

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS A. ZIELINSKI and U.S. POSTAL SERVICE,
POST OFFICE, Buffalo, NY

*Docket No. 98-1759; Submitted on the Record;
Issued June 1, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to further review the merits of appellant's claim under 5 U.S.C. § 8128.

On April 20, 1971 appellant, then a 20-year-old mailhandler, filed a claim for a traumatic injury in the performance of duty. The Office accepted appellant's claim for lumbosacral strain and a herniated disc. Appellant experienced intermittent periods of disability until October 17, 1973, when he stopped work and did not return.

By decision dated April 22, 1994, the Office reduced appellant's compensation effective May 1, 1994 on the grounds that he had the capacity to work as a sales attendant in a self-service store. In a letter dated May 9, 1994, appellant requested reconsideration of his claim, which the Office denied in a merit decision dated July 26, 1994.

In a letter dated February 27, 1995, appellant's attorney requested a copy of the case record and stated that he would submit medical evidence in support of appellant's May 9, 1994 request for reconsideration. On March 2, 1995 the Office received a work restriction evaluation and accompanying office visit note from appellant's attending physician dated February 1, 1995.

By letter dated May 31, 1995, appellant's attorney indicated that he had submitted a report from appellant's attending physician dated May 15, 1995 and requested that the Office "issue a reconsideration decision based on this report at your earliest convenience." Appellant's attorney again requested that the Office issue a reconsideration decision based on newly submitted medical evidence in letters dated August 1 and November 8, 1995, and February 5, 1996. The record indicates that the Office received additional medical evidence from appellant on January 23, 1996. Appellant continued to submit medical evidence and again requested reconsideration by letter dated February 4, 1998.

By letter dated February 11, 1998, the Office informed appellant's attorney that it had issued a decision regarding appellant's 1994 request for reconsideration on July 26, 1994. In response, appellant's attorney submitted a copy of a letter dated March 23, 1995, in which he requested reconsideration of the Office's July 26, 1994 decision. He further submitted medical evidence which he alleged accompanied the March 1995 letter.

In an internal memorandum dated March 9, 1998, an Office claims examiner indicated that the record did not contain a copy of the March 23, 1995 request for reconsideration but noted that appellant's attorney had referenced the March 1995 request for reconsideration in his letter dated May 31, 1995. He recommended that the Office "render a merit decision so as to preserve the claimant's appeal rights."

By decision dated May 1, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative and irrelevant and thus insufficient to warrant review of the prior decision.

The Board finds that the Office abused its discretion by refusing to further review the merits of appellant's claim under 5 U.S.C. § 8128.

The only Office decision before the Board on this appeal is the Office's May 1, 1998 decision finding that appellant did not submit sufficient evidence in support of his application for reconsideration to warrant review of its prior decision. Since more than one year has elapsed between the date of the Office's most recent merit decision on July 26, 1994 and the filing of appellant's appeal on May 14, 1998, the Board lacks jurisdiction to review the merits of his claim.¹

The Office's procedure manual provides: "When a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to have review of the merits of the case by the Board, the Office should conduct a merit review."²

In the present case, the most recent merit decision is the Office's July 26, 1994 decision. Appellant, through his attorney, requested that the Office "issue a reconsideration decision" in a letter dated May 31, 1995. The Office did not issue a decision on appellant's May 31, 1995 request for reconsideration until May 1, 1998. As this was more than a 90-day delay and it jeopardized appellant's right to have the Board review the merits of his claim, the Office should have issued a decision on the merits of his claim in conformance with its procedures.³

¹ 20 C.F.R. § 501.3(d)(2).

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.8 (June 1997).

³ *Carlos Tola*, 42 ECAB 337 (1991).

The decision of the Office of Workers' Compensation Programs dated May 1, 1998 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
June 1, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member