

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KENNETH A. AMO and DEPARTMENT OF THE NAVY,  
NAVAL SEA SYSTEMS COMMAND, Bremerton, WA

*Docket No. 97-1954; Submitted on the Record;  
Issued August 9, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that the case is not in posture for decision.

The only decision before the Board on this appeal is the Office's December 4, 1996 decision, denying appellant's request for a review on the merits of its November 20, 1995 decision. By decision dated November 20, 1995, the Office determined that appellant's modified duties as a machinist at the employing establishment represented his wage-earning capacity.<sup>1</sup> Because more than one year has elapsed between the issuance of the Office's November 20, 1995 decision and May 19, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the November 20, 1995 decision.<sup>2</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.<sup>4</sup> To be entitled to a merit review of an Office

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<sup>1</sup> The Office had determined that on July 20, 1994 appellant sustained a herniated nucleus pulposus at L4-5 and paid compensation for periods of disability.

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

<sup>3</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>5</sup> When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>6</sup>

In the present case, the Office received a November 15, 1996 letter, from John E. Goodwin, attorney at law, requesting reconsideration of appellant's claim. Mr. Goodwin argued that the Office's determination of appellant's wage-earning capacity was invalid because the machinist position performed by appellant was a makeshift or odd lot position.<sup>7</sup> In its December 4, 1996 decision, the Office determined that it would not reopen appellant's claim for merit review because he had not been designated as appellant's representative.

The Board notes that this Office finding was erroneous. The Office's regulation on representation of claimants states that appointment of a representative "shall be made in writing or on the record at the hearing" and that a written notice appointing a representative "shall be signed by the claimant or his or her legal guardian and shall be sent to the Office."<sup>8</sup> The record contains a statement, signed by appellant on October 6, 1996 and received by the Office on October 9, 1996 in which appellant authorized Mr. Goodwin to serve as his representative in connection with the current claim. This document effectively authorized Mr. Goodwin to represent appellant and, therefore, he was appellant's authorized representative when the reconsideration request was filed on November 15, 1996.<sup>9</sup> Therefore, the December 4, 1996 letter sent to the Office by Mr. Goodwin constituted a valid reconsideration request and the Office should consider, in accordance with the above-noted precedent, whether the submission of such a request required reopening of appellant's claim for review on the merits.

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<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>7</sup> Mr. Goodwin indicated that he was attaching a retainer agreement signed by appellant, but it is unclear whether such a document was in fact attached. The record also contains an October 17, 1996 limited retainer agreement signed by appellant which contains authorization for Mr. Goodwin's representation of appellant on that particular date.

<sup>8</sup> 20 C.F.R. § 10.142.

<sup>9</sup> Moreover, it should be noted that there is no requirement that the Office actually have the authorization in hand at the time an authorized representative acts on behalf of a claimant. The representative only needs to show that he or she was authorized at the time such action was undertaken. *Ira D. Gray*, 45 ECAB 445, 447 (1994).

The decision of the Office of Workers' Compensation Programs dated December 4, 1996 is set aside and the case remanded to the Office for proper consideration of appellant's reconsideration request.

Dated, Washington, D.C.  
August 9, 1999

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member