U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOAN F. MARTIN and U.S. POSTAL SERVICE,
POST OFFICE, Los Altos, CA

Docket No. 98-687; Submitted on the Record;
Issued October 13, 1999

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The facts in this case indicate that on January 29, 1987 appellant, then a 51-year-old carrier, sustained an employment-related thoracolumbar back strain and right shoulder impingement. She did not stop work but was assigned limited duty and received continuation of pay and compensation for limited periods of missed work. On February 4, 1993 appellant submitted a recurrence claim, noting that she had not gotten better since the January 29, 1987 employment injury. She had stopped work on February 3, 1993. By letter dated August 17, 1993, the Office proposed to terminate appellant's compensation benefits. The Office noted that, since the evidence failed to establish a recurrence of disability, appellant was not entitled to wage-loss compensation beginning February 4, 1993. By decision dated September 10, 1993, the Office found that appellant failed to establish that she sustained a recurrence of disability and terminated her medical benefits.[1] Appellant returned to work in January 1994. Following appellant's request, a hearing was held on February 28, 1995. In a decision dated May 22, 1995 and finalized May 24, 1995, an Office hearing representative affirmed that appellant failed to establish a recurrence of disability and, therefore, was not entitled to wage-loss compensation. The hearing representative, however, reversed the termination of appellant's medical benefits. By letter dated August 14, 1997, appellant's union representative queried the Office regarding a reconsideration request allegedly mailed to the Office on March 29, 1996 and attached a copy of the aforementioned request. By decision dated September 24, 1997, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

[1] The Office based its opinion on second opinion evaluations provided by Dr. Marjorie Oda, a Board-certified orthopedic surgeon, and Dr. Thomas Lowry who is Board-certified in psychiatry and neurology.

The Board finds that appellant's March 29, 1996 request for reconsideration was timely filed.

The only decision before the Board is the Office's September 24, 1997 decision denying appellant's request for reconsideration of the May 24, 1995 decision. Because more than one year had elapsed between the issuance of this decision and December 24, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the May 24, 1995 Office decision.[2]

On appeal, appellant's counsel argues that the "mailbox rule" is applicable in this case. The record indicates that, on August 14, 1997, a representative from the San Francisco office of appellant's union submitted a copy of a March 29, 1996 letter in which James L. Stankovich, regional union representative, had specifically requested reconsideration and presented arguments in support thereof. The original of this letter is not contained in the case record, but the "mailbox rule" raises a presumption that the Office received this letter, as the copy shows a proper address and the union indicated it was mailed in the ordinary course of business.[3] The evidence cited by the Office in its September 24, 1997 determination that the request for reconsideration was not timely is not sufficient to rebut the "mailbox rule" presumption in this case. The Board, therefore, finds that the March 29, 1996 request was duly mailed and represents a timely request for reconsideration. Nonetheless, the Office's denial of appellant's reconsideration request in this case constitutes harmless error as she submitted no relevant or new evidence to warrant a reopening of her claim.[4]

Under section 10.138(b)(1) of the federal regulations, a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and the specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by: (1) showing that the Office erroneously applied or interpreted a point of law; (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[5] Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.[6]

In support of her request for reconsideration, appellant submitted reports from Dr. Richard F. Thompson, her treating physician who is Board-certified in family practice and

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[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] *See Bonnye Matthews*, 45 ECAB 657 (1994) (where the Board found that the "mailbox rule" raised a presumption, which was not rebutted, that the Office received the original letter, as the copy showed a proper address and the attorney indicated that the letter was mailed in the ordinary course of business); *see also Larry L. Hill*, 42 ECAB 596 (1991).

[4] *See Mohamed Yunis*, 46 ECAB 827 (1995).

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

preventive medicine. In these reports, Dr. Thompson merely reiterated findings and conclusions that had been considered by the Office in previous decisions.[7] Appellant also submitted a February 19, 1996 report from Dr. Linda K. Weir, an osteopathic physician who practices psychiatry. Dr. Weir diagnosed major depression, recurrent, and advised that the condition was "probably" secondary to the 1987 employment injury but did not discuss a specific period of disability. Consequently, the evidence submitted by appellant did not meet the requirements set forth at 20 C.F.R. § 10.138. As appellant did not demonstrate that the Office erroneously applied or interpreted a point of law, advanced a point of law not previously considered by the Office or submit relevant new evidence, the Office did not abuse its discretion by declining to reopen her claim for merit review.

The decision of the Office of Workers' Compensation Programs dated September 24, 1997 is hereby affirmed as modified.

Dated, Washington, D.C.
October 13, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] Dr. Thompson diagnosed employment-related fibromyalgia with accompanying fatigue and depression.