

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARILYN Y. COX and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Milwaukee, WI

*Docket No. 03-37; Submitted on the Record;
Issued March 21, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration on the merits of her claim under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act, on the basis that her request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607 and did not show clear evidence of error.

On October 28, 1992 appellant, then a 31-year-old food service worker, was getting dishes for the next meal when a cart pushed by a coworker struck her in the right knee and leg. She stopped work on October 29, 1992 and returned to work on November 23, 1992. Appellant stopped work again on December 29 through December 30, 1992. She received continuation of pay for these dates. The Office accepted appellant's claim for lumbar strain, contusion of the right knee, post-traumatic prepatella bursitis and bulging discs at L4-5 and L5-S1. She received temporary total disability compensation for the periods February 23 through May 21, 1993 and after September 10, 1993.

In an August 20, 1996 decision, after issuing proper notice, the Office terminated appellant's compensation effective September 15, 1996 on the grounds that any disability related to the October 28, 1992 employment injury had ceased.

By letter dated January 30, 1997, appellant requested reconsideration of the Office's decision. In a March 14, 1997 merit decision, the Office denied appellant's request for modification of the August 20, 1996 decision.

Appellant appealed to the Board, and in a decision dated August 10, 1998, the Board affirmed the Office's March 14, 1997 decision.¹

¹ Docket No. 98-1190.

By letter dated January 13, 2000, appellant, through counsel, requested reconsideration before the Office, together with new evidence, and further requested an oral hearing before an Office representative. In a merit decision dated July 6, 2000, the Office denied appellant's request for modification of the prior decision. The Office further found that, while appellant had also requested a hearing, appellant's only appeal right was a reconsideration.²

By letter dated September 19, 2000, appellant, through counsel, requested reconsideration of the Office's prior decision and submitted additional evidence in support of her request. In a merit decision dated January 9, 2001, the Office denied appellant's request for modification of the July 6, 2000 decision.

By letter dated July 6, 2001, and date stamped received by the Office on July 9, 2001, appellant, through counsel, requested reconsideration of the Office's prior decision, and submitted a new medical report from Dr. Daniel A. Ladwig, dated May 8, 2001, in support of her request. By letter dated May 20, 2002, appellant, through counsel, inquired as to the status of her reconsideration request, and further noted that she still wanted an oral hearing before an Office representative. In a decision dated August 21, 2002, the Office found that appellant's May 20, 2002 request for reconsideration was not filed within one year of its January 9, 2001 decision and that appellant had not established clear evidence of error with respect to her untimely request for reconsideration. The Office further found that the record contained no evidence of any timely hearing requests by either appellant or her attorney.

The Board finds that the Office improperly determined that appellant's application for review was not timely filed.

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.³ As appellant filed her appeal with the Board on September 25, 2002, the only decision properly before the Board is the Office's August 21, 2002 decision denying appellant's request for reconsideration.

Section 8128(a) of the Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁶ As one such limitation, the Office has

² The record also contains a record of a May 31, 2000 telephone conversation between the Office and appellant, in which the Office informed appellant that she was not entitled to an oral hearing.

³ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁴ 5 U.S.C. § 8128(a).

⁵ *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁶ Thus, 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 relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. 20 C.F.R. § 10.606(b).

stated that it 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.⁷ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁸

In this case, the Office issued a merit decision denying appellant's request for modification on January 9, 2001. On July 9, 2001 the Office received a letter dated July 6, 2001 from Peter M. Donohue, appellant's authorized representative, who identified appellant, the OWCP claim number, submitted medical evidence not previously considered by the Office and requested reconsideration of the prior decision. The Board finds that under these circumstances the July 6, 2001 letter constitutes a valid request for reconsideration filed within one year of the January 9, 2001 decision. While the Office held, in its August 21, 2002 decision, that it had never received either appellant's July 6, 2001 timely request for reconsideration or any new medical evidence, both items are contained in the record before the Board, and both items are clearly date stamped as having been received by the Office on July 9, 2001.

As appellant's request for reconsideration of the Office's decision was timely, the Office must evaluate the request under the appropriate standard.⁹ 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 January 9, 2001. In addition, the Board notes that, by letter dated January 13, 2001 and by telephone call on May 31, 2000, appellant requested an oral hearing before an Office representative. The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Office procedures, which require the Office to exercise its discretion to grant or deny a hearing request when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.¹⁰ While the Office informed appellant, both in its May 31, 2000 telephone conversation and in its July 6, 2000 decision, that she did not have a right to an oral hearing, the Office never issued a formal decision on appellant's request, in which it explained the reasons for the denial and further exercised its discretion. After such further development as it deems necessary, the Office should issue an appropriate decision addressing both appellant's request for reconsideration and her request for an oral hearing.

⁷ 20 C.F.R. § 10.607(a). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

⁸ *See Veletta C. Coleman*, *supra* note 4.

⁹ As noted above, 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 relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office. 20 C.F.R. § 10.606(b).

¹⁰ *Lawrence C. Parr*, 48 ECAB 445 (1997); *Linda J. Reeves*, 48 ECAB 373 (1997).

The decision of the Office of Workers' Compensation Programs dated August 21, 2002 is reversed and the case remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
March 21, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member