

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA J. LaDAY and U.S. POSTAL SERVICE,
BEAUMONT GENERAL MAIL FACILITY, Beaumont, Tex.

*Docket No. 96-1024; Submitted on the Record;
Issued October 16, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying as untimely appellant's March 22, 1995 request for reconsideration.

This is the second appeal before the Board in this case. By decision and order issued August 2, 1994,¹ the Board affirmed February 19, 1993 and October 20, 1992 decisions, finding that the Office properly terminated appellant's compensation benefits effective October 20, 1992 on the grounds that her disability due to an accepted September 5, 1990 back strain, or other employment factors, had ceased by that date. The law and facts of the case as set forth in the August 2, 1994 decision and order are incorporated by reference.

In a March 22, 1995 letter, appellant requested reconsideration of the Office's October 20, 1992 decision. She submitted additional medical evidence.

In a March 8, 1995 form report, Dr. Davill Armstrong, an attending neurologist, diagnosed bilateral carpal tunnel syndrome, a torn meniscus of the left knee, and cervical and lumbar disc disease. He noted that appellant was indefinitely disabled from September 5, 1990 onward when she lifted a flat containing telephone books. Dr. Armstrong noted that appellant required left knee surgery, and that she had permanent impairments of unspecified cervical and lumbar discs. He checked a box "yes" indicating his support for causal relationship.

In a March 14, 1995 form report, a neurologist whose signature is illegible noted a September 5, 1990 date of injury, diagnosed "moderate carpal tunnel syndrome and lumbar radiculopathy," and referred appellant to an orthopedic surgeon.

¹ Docket No. 93-1240.

By decision dated June 12, 1995,² the Office denied appellant's March 22, 1995 request for a merit review on the grounds that it was not filed within one year of the Office's October 20, 1992 decision, as required by 20 C.F.R. § 10.138(b)(2). The Office noted conducting a limited review of the two form reports submitted, and found they did not demonstrate clear evidence of error sufficient to warrant review of the prior decision. The Office found that the weight of the medical evidence continued to be represented by Dr. Donald H. Nowlin, a Board-certified orthopedic surgeon and impartial medical examiner, who on June 10, 1992 provided "a thorough, well-rationalized report negating continuing injury-related disability."

The Board finds that the Office improperly denied as untimely appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act³ 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;

(2) award compensation previously refused or discontinued."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) 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."

In this case, the Office improperly found that appellant's March 22, 1995 request for reconsideration was untimely filed. The Office based this improper finding on the last merit decision in this case being issued on February 19, 1993. This is incorrect. The Office should have found that the last merit decision in this case is the Board's August 2, 1994 decision and order.

Therefore, the Board finds that appellant's March 22, 1995 reconsideration request was timely filed well within the one-year time limit, and that the Office's denial of appellant's reconsideration request on the basis it was not timely filed was in error.⁴

² In a November 7, 1995 letter, the Office advised appellant that the June 12, 1995 decision was sent by mistake to her old address, and enclosed a copy of the decision.

³ 5 U.S.C. § 8128(a).

⁴ See *Gloria J. Catchings*, 43 ECAB 242 (1991); *Douglas McLean*, 42 ECAB 759 (1991).

The decision of the Office of Workers' Compensation Programs dated June 12, 1995 is hereby set aside, and the case remanded to the Office for a determination on whether appellant may obtain review of the merit of her claim under 20 C.F.R. § 10.138(b)(1).⁵

Dated, Washington, D.C.
October 16, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁵ Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office.