

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARILYN F. WILSON and U.S. POSTAL SERVICE,  
POST OFFICE, Dallas, TX

*Docket No. 98-401; Submitted on the Record;  
Issued December 15, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM:

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's March 24, 1997 request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and appellant failed to present clear evidence of error.

On March 25, 1992 appellant, then a 37-year-old rural mail carrier, sustained an injury to her left shoulder while in the performance of duty. She ceased working on March 28, 1992. The claim was initially accepted for a left shoulder strain. While appellant's employment-related left shoulder strain subsequently resolved, it was later determined that appellant also suffered from cervical radiculopathy secondary to a bulging disc at C5-6. The Office accepted this latter condition as also arising from appellant's March 25, 1992 employment injury. Appellant was awarded appropriate wage-loss compensation.

On March 31, 1995 the Office advised appellant that it proposed to terminate her compensation on the basis that her current disability was unrelated to her March 25, 1992 employment injury. The Office explained that its proposed action was based on the findings of the impartial medical specialist, Dr. David R. Webb, Jr. Appellant was further advised that if she disagreed with the proposed termination of compensation, she had 30 days within which to submit additional evidence or an argument.

On April 7, 1995 appellant's counsel requested copies of certain medical reports of record. The Office complied with counsel's request on April 26, 1995. In a letter dated May 1, 1995, appellant's counsel expressed opposition to the proposed termination of compensation and requested additional time to review the recently forwarded documents. The record indicates that the Office received counsel's letter on May 3, 1995.

By decision dated May 2, 1995, the Office terminated appellant's compensation effective April 30, 1995. The only new evidence received by the Office were treatment notes, dated February 13, 1995, from Dr. John F. Prudich, appellant's treating physician. The Office

explained that this evidence was cumulative and, therefore, of diminished probative value. Accordingly, the Office concluded that Dr. Webb's opinion still represented the weight of the medical opinion evidence.

On June 12, 1995 appellant's counsel sent a certified letter to the Office's Branch of Hearings and Review requesting that the termination "be reversed and that benefits be restored to [appellant]." After explaining the delays he had encountered in obtaining pertinent information regarding the claim, counsel stated: "Whatever appeals that are available or whatever step is next, please note our appeal." He further stated: "There is certainly just cause, if there is any problem of any delay in regard to this matter." In conclusion, counsel stated: "We appeal all avenues that are open to this unfortunate employee." Along with his letter, counsel submitted a May 9, 1995 supplemental report he had solicited from Dr. Webb.

The record does not indicate that the Office's Branch of Hearings and Review ever responded to counsel's June 12, 1995 letter.

In August 1995, the Office received additional medical evidence from Dr. Prudich. The record also indicates that appellant contacted the Office on two occasions in February and March 1996. In a letter dated March 24, 1997, appellant requested reconsideration.

By decision dated May 20, 1997, the Office denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a)<sup>1</sup> on the grounds that her March 24, 1997 application for review was not timely filed and that she failed to present clear evidence of error.

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.<sup>2</sup> As appellant filed her appeal with the Board on October 27, 1997, the Board lacks jurisdiction to review the Office's merit decision dated May 2, 1995. Consequently, the only decision properly before the Board is the Office's May 20, 1997 decision denying appellant's request for reconsideration.

The Board finds that the Office improperly denied appellant's March 24, 1997 request for reconsideration.

In its May 20, 1997 decision, the Office concluded that appellant's March 24, 1997 request for reconsideration was untimely and that appellant had failed to present clear evidence

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<sup>1</sup> Under section 8128 of the Federal Employees' Compensation 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).

<sup>2</sup> *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

that the Office's May 2, 1995 decision terminating compensation was in error.<sup>3</sup> In an accompanying memorandum, the Office explained that it was "unclear as to what transpired in the case subsequent to the issuance of the [May 2, 1995] formal decision." The Office specifically noted counsel's June 12, 1995 letter to the Office's Branch of Hearings and Review, but stated that a "hearing was never requested." Furthermore, the Office indicated that neither appellant nor her attorney contacted the Office between June 12, 1995 and the time appellant filed her request for reconsideration in March 1997. Inasmuch as the March 24, 1997 request for reconsideration was filed more than one year after the Office's May 2, 1995 decision, the request was deemed untimely. Additionally, the Office noted that appellant did not submit any new evidence along with her request for reconsideration. Consequently, the Office concluded that there was no clear evidence of error.<sup>4</sup>

The Board finds that the Office erred in concluding that a "hearing was never requested." While counsel's June 12, 1995 letter to the Office's Branch of Hearings and Review did not specifically request a hearing, it is clear that this letter was submitted to the Office's Branch of Hearings and Review from the Office's May 2, 1995 decision terminating compensation. As previously noted, the June 12, 1995 letter was addressed to the Office's Branch of Hearings and Review requested that the termination "be reversed and that benefits be restored to [appellant]." Moreover, counsel stated: "Whatever appeals that are available or whatever step is next, please note our appeal." He concluded by stating: "We appeal all avenues that are open to this unfortunate employee." Thus, while counsel's June 12, 1995 request for review may not have been artfully drafted, the intent to seek review of the May 2, 1995 decision by the Office's Branch of Hearings and Review is clear. Counsel submitted additional medical evidence with his hearing request.

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record.<sup>5</sup> A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of issuance of the decision.<sup>6</sup> A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision, as determined by the postmark of the request.<sup>7</sup> The Office has discretion, however, to grant or deny a request that is made after this

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<sup>3</sup> Office regulations provide that a claimant must file his or her application for review within one year of the date of the decision denying or terminating benefits. 20 C.F.R. § 10.138(b)(2). However, Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>4</sup> The May 20, 1997 decision makes no reference to the evidence submitted after the Office's May 2, 1995 decision terminating compensation.

<sup>5</sup> 20 C.F.R. § 10.131(a), (b).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

30-day period.<sup>8</sup> In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.<sup>9</sup>

Although the June 12, 1995 request for review was submitted more than 30 days after the Office's May 2, 1995 decision, the Office has the discretion to grant the hearing request and must exercise that discretion. The Office's Branch of Hearings and Review was obligated to respond to appellant's June 12, 1995 request for review.<sup>10</sup> The failure to do so, in this instance, created a delay which compromised appellant's opportunity to obtain a merit review of the Office's May 2, 1995 decision before the Board.<sup>11</sup> As such, the Office's May 20, 1997 decision denying reconsideration will be set aside, and the case remanded to the Office's Branch of Hearings and Review for a determination regarding appellant's outstanding request for a hearing. In the event the Office denies appellant's request for a hearing, the Office should grant appellant a merit review.<sup>12</sup>

The decision of the Office of Workers' Compensation Programs dated May 20, 1997 is set aside and the case is remanded for further action consistent with this opinion.

Dated, Washington, D.C.  
December 15, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>8</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>9</sup> *Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>10</sup> *See Phillip G. Feland*, 47 ECAB 418, 424 (1996) (the Board held that the Office must exercise its discretion in deciding whether to grant a hearing).

<sup>11</sup> *Brian R. Leonard*, 43 ECAB 255, 259-60 (1991) (the Board held that the Office's delay in processing appellant's request for a hearing effectively denied appellant the opportunity to obtain merit review of his claim, and thus, constituted an abuse of discretion).

<sup>12</sup> *Id.* at 260.