U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MACK R. KILGORE and TENNESSEE VALLEY AUTHORITY, JOHN SEVIER FOSSIL PLANT, Rogersville, TN

Docket No. 01-2050; Submitted on the Record;
Issued September 9, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act on the grounds that the application for review was not timely filed and it failed to present clear evidence of error.

On May 8, 1997 appellant, then a 52-year-old maintenance worker, was injured in the performance of duty when he was climbing stairs to repair an exhaust fan and twisted his knee. The Office accepted the claim for a left knee sprain. Appellant underwent a partial arthroscopic medial menisectomy on August 13, 1997. He received appropriate compensation for intermittent periods of wage-loss and medical benefits.

On January 11, 2000 appellant filed a claim for a schedule award.

In a decision dated February 8, 2000, the Office issued a schedule award for two percent permanent impairment of the left lower extremity. The period of the award was August 13, 1988 to September 22, 1998.

By letter dated February 7, 2001, which was date-stamped as received by the Office on February 12, 2001, appellant requested reconsideration and submitted copies of medical records.

In a decision dated June 6, 2001, the Office denied appellant's reconsideration request on the grounds that it was not timely filed and failed to show clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] Because appellant filed her appeal on August 10, 2001, more than one year after the February 8, 2000 decision, the Board lacks jurisdiction to review the propriety of appellant's schedule award.

[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

Thus, the only decision before the Board is the Office's June 6, 2001 decision denying appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.

Section 8128(a) of the Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[5] As one such limitation, the Office has stated that it 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.[6] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).[7] The Office regulation, however, does not specify when an application for review is "filed" for the purpose of determining timeliness. The Office has administratively decided that timeliness of a request for reconsideration should be determined by the postmark on the envelope, if available, and that otherwise the date of the letter itself should be used.[8]

In the present case, the Office did not make part of the record the envelope in which appellant's letter requesting reconsideration was mailed. The Office therefore should have turned to the date of the letter itself, February 7, 2001. As this date was within one year of the date of the Office's February 8, 2000 decision, the Office's denial of appellant's reconsideration request as untimely filed was in error.[9]

[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] 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] The Office will deny a timely application for reconsideration without reopening a case for review on the merits if it fails to meet certain standards. The regulations state that the application for review and supporting documentation must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b) (1999).

[6] 20 C.F.R. § 10.607(a) (1999).

[7] *See Leon D. Faidley, Jr., supra* note 3.

[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (May 1996); *Gloria J. Catchings*, 43 ECAB 242 (1991).

[9] *See Douglas McLean*, 42 ECAB 759 (1991).

The decision of the Office of Workers' Compensation Programs dated June 6, 2001 is set aside and the case remanded to the Office for a determination as to whether appellant is entitled to review of the merits of her claim under 20 C.F.R. § 10.606(b) (1999).

Dated, Washington, DC
September 9, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member