

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH A. AIELLO and U.S. POSTAL SERVICE,
POST OFFICE, White Plains, NY

*Docket No. 98-1450; Submitted on the Record;
Issued February 2, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office, by its February 9, 1998 decision, properly declined to reopen appellant's case for further consideration of the merits as appellant's January 25, 1998 application for review as not timely filed and failed to present clear evidence of error.¹

On February 8, 1994 appellant, then a 40-year-old rural letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he was delivering a large parcel when he slipped on some ice underneath some snow of the driveway in front of the door of his postal customer. Appellant went on to explain that it had been snowing for about one-half hour when he slipped and fell on his left side, causing an injury to his hip, knee, ribs and shoulder. On the reverse side of this form, the employing establishment indicated that its knowledge of the alleged incident was in agreement with the statements made by appellant.

By decision dated October 4, 1995, the Office denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to support the fact of injury in this case.

¹ The Office's last merit decision dated May 3, 1996 was issued more than one year prior to the date appellant filed his appeal dated April 1, 1998, postmarked April 2, 1998 and filed with the Board on April 8, 1998. Therefore, the Board lacks jurisdiction to consider the merits of appellant's claim; *see Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2). The only decision before this Board is the Office's February 9, 1998 decision.

In an undated letter received by the Office on February 14, 1996, appellant requested reconsideration, responded to the Office's August 25, 1994 informational letter and submitted additional evidence in support of his claim. By merit decision dated May 3, 1996, the Office found that the medical evidence submitted in support of reconsideration was not sufficient to warrant modification of its prior October 4, 1995 decision. The Office found that Dr. Donna Restivo, a chiropractor, did not take x-rays until March 18, 1994, 39 days after the alleged injury. The Office also found that this delay in diagnostic testing caused the Office to initiate additional development by letter dated March 20, 1996, which afforded appellant a second opportunity to provide supportive evidence. Appellant, however, submitted no additional evidence.

Thereafter, by letter dated January 25, 1998, appellant filed a request for reconsideration indicating that his attending chiropractor's Office located his x-rays, which were previously requested by the Office and would be forwarded to the Office. In a nonmerit decision dated February 9, 1998, the Office denied appellant's request for reconsideration as untimely filed. The Office found that appellant's request for reconsideration dated February 9, 1998 was filed more than one-year after the last merit decision was issued in this case on May 3, 1996. The Office moreover found that appellant's statement that his attending chiropractor was sending x-rays to the Office did not establish clear evidence of error on the part of the Office and, therefore, did not constitute a basis for the Office to review the case under section 8128 of the Federal Employees' Compensation Act.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² 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.³ 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.⁴

The Board finds that, since more than one year elapsed from the date of issuance of the Office's May 3, 1996 merit decision to the date appellant's request for reconsideration was filed with the Office on January 25, 1998, appellant's request for reconsideration is untimely. Appellant did not submit any evidence in support of his request for reconsideration. Rather, he contended:

"The x-ray evidence was a major part of the denial of this claim, unfortunately for me the doctor's office had lost the x-rays. I have just been notified by Dr. Restivo's office that the x-rays have been found. The x-rays had been misfiled. Dr. Restivo's office notified me that they are sending the x-rays and the other information you required. Please give this information consideration, along

² 5 U.S.C. § 8128(a).

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

⁴ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

with this fact; that is accident occurred while I was completing my duties as a rural carrier, it required several months of extensive treatment by Dr. Restivo; the treatment I received during this period was in no way similar to the regular maintenance program that I was on for my scoliosis condition. I feel this is a legitimate claim and bears no intent to defraud the workers' compensation program. Whatever original filing problems there were at the beginning of this case were due to the [employing establishment's] error and the medical evidence problems were due to the [doctor]'s office staff error; I do not feel it is fair to penalize me for these problems.”

Appellant's contentions, however, do not pertain to the relevant issue of the present case in that he did not submit any medical evidence in support of his contention that he sustained an injury on February 8, 1994, as alleged and whether appellant's medical condition resulted from the accepted work-related incident of February 8, 1994. Since appellant has submitted no evidence to support his request for reconsideration, the Board finds that he has failed to raise a substantial question as to the correctness of the Office's May 3, 1996 merit decision and has failed to establish clear evidence of error on the part of the Office.⁵ Accordingly, the Office did not abuse its discretion in denying a merit review of appellant's claim.

The decision of the Office of Workers' Compensation Programs dated February 9, 1998 is hereby affirmed.

Dated, Washington, D.C.
February 2, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁵ See *Thankamma Mathews*, *supra* note 4.