

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANET L. LEAL and DEPARTMENT OF AGRICULTURE,
FOOD SAFETY & INSPECTION SERVICE, Alameda, CA

*Docket No. 97-2878; Submitted on the Record;
Issued January 3, 2000*

DECISION and ORDER

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

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

On June 23, 1993 appellant, then a 41-year-old food inspector, sustained employment-related lateral epicondylitis of her left elbow; the Office paid compensation for periods of disability. Appellant stopped work on June 24, 1994 and began working in February 1996 as an assistant manager in a retail store. By decision dated May 13, 1996, the Office adjusted appellant's compensation effective March 11, 1996 based on its determination that her wages as an assistant manager represented her wage-earning capacity.¹ On May 13, 1997 the Office received a letter dated May 12, 1997, from Rick L. Russwurm, Esq., indicating that appellant wished to request reconsideration of the Office's May 13, 1996 decision.² By decision

¹ By decision dated November 25, 1996, the Office denied appellant's September 26, 1996 hearing request as untimely. Appellant has not requested review of this decision and the matter is not currently before the Board.

² Several medical reports were attached to the May 12, 1997 letter.

dated June 25, 1997, the Office denied the request for a merit review on the grounds that the request was not made by appellant or an authorized representative on her behalf.³

The only decision before the Board on this appeal is the Office's June 25, 1997 decision denying a merit review of its May 13, 1996 decision. Because more than one year has elapsed between the issuance of the Office's May 13, 1996 decision and September 16, 1997, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the May 13, 1996 decision.⁴

Section 8128(a) of the Federal Employees' Compensation Act 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 previously awarded; or

(2) award compensation previously refused or discontinued."⁵

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."⁶ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁷

In the present case, the evidence establishes that on May 13, 1997 the Office received a request for reconsideration of its May 13, 1996 decision from Mr. Russwurm. The record contains a notation indicating that the Office telephoned Mr. Russwurm on June 19, 1997 and requested that he submit evidence of authorization to represent appellant.⁸ On June 20, 1997 the

³ In its June 25, 1997 decision, the Office indicated that it had performed a limited examination of the evidence submitted by appellant and noted that it was insufficient to require the reopening of her case for merit review; the Office also indicated that the letter it received on May 13, 1997 would not have constituted a timely reconsideration request. The Board notes, however, that this language in the Office's decision constitutes dicta. A reading of the Office's decision in its entirety reveals that appellant's case was denied on the grounds that a reconsideration request was not made by appellant or an authorized representative on her behalf.

⁴ See 20 C.F.R. § 501.3(d)(2).

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ The record also contains a June 23, 1997 letter in which the Office requested that Mr. Russwurm provide written authorization from appellant for him to act as her representative.

Office received, via facsimile transmission, a signed letter in which appellant stated, “I am writing this to inform you that Mr. Russwurm, attorney at law, ... has been hired by me as my attorney. This is written authorization for you that he is representing me and that you may communicate with him regarding my case.”

The Office’s regulation on representation of claimants in effect at the time of the reconsideration request, stated that appointment of a representative “shall be made in writing or on the record at the hearing.”⁹ Although there is no requirement that the Office actually have the authorization in hand at the time an authorized representative acts on behalf of a claimant, the representative needs to show that he was authorized at the time such action was undertaken.¹⁰ The Board notes that the record does not contain any document which constitutes a valid reconsideration request. Appellant did not request reconsideration of the case on her own behalf and the evidence of record does not show that Mr. Russwurm was authorized to file the reconsideration request on her behalf in the letter received by the Office on May 13, 1997. Although the record contains a June 20, 1997 letter in which appellant indicated that she was authorizing Mr. Russwurm to act as her representative, the letter served to authorize Mr. Russwurm’s representation beginning June 20, 1997 and did not provide any indication that it was intended to authorize his filing of a reconsideration request on her behalf in May 1997.¹¹ For these reasons, the Office properly denied the request for merit review on the grounds that the request was not made by appellant or an authorized representative on her behalf.

⁹ 20 C.F.R. § 10.142.

¹⁰ *Ira D. Gray*, 45 ECAB 445, 447 (1994).

¹¹ Nor did appellant indicate in her June 20, 1997 letter that she wished to file a reconsideration request on her own behalf.

The decision of the Office of Workers' Compensation Programs dated June 25, 1997 is affirmed.

Dated, Washington, D.C.
January 3, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member