The Office noted that a review of the record did not show that the Office had received the request dated August 23, 1996 and found that Dr. Seiters' report did not establish a total disability for work beginning March 15, 1991. The instant appeal follows.

The only decision before the Board is the Office's October 20, 1997 decision denying appellant's request for reconsideration of the June 19, 1996 decision. Because more than one year has elapsed between the issuance of this decision and November 20, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the June 19, 1996 Office decision.<sup>2</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>3</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>4</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>5</sup>

While appellant contends that he timely requested reconsideration, the case file did not contain such request until it was submitted and date-stamped received by the Office on September 12, 1997. The Board, therefore, finds that more than one year had elapsed from the date of issuance of the Office's June 19, 1996 merit decision and appellant's request for reconsideration dated August 25, 1997. His request for reconsideration was, therefore, untimely. The Board further finds that the arguments made by appellant in support of this request do not demonstrate clear evidence of error in the Office's June 19, 1996 merit decision.

In support of his request, appellant submitted a report dated August 8, 1996 in which Dr. Seiters advised that appellant's July 17, 1996 magnetic resonance imaging scan demonstrated postoperative changes at the L5-S1 level with nerve root asymmetry and no disc herniation. Mild facet joint arthritis was noted at L4-5 and L5-S1. Dr. Seiters concluded, "I continue to feel that this patient is unable to continue work as inventory clerk based on his demonstrated progressive pain when he attempted to do so."

Office procedures provide that the term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error. Evidence such as a well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require review of the case.<sup>6</sup> In this

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<sup>2</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2); see also *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>5</sup> *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>6</sup> *Jeanette Butler*, 47 ECAB 128 (1995).

case, Dr. Seiders merely reiterated his conclusions that had previously been considered by the Office in its June 19, 1996 merit decision. Therefore, as he has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office's June 19, 1996 decision, he has failed to establish clear evidence of error, and the Office did not abuse its discretion in denying a merit review of his claim.

The decision of the Office of Workers' Compensation Programs dated October 20, 1997 is hereby affirmed.

Dated, Washington, D.C.  
February 7, 2000

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member