

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERYL D. JOHNSTON and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, GA

*Docket No. 03-987; Submitted on the Record;
Issued September 15, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for a further review of the merits.

Appellant, then a 34-year-old rural carrier, filed a claim for a traumatic injury of December 27, 1995 when an "A" frame that she was pushing up a ramp fell. The Office accepted the claim for cervical and lumbar strains and a right shoulder strain, and appellant received appropriate compensation. As no light-duty work was available at the employing establishment, she was placed on the compensation rolls effective February 26, 1996. The employing establishment offered appellant a light-duty job as a modified rural carrier associate, which the Office found suitable on December 18, 1996. Appellant did not return to work or respond to the Office's December 18, 1996 letter which notified her that refusing suitable work would disqualify her from further compensation benefits.

By decision dated January 24, 1997, the Office terminated appellant's claim for continuing compensation benefits on the grounds that she neglected to work a suitable job. The Office denied appellant's subsequent requests for modification in decisions dated February 10 and October 22, 1998 and November 3, 1999. On January 31, 2000 appellant, through her attorney, appealed to the Board. By order dated May 25, 2000, the Board dismissed appellant's appeal on the grounds that she had requested to withdraw her appeal and seek reconsideration with the Office.¹

In a letter dated April 25, 2000, appellant's attorney requested reconsideration and submitted a March 28, 2000 medical report from Dr. Robert B. Stolz, a chiropractor, who summarized appellant's medical treatment and opined that, based upon the differences in the symptoms appellant had before and after her December 27, 1995 injury, she sustained a herniated disc on December 27, 1995 as she did not have a herniated disc prior to that date. By

¹ Docket No. 00-1202 (issued May 25, 2000).

decision dated December 5, 2002, the Office denied appellant's request for a review, finding that, as Dr. Stolz was not a physician within the meaning of the Federal Employees' Compensation Act, his opinion was of little or no probative value and, thus, the evidence was irrelevant.

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 December 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 last merit decision dated November 3, 1999 and February 27, 2003, the date appellant filed her appeal before the Board, the Board lacks jurisdiction to review the decision dated November 3, 1999.²

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."³

In this case, the most recent merit decision is the Office's November 3, 1999 decision. Appellant requested reconsideration on April 25, 2000. The Office did not issue a decision on appellant's April 25, 2000 request for reconsideration until December 5, 2002. As this was more than a 90-day delay, 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.⁴

² See 20 C.F.R. §§ 501.2(c); 501.3(d).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (June 2002).

⁴ *Carlos Tola*, 42 ECAB 337 (1991).

The decision of the Office of Workers' Compensation Programs dated December 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
September 15, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member