

**United States Department of Labor
Employees' Compensation Appeals Board**

YVONNE R. MCGINNIS, Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, San Bernardino, CA, Employer**

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**Docket No. 05-805
Issued: June 21, 2005**

Appearances:
Yvonne R. McGinnis, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 18, 2005 appellant filed a timely appeal of a November 26, 2004 nonmerit decision of the Office of Workers' Compensation Programs that found her September 20, 2004 request for reconsideration was untimely filed and did not present clear evidence of error. As the Office's most recent decision on the merits of appellant's claim for fibromyalgia was issued on October 27, 1994, the Board, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, does not have jurisdiction to review the merits of her case.¹

ISSUE

The issue is whether the Office properly found that appellant's September 20, 2004 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

¹ These sections of the Board's regulations require that an appeal be filed within one year of the date of issuance of the Office's final decision.

FACTUAL HISTORY

This case was previously on appeal before the Board. By decision dated February 26, 2003, the Board found that appellant's May 8, 2002 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.² The Board noted that the most recent decision on appellant's claim for fibromyalgia was the Office's October 27, 1994 decision.

In a February 20, 2004 letter to the Office, appellant requested reconsideration of her fibromyalgia claim, Office file number 131045972 and submitted new medical evidence. In a March 24, 2004 letter, the Office advised appellant that she had not requested any additional appeals since the Board's February 26, 2003 decision and order. In a May 18, 2004 letter, appellant maintained that she previously requested reconsideration in file number 131045972 on October 20, 2003. She stated that she put the wrong case file number on her request and asked that the Office consider the new evidence she submitted in October 2003.

On June 22, 2004 appellant filed an appeal to the Board of a May 18, 2004 nonmerit Office decision that found her May 12 and October 20, 2003 requests for reconsideration were not timely filed and did not demonstrate clear evidence of error. This appeal was docketed as No. 04-1678.

On July 14, 2004 the Office advised appellant that it was not clear from her May 18, 2004 letter, which decision or issues she was asking it to reconsider. In a September 20, 2004 letter, appellant requested reconsideration in file number 131045972 and stated that this request was based on a new medical report dated August 20, 2004.³ By decision dated November 26, 2004, the Office found that appellant's September 20, 2004 request for reconsideration in file number 131045972 was not timely filed and did not demonstrate clear evidence of error.

On January 19, 2005 the Board issued an Order Remanding Case in Docket No. 04-1678, finding that appellant's October 20, 2003 letter and the May 2, 2003 medical report accompanying it clearly referred to her claim for fibromyalgia, file number 131045972, but was adjudicated by the Office in its May 18, 2004 decision as a request for reconsideration of her claim for right shoulder tendinitis, file number 130995970. With regard to appellant's October 20, 2003 request for reconsideration, the Board set aside the May 18, 2004 decision and remanded the case to the Office for a decision on her request for reconsideration in file number 131045972.

LEGAL PRECEDENT

The Board and the Office cannot simultaneously have jurisdiction over the same issue in the same case.⁴ While a decision of the Office refusing to reopen a case for a review of the merits of the claim is on appeal before the Board, the Office does not have jurisdiction to issue

² Docket No. 02-2238 (issue February 26, 2003).

³ The case record submitted to the Board on the present appeal does not contain an August 20, 2004 medical report.

⁴ *Russell E. Lerman*, 43 ECAB 770 (1992).

another decision refusing to reopen the case for merit review, where the underlying issue is the same.⁵

ANALYSIS

The Board finds that the Office's November 26, 2004 decision is null and void. The underlying issue in this nonmerit decision was whether appellant has fibromyalgia that is causally related to her employment. This is the same underlying issue in appellant's appeal to the Board that was docketed as No. 04-1678 on June 22, 2004. As the Board did not issue a decision on this appeal until January 19, 2005, the Office did not have jurisdiction to issue a decision concerning this same issue on November 26, 2004.

CONCLUSION

The Office did not have jurisdiction to issue its November 26, 2004 nonmerit decision.

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2004 decision of the Office of Workers' Compensation Programs is set aside as null and void. The case is remanded to the Office for appropriate action on appellant's outstanding September 20, 2004 request for reconsideration.

Issued: June 21, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁵ *Terry L. Smith*, 51 ECAB 182 (1999).