U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY G. SCHLOSSER and U.S. POSTAL SERVICE,
POST OFFICE, Billings, MT

Docket No. 02-2169; Submitted on the Record;
Issued December 23, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On April 15, 1997 appellant, then a 62-year-old welder, filed a claim for an occupational disease of anxiety and depression.

By letter dated October 23, 1997, the Office advised appellant that it had accepted that he sustained a temporary aggravation of depression that ceased by March 11, 1997.

On November 6, 1997 appellant filed a claim for compensation for wage loss from February 11, 1997, when he stopped work, to March 11, 1997. On this claim form appellant also claimed entitlement to a schedule award.

On April 3, 1998 appellant filed a claim for a traumatic injury sustained on February 11, 1997, stating that a coworker started an argument with him on that date, which caused his blood pressure to rise, which resulted in an event of ischemic optic neuropathy. In a letter dated May 18, 1998, appellant's representative stated that appellant's claim for a schedule award was for a loss of vision due to the February 11, 1997 employment incident.

By letter dated June 20, 1998, appellant requested reconsideration of the Office's finding that the aggravation of his depression ended by March 11, 1997.

By decision dated November 19, 1998, the Office found that the additional evidence submitted by appellant was insufficient to warrant modification of its prior decision that the aggravation of his depression had ceased.

Appellant appealed this decision to the Board, which, by decision and order dated October 23, 2000, found that the case was not in posture for a decision due to a conflict of medical opinion on the question of whether the employment-related effect on appellant's

depression ended by March 11, 1997. The Board noted that the case record did not contain a final decision on appellant's claim for an ischemic optic neuropathy.[1]

The Office referred appellant, the case record and a statement of accepted facts to a Board-certified psychiatrist to resolve the conflict of medical opinion. Based on this specialist's report, the Office, by decision dated February 21, 2001, found that appellant sustained a permanent aggravation of depression, entitling him to compensation after March 11, 1997.

The Office undertook further development of appellant's claim for a left-eye condition, obtaining statements from appellant and coworkers about the February 11, 1997 incident.

By decision dated May 10, 2001, the Office found that the February 11, 1997 incident did not occur as alleged by appellant.

In a letter dated December 13, 2001, appellant stated that he was submitting a letter from Dr. Timothy P. Minton, a Board-certified ophthamologist, who "very clearly connecting the events of February 11, 1997, my stroke at work, and the loss of vision in my left eye." Appellant stated:

> "I request based on his finding in fact I suffered a consequential injury to my left eye. I have a disabling condition of the left eye arising directly out of the events of February 11, 1997. I am therefore claiming a compensational condition and expect to be compensated. If you deny this as a reconsideration I will argue that the original decision was in error under 5 U.S.C. § 8128."

Appellant's December 13, 2001 letter was accompanied by a November 30, 2001 report from Dr. Minton who had previously submitted reports on appellant's eye condition.

On April 22, 2002 appellant wrote to his congressional representative about his claim for a schedule award. On April 24, 2002 appellant's congressional representative forwarded appellant's April 22, 2002 letter to the Office, accompanied by a copy of appellant's December 13, 2001 letter to the Office.

On May 10, 2002 appellant called the Office to ascertain the status of his request for reconsideration on the denial of his claim for a schedule award for his loss of vision. The Office advised appellant that his December 13, 2001 letter did not state that he wanted a reconsideration.

In a letter to appellant's congressional representative dated May 31, 2002, the Office stated: "The Office has received [appellant's] request for a reconsideration, which he dated December 13, 2001; however, [it was] not received according to our records until April 24, 2002.

By decision dated May 31, 2002, the Office found that the evidence accompanying appellant's request for reconsideration filed on April 24, 2002 was immaterial and insufficient to warrant review of its prior decision.

[1] Docket No. 99-895 (issued October 23, 2000).

The Board finds that the Office improperly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

20 C.F.R. § 10.606 states that an employee seeking reconsideration should send the application for reconsideration to the address as instructed in the final decision, and that the application must be submitted in writing and must set forth arguments and contain evidence that either shows that the Office erroneously applied or interpreted a specific point of law, advances a relevant legal argument not previously considered by the Office, or constitutes relevant and pertinent new evidence not previously considered by the Office.

With regard to the contents of a request for reconsideration, the Office's procedure manual states: "While no special form is required, the request must be in writing, identify the decision and the specific issue(s) for which reconsideration is being requested, and be accompanied by relevant new evidence or argument not considered previously."[2]

Appellant's December 13, 2001 letter to the Office constituted a request for reconsideration. It was addressed to the address provided with the Office's May 10, 2001 decision for requests for reconsideration, it identified the decision and the specific issue for which reconsideration was being requested, and it was accompanied by new evidence.[3] In its May 31, 2002 letter to appellant's congressional representative and in its May 31, 2002 decision, the Office recognized appellant's December 13, 2001 letter as a request for reconsideration, but stated that this request was not received until April 24, 2002. The original of the December 13, 2001 letter shows that it was received by the Office on December 18, 2001.

The Office did not issue a decision on appellant's December 13, 2001 request for reconsideration for over five months. The Office's procedure manual provides: "When a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, the [Office] should conduct a merit review. That is, the basis of the original decision and any new evidence should be considered and, if

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2a (June 2002).

[3] The Board's decision is not adjudicating whether this new evidence was sufficient to require reopening appellant's case for further review of the merits of his claim.

there is no basis to change the original decision, an order denying modification (rather than denying the application for review) should be prepared."[4]

The Office's delay of over five months resulted in appellant losing his right to appeal to the Board the Office's most recent merit decision, which was dated May 10, 2001.[5] The case therefore will be remanded to the Office for issuance of a decision on the merits of appellant's claim for an eye condition related to a February 11, 1997 employment incident.[6]

The May 31, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, DC
December 23, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

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

[5] 20 C.F.R. § 501.3(d)(2) requires that an appeal must be filed within one year from the date of issuance of the final decision of the Office.

[6] *See Debra E. Stoler*, 43 ECAB 561 (1992).