

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES E. LOCKHART and DEPARTMENT OF DEFENSE,
Columbus, OH

*Docket No. 00-2706; Submitted on the Record;
Issued March 19, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's September 22, 1999 request for reconsideration.

In a decision dated June 2, 2000, the Office found that appellant's September 22, 1999 request for reconsideration was repetitious and immaterial and therefore insufficient to warrant a review of its prior merit decision.¹ The Office stated that along with appellant's September 22, 1999 letter were two letters from his attorney, dated July 21 and May 10, 1999, as well as a May 7, 1999 report from Dr. Joseph I. Hoffman Jr., an orthopedic surgeon. The Office noted:

"In the July 21, 1999 letter your attorney asked Dr. Hoffman to provide an addendum to his May 7, 1999, medical report. However, a supplemental report from Dr. Hoffman was not included with the September 22, 1999, reconsideration request. The May 10, 1999 letter is a copy of your attorney's previous request for reconsideration and Dr. Hoffman's May 7, 1999, medical report is duplicate evidence already in your file and previously considered in the prior decision. Therefore, these documents are considered to be repetitious in nature."

On appeal appellant contends that the Office's ruling is in error as the addendum from Dr. Hoffman dated August 31, 1999 was submitted after the Office's merit decision of June 16, 1999.

An appeal to the Board must be mailed no later than one year from the date of the Office's final decision.² Because appellant mailed his August 22, 2000 appeal more than one

¹ Although the decision indicated that the Office had conducted a merit review and was denying modification of its prior decision because the evidence submitted in support of appellant's request was repetitious and immaterial in nature, the notice of decision makes clear that the Office conducted no such review and was instead denying appellant's request because he submitted no new and relevant evidence.

² 20 C.F.R. § 501.3(d) (time for filing); *see id.* § 501.10(d)(2) (computation of time).

year after the Office's merit decision of June 16, 1999, the Board has no jurisdiction to review that decision. The only decision that the Board may review on this appeal is the Office's June 2, 2000 decision denying appellant's September 22, 1999 request for reconsideration. Therefore, the only issue before the Board is whether the Office abused its discretion in denying that request.

The Board finds that the Office abused its discretion in denying appellant's September 22, 1999 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act provides that the Secretary of Labor (the Office) may review an award for or against payment of compensation at any time on his own motion or on application.³ It is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128.⁴

Section 10.606(b) of the implementing regulations⁵ provides that an application for reconsideration, including all supporting documents, must be submitted in writing and set forth arguments and contain evidence that either:

“(1) Shows that [the Office] erroneously applied or interpreted a specific point of law;

(2) Advances a relevant legal argument not previously considered by [the Office];
or

(3) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”

The request may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If the Office grants reconsideration, the case is reopened and reviewed on its merits. Where the request fails to meet at least one of the standards described, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁶

The record shows that appellant made a September 22, 1999 request for reconsideration. In this request, appellant advised the Office that he was submitting an August 31, 1999 addendum by Dr. Hoffman to his May 7, 1999 report. Although the Office found that no such addendum was included with appellant's request, an August 31, 1999 addendum by Dr. Hoffman appears in the record at page 1019, immediately following his May 7, 1999 report. Appellant's request for reconsideration, Dr. Hoffman's May 7, 1999 report and the August 31, 1999 addendum are all date-stamped by the Office on September 24, 1999, establishing that the

³ 5 U.S.C. § 8128(a).

⁴ *Daisy M. Tharp*, 27 ECAB 377 (1976).

⁵ 20 C.F.R. § 10.606(b) (1999)

⁶ *Id.* at § 10.608.

addendum was properly associated with appellant's request for reconsideration and that the Office had in fact received this evidence prior to denying appellant's request.

Because the Board's jurisdiction of a case is limited to reviewing that evidence that was before the Office at the time of its final decision, it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to the issuance of its final decision. As the Board's decisions are final as to the subject matter appealed, it is critical that all evidence relevant to that subject matter and properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.⁷

As the Office failed to consider all the evidence properly submitted with appellant's September 22, 1999 request for reconsideration before issuing a decision on that request, the Board finds that the Office abused its discretion. The Board will therefore set aside the Office's June 2, 2000 decision and remand the case for a proper exercise of discretion and an appropriate final decision on appellant's September 22, 1999 request for reconsideration.

The June 2, 2000 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
March 19, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ See *William A. Couch*, 41 ECAB 548, 553 (1990) (remanding the case to the Office for full consideration of the evidence properly submitted by the claimant prior to the date of the Office's final decision).