

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEWEL S. KHALSA and U.S. POSTAL SERVICE,
RINCON STATION, San Francisco, CA

*Docket No. 01-1013; Submitted on the Record;
Issued January 11, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

The case has been on appeal previously.¹ In a June 15, 1999 decision, the Board found that the Office had improperly terminated appellant's compensation for refusing to accept an offered position as a modified distribution clerk. The Board found that appellant had given reasons for his refusal to accept the offered position but the Office had not followed its procedures, which required it to inform appellant that the reasons he gave for refusing the position were unacceptable and then providing him an additional opportunity to accept or reject the offered position. The Board reversed the Office's decision to terminate appellant's compensation for right lateral epicondylitis.

In an August 17, 1999 letter, the Office noted that appellant had been informed in an October 8, 1996 decision, that the light-duty position offered to him was consistent with the physical limitations imposed on him due to the employment injury. The Office indicated that it had further found the job offered to be suitable to his limitations. It reminded appellant that he had been given 30 days to accept the position or give an explanation of the reasons for refusing it. The Office noted that appellant, in a September 4, 1996 letter, had given his reasons for refusing the position. The Office found that his reasons for refusing the position were not justified. Appellant was granted 15 days to accept the position without penalty. No further reason for refusal would be considered. The Office warned that, if appellant refused the position, his compensation would be terminated.

In a September 7, 1999 letter, appellant indicated that he would accept the offered position and return to work. Appellant returned to work on September 19, 1999. However, he

¹ *Kewel S. Khalsa*, Docket No. 97-2404 (issued June 15, 1999). The history of the case is contained in the prior decision and is incorporated by reference.

stopped working on September 21, 1999 and filed a claim for recurrence of disability. Appellant stated that he had continuous pain in his right arm, which became worse as he was casing the mail. He indicated that he was only able to work a day and a half. In a subsequent letter, appellant stated that driving long distances to and from work also increased his right arm pain. Appellant noted that Dr. Arun Mehta, a Board-certified orthopedic surgeon, stated that he could not return to work unless he released appellant to work. He submitted an October 7, 1999 report from Dr. Mehta who stated that appellant was 67 years old and was permanently disabled.

In a November 1, 1999 decision, the Office denied appellant's claim for compensation on the grounds that he had not met his burden of proof that his recurrence of disability was causally related to his employment injury.

In a November 21, 1999 letter, received by the Office on December 2, 1999, appellant requested an appeal to the Branch of Hearings and Review. He submitted a November 11, 1999 report from Dr. Mehta who stated that appellant had pain in the right elbow with difficulty in moving the arm and occasional tingling in the arm. He also noted that appellant had signs and symptoms of the right carpal tunnel and weakness in the right arm. Dr. Mehta again stated that appellant's condition was permanent and stationary and repeated his conclusion that appellant was totally disabled.

On December 13, 1999 the Office issued an amended decision, revising the November 1, 1999 decision. The Office found that appellant abandoned a suitable job on September 21, 1999 and, therefore, his entitlement to further compensation was terminated.

In a March 9, 2000 letter to the Branch of Hearings and Review, received by the Office on March 17, 2000, appellant again requested an appeal, expressing his disagreement with the Office's December 13, 1999 decision. In a December 22, 2000 letter, appellant's attorney submitted additional medical evidence and requested reconsideration of the Office's decisions.

In a December 28, 2000 decision, the Office denied appellant's request for reconsideration because it was not submitted within one year of the November 1, 1999 decision and the request did not present any clear evidence of error.

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

Under section 8128(a) of the Federal Employees' Compensation Act,² the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in the implementing federal regulations,³ which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review. Section 10.607 of the regulations provide that "the Office will not review ... a decision denying or terminating a benefit unless the

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606.

application is filed within one year of the date of that decision.”⁴ In *Leon D. Faidley, Jr.*,⁵ the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

In this case, the Office issued a November 1, 1999 decision denying appellant’s claim for compensation on the grounds that he had not established that he had a recurrence of disability causally related to his original employment-related condition. In a November 21, 1999 letter, appellant requested a review of this decision by the Office’s Branch of Hearings and Review. However, the Office, instead of determining whether appellant was entitled to a hearing, issued a new decision that superceded the November 1, 1999 decision. In that December 22, 1999 decision, the Office terminated appellant’s further entitlement to compensation on the grounds that he had abandoned suitable employment. In a March 9, 2000 letter, appellant requested review of the new decision by the Branch of Hearings and Review. Once again, the Office failed to respond to appellant’s request for further review of its decision. While the March 9, 2000 letter may not have been submitted within 30 days of the December 22, 1999 decision, as required in requesting a hearing,⁶ the letter clearly expresses appellant’s disagreement with the decision and a desire for review of that decision. The Office did not make a decision on whether appellant had a right to a hearing before an Office hearing representative or should otherwise seek further review through a request for reconsideration. Appellant, therefore, was never notified by the Office that his requests for further review might be flawed and should be resubmitted. As appellant requested for a review in his March 9, 2000 letter, he timely made a request for reconsideration within one year of the Office’s December 22, 1999 decision, particularly as the Office did not respond to that letter. The case will therefore be remanded for an appropriate review of appellant’s request for reconsideration under the proper standard.

⁴ 20 C.F.R. § 10.607.

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ 5 U.S.C. § 8124(b).

The decision of the Office of Workers' Compensation Programs, dated December 28, 2000, is hereby reversed.

Dated, Washington, DC
January 11, 2002

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member