

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EVERETT L. JOHNSTON and DEPARTMENT OF VETERANS AFFAIRS,
DENVER MEDICAL CENTER, Denver, CO

*Docket No. 99-163; Submitted on the Record;
Issued September 12, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

This is appellant's second appeal before the Board in this case. In the prior appeal, the Board affirmed the August 26 and June 27, 1995 decisions of the Office, finding that appellant had not established that he sustained cervical strain, lumbosacral strain and a right wrist ganglion on September 22, 1994 as he caught himself from falling off a ladder.¹

Thereafter, on March 10, 1998 appellant requested reconsideration before the Office. By decision dated May 4, 1998, the Office denied appellant's request as untimely and not demonstrating clear evidence of error.

The Board finds that the Office abused its discretion by finding appellant's request for reconsideration as untimely made.

The Board notes that the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Preliminary Processing*, Chapter 2.1602.3(b)(1) states, in pertinent part:

“[A] right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, *any merit decision by the Employees' Compensation Appeals Board (ECAB)*, and any merit decision following action by the ECAB....” (Emphasis added.)

¹ Docket No. 95-2689 (issued February 23, 1998).

In accordance with the Office's procedure manual, the time limitation period within which appellant had a right to request a merit reconsideration of his claim began to run with the issuance of the February 23, 1998 merit decision by the Board. Therefore, appellant's March 10, 1998 request for reconsideration of his case was not untimely.

The case will be remanded to the Office for reconsideration of appellant's timely request for reconsideration under the applicable standards of review.

The decision of the Office of Workers' Compensation Programs dated May 4, 1998 is hereby set aside and the case is remanded for further action in accordance with this decision of the Board.

Dated, Washington, DC
September 12, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member