

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK K. CARNEAL and TENNESSEE VALLEY AUTHORITY,
DIVISION OF MEDICAL SERVICES, Paducah, Ky.

*Docket No. 96-781; Submitted on the Record;
Issued February 2, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly considered appellant's request for reconsideration of his claim under section 8128 of the Federal Employees' Compensation Act.

The Board has duly reviewed the case record in the present appeal and finds that the Office improperly considered appellant's request for reconsideration of his claim under section 8128 of the Act.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advancing a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.² To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.³ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁴

In the present case, appellant sustained an employment-related dislocation of his right shoulder on May 14, 1987. By decision dated and finalized December 9, 1994, an Office hearing representative affirmed a February 22, 1994 Office decision on the grounds that appellant was not entitled to wage-loss benefits after September 17, 1993 in connection with his

¹ 5 U.S.C. §§ 8101-8193. 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 U.S.C. § 8128(a).

² 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

³ 20 C.F.R. § 10.138(b)(2).

⁴ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

May 14, 1987 employment injury.⁵ The Office further noted that it was unclear whether appellant was paid compensation based on a correct pay rate; the Office provided instructions for developing the factual evidence and indicated that a determination should be made with respect to this matter.

By letter dated July 20, 1995, appellant requested reconsideration of the Office's December 9, 1994 decision. In support of his reconsideration request, appellant submitted an August 4, 1994 report of Dr. James Wilkinson, an attending Board-certified orthopedic surgeon and a June 20, 1995 report of a physical therapist. By decision dated August 19, 1995, the Office determined that appellant was not entitled to a hearing before an Office hearing representative under section 8124 of the Act.

The Board notes that the Office incorrectly interpreted appellant's July 20, 1995 letter requesting reconsideration under section 8128 of the Act as a request for a hearing under section 8124 of the Act. Therefore, the case should be remanded to the Office for the purpose of properly considering appellant's request for reconsideration, under the standards delineated above, of the Office's December 9, 1994 decision. The Board further notes that, although the Office began development of the evidence regarding appellant's correct pay rate, it does not appear that the Office made a determination regarding this matter as delineated in its December 9, 1994 decision. After any development it deems necessary, the Office should issue an appropriate decision regarding appellant's reconsideration request and his pay rate for compensation purposes.

The decision of the Office of Workers' Compensation Programs dated August 19, 1995 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
February 2, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

⁵ The December 9, 1994 decision was issued after a review of the written record.