

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARILYN McINNIS and U.S. POSTAL SERVICE,
POST OFFICE, Honolulu, HI

*Docket No. 98-148; Submitted on the Record;
Issued January 11, 2000*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office improperly determined that appellant's application for review was not timely filed.

In its most recent merit decision, dated February 8, 1995, the Office terminated appellant's compensation benefits on the grounds that the weight of the medical evidence, represented by the opinion of the impartial medical examiner, established that appellant no longer had any condition causally related to chemical exposure in her federal employment. By letter dated February 14, 1995 and received February 22, 1995, appellant took issue with several determinations and actions of the Office with respect to her claim and asked the Office for help with her case. In a letter of response dated March 7, 1995, the Office informed appellant that her concerns had all been previously addressed, either by letter to her representatives or in the formal decision and advised appellant to exercise the appeal rights available to her if she continued to disagree with the Office's decision.

By letter received February 2, 1996, Wilson Clow, Jr., appellant's authorized representative, submitted a formal request for a "national merit review" of appellant's case. Mr. Clow stated that he had new medical evidence which supported appellant's claim and asked that the case be "fairly reviewed on the merits of the evidence." In support of his request, Mr. Clow submitted a January 23, 1996 medical report from Dr. Ronald Wempen. In a response dated February 22, 1996, the Office advised Mr. Clow that it was unclear from his letter what

appeal rights he sought to exercise on behalf of appellant and requested that he clarify his request.¹

In a letter dated October 1, 1996, Patsy T. Mink, Member of Congress, inquired on behalf of appellant as to the status of the claim. By letter dated October 8, 1996, the Office explained that the claim had been rejected. By letter dated April 3, 1997, Ms. Mink forwarded a copy of Dr. Wempen's report to the Office and inquired as to how to have the report considered by the Office. In a letter dated April 14, 1997, the Office advised that appellant and her representative should exercise the appeal rights attached to the February 8, 1995 decision.

By letter dated June 27, 1997, appellant resubmitted Dr. Wempen's report and asked the Office for "reconsideration/merit review." In a decision dated July 22, 1997, the Office found that appellant's request for reconsideration was untimely and that the evidence submitted did not establish 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.² As appellant filed her appeal with the Board on October 8, 1997, the only decision properly before the Board is the Office's July 22, 1997 decision denying appellant's request for reconsideration.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁴ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁵

In this case, the Office issued a decision denying appellant's claim on February 8, 1995 on the grounds that the medical evidence was insufficient. On February 2, 1996 the Office received a letter of the same date from appellant's authorized representative, who identified appellant, the Office's claim number and submitted relevant medical evidence not previously considered by the Office and asked that the case be "reviewed on the merits of the evidence."

¹ In its letter, the Office noted that the fact that Mr. Clow had submitted additional evidence indicating that he did not wish an appeal, and further noted that the 30-day period for requesting a hearing had expired, although Mr. Clow could still request a hearing and explain the basis for the delay in the request. The Office concluded that, in order not to prejudice appellant's review and appeal options, it would not make any assumptions about which appeal option was sought.

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

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

The Board finds that under these circumstances the February 2, 1996 letter constituted a timely request for reconsideration.⁶

As appellant's request for reconsideration of the Office's decision was timely, the Office must evaluate the request under the appropriate standard.⁷ The "clear evidence of error" standard utilized in this case is appropriate only for untimely reconsideration requests. Accordingly, the case will be remanded to the Office for proper consideration of appellant's timely request for reconsideration of the Office's decision of February 8, 1995. After such further development as it deems necessary, the Office should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated July 22, 1997 is reversed and the case remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
January 11, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ See *Vicente P. Taimanglo*, 45 ECAB 504 (1994).

⁷ Although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (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; see 20 C.F.R. § 10.138(b)(1).