

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHELIA L. JOHNSON and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Shreveport, LA

*Docket No. 03-463; Submitted on the Record;
Issued May 8, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration under section 8128(a) of the Federal Employees' Compensation Act on the grounds that the request was not timely filed within the one-year time limitation period under section 10.607(a) of the implementing regulations.

On July 13, 1998 appellant, then a 41-year-old health technician, filed a claim alleging that on the same date her foot got caught on a chair leg and she fell injuring both ankles and her right knee. The Office accepted appellant's claim for bilateral ankle sprain and thereafter accepted a right knee injury as a consequential injury to the original ankle injury. The Office authorized arthroscopy to repair injury to the knee. Appellant stopped work on July 31, 1998 and returned on August 5, 1998.

In support of her claim, appellant submitted various medical records from Dr. William Webb, a Board-certified orthopedic surgeon, dated August 4, 1998 to January 8, 1999. Dr. Webb indicated a history of appellant's work-related injury. Dr. Webb noted that she continued to have persistent problems with her ankles and during a physical therapy session she injured her right knee. He recommended arthroscopic surgery to repair the right knee injury. Dr. Webb noted performing arthroscopic debridement of hypertrophic synovium on December 22, 1998. He diagnosed appellant with hypertrophic synovium of the patellofemoral joint. Dr. Webb noted that appellant was progressing postoperatively and indicated that she could return to work in March 1999.

Thereafter, appellant returned to a full-time limited-duty sedentary position in March 1999.

On April 29, 1999 the Office referred appellant for a second opinion examination with Dr. Edwin C. Simonton, a Board-certified orthopedic surgeon. The Office provided the physician with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties. In a medical report dated May 11, 1999, Dr. Simonton indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's work injury and indicated that appellant had recovered from the arthroscopic surgery on her right knee except for residual atrophy of the right thigh which would

not prevent her from working. Dr. Simonton recommended restrictions on squatting, kneeling and excessive stair climbing.

On April 23, 2000 appellant filed a CA-2a notice of recurrence of disability indicating that she sustained a recurrence of bilateral ankle and right knee pain on February 10, 2000 which was causally related to the accepted work-related injury of July 31, 1998.

Accompanying her claim appellant filed a magnetic resonance imaging (MRI) scan of the right knee dated May 24, 2000 and a report from Dr. Webb dated June 21, 2000. The MRI scan revealed a mass in the joint space of the infrapatellar area and degenerative signs of the menisci. Dr. Webb's report of June 21, 2000 noted appellant's complaints of pain in both knees. He diagnosed appellant with osteoarthritis in both knees, sprained right ankle and mass on the right knee. Dr. Webb noted that appellant could return to light duty eight hours per day with restrictions on standing, squatting and lifting.

In a decision dated July 3, 2000, the Office denied appellant's claim for recurrence of disability on the grounds that the evidence failed to establish a material worsening of the accepted injury to the extent that limited-duty work could not be performed in the period claimed.

In a letter dated July 19, 2000, appellant requested an oral hearing before an Office hearing representative. In a letter dated August 22, 2000, she withdrew her request for an oral hearing and indicated that she would like the Office to reconsider the decision of July 3, 2000.

In a decision dated October 25, 2000, the Office denied appellant's request for reconsideration of the Office decision dated July 3, 2000 on the grounds that the additional evidence submitted in support of the request was insufficient to warrant modification of the prior decision.

In a letter facsimiled November 22, 2000, appellant requested an oral hearing before an Office hearing representative.

In a decision dated January 22, 2001, the Office denied appellant's request for an oral hearing on the grounds that appellant had already received reconsideration on the issue and was not entitled to a hearing on the same issue. Appellant was informed that her case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

In a letter dated February 12, 2001 and received in the Office on February 22, 2001, appellant requested reconsideration of the decision regarding her compensation, benefits and surgery. She indicated that she was submitting additional evidence from her treating physician Dr. Webb.

Thereafter, in a letter dated March 5, 2002, appellant, through her attorney, requested reconsideration and submitted additional evidence from Dr. Webb.

In a decision dated September 6, 2002, the Office denied appellant's application of reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

The Board finds that the Office abused its discretion in denying appellant's request for reconsideration under section 8128(a) of the Act on the grounds that the request was not timely filed within the one-year time limitation period under section 10.138(b)(2) of the implementing regulations.

Appellant is requesting review of the July 3 and October 25, 2000 Office decisions.

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 The Board finds that the Office abused its discretion in denying appellant's request for reconsideration under section 8128(a) of the Act on the grounds that the request was not timely filed within the one-year time limitation period under section 10.607(a)² of the implementing regulations. Under section 8128(a) of the Act,³ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with section 10.606(b)(2) of the implementing federal regulations,⁴ which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review;⁵ that section also provides that the Office will not review a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision.⁶ The Board has held that the imposition of the one-year time limitation period for filing a request for reconsideration is not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's procedure manual states:

"The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, any ... decision by the 'Employees' Compensation Appeals Board, ... and any [*de novo*] decision following action by the [Board], but does not include prerecoupment hearing/revision decisions."⁷ (Emphasis added.)

The Board has held that Chapter 2.1602.3(b)(1) of the Office's procedure manual should be interpreted to mean that a right to reconsideration within one year accompanies any subsequent merit decision on the issues, including any merit decision by the Board.⁸

¹ 20 C.F.R. §§ 10.606; 10-607 (1999).

² 20 C.F.R. § 10.607(a).

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b) (1999).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ 20 C.F.R. § 10.607(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602, para. 3b(1) (May 1996).

⁸ See *John W. O'Connor*, 42 ECAB 797 (1991); *Ranjan V. Vora*, Docket No. 90-1304 (issued December 18, 1990).

In this case, the Office issued its last merit decision on October 25, 2000. The September 6, 2002 Office decision did not consider appellant's request for reconsideration dated February 12, 2001 and received by the Office on February 22, 2001, rather it only addressed appellant's second reconsideration request filed March 5, 2002 and found that this request for reconsideration was untimely. However, appellant's request for reconsideration dated February 12, 2001 was clearly marked on the subject line "reconsideration/compensation of benefits/surgery" and was within one year of the October 25, 2000 merit decision by the Office and was timely.

The Office has abused its discretion in denying appellant's request for reconsideration under section 8128(a) of the Act by not considering the outstanding timely request's for reconsideration.

On remand, the Office should treat as timely appellant's February 12, 2001 request for reconsideration, exercise its discretion in determining whether these requests are sufficient to warrant a merit review and issue an appropriate decision.

The decision's of the Office of Workers' Compensation Programs dated September 6, 2002 is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
May 8, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member