

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY F. NICHOLS and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Detroit, MI

*Docket No. 03-1964; Submitted on the Record;
Issued October 15, 2003*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a); and (2) whether the Office properly found that appellant's June 17, 2003 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

The Board issued a decision in appellant's case on January 28, 2003, finding that he had not established that he sustained a recurrence of total disability causally related to his December 29, 1983 employment injury.¹

By letter to the Office dated March 6, 2003, appellant requested reconsideration, and stated that he would be submitting new evidence from his doctor.

By decision dated April 10, 2003, the Office found that appellant's request for reconsideration was insufficient to warrant review of its prior decision, as it did not raise substantive legal questions nor include new and relevant evidence.

By letter dated June 17, 2003, appellant requested reconsideration, and submitted medical reports from Dr. Louis D. Zegarelli, an osteopath, dated April 29, May 13 and June 11, 2003.

By decision dated June 24, 2003, the Office found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

The Board finds that the Office, by its April 10, 2003 decision, properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

¹ Docket No. 02-2309 (issued January 28, 2003). Appellant sustained an injury on December 29, 1983 which was accepted for a lumbosacral strain with radiculitis and sciatica and a herniated disc.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.

Appellant's March 6, 2003 request for reconsideration was not accompanied by any new evidence, nor did it advance a legal argument or address a specific point of law. The Office, in its April 10, 2003 decision, properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The Board finds that the Office improperly determined that appellant's June 17, 2003 request for reconsideration was not timely filed.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that “An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.” The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).²

With regard to when the one-year time limitation begins to run, the Office procedure manual provides:

“Regulations effective June 1, 1987 established a one-year time limit for requesting reconsideration (20 C.F.R. § 10.607(a)).... The one-year period for requesting reconsideration begins on the date of the original decision. However, 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

² Leon D. Faidley, Jr., 41 ECAB 104 (1989).

decision following action by the ECAB, but does not include prerecoyment hearing/revision decisions.”³ (Emphasis added.)

In the present case, the Board issued a merit decision on January 28, 2003 with regard to appellant’s claim for a recurrence of disability. Appellant had one year from that date to file a timely request for reconsideration with the Office. As his June 17, 2003 request for reconsideration was timely, the Office must evaluate it under the appropriate standard set forth at 20 C.F.R. § 10.606(b). The “clear evidence of error” standard used in this case is appropriate only for untimely reconsideration requests.⁴ Accordingly, the case will be remanded to the Office for proper consideration of appellant’s timely June 17, 2003 request for reconsideration.

The April 10, 2003 decision of the Office of Workers’ Compensation Programs is affirmed. The June 24, 2003 decision of the Office is reversed and the case remanded to the Office for action consistent with this decision of the Board

Dated, Washington, DC
October 15, 2003

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3a (June 2002).

⁴ See *Robbin Bills*, 45 ECAB 784 (1994).