

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH COSTIGAN and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Jersey City, N.J.

*Docket No. 96-1389; Submitted on the Record;
Issued August 27, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for review of the merits under 5 U.S.C. § 8128(a).

In the present case, the Office accepted that appellant sustained post-concussion syndrome, right ulnar nerve entrapment, TMJ (temporomandibular joint) syndrome, right shoulder and cervical sprains in the performance of duty. By decision dated April 26, 1993, the Office issued a schedule award for a 30 percent permanent impairment of the right arm. An Office hearing representative affirmed the schedule award by decision dated January 26, 1994. By decision dated February 16, 1995, the Office denied modification of the prior decisions.

In a decision dated January 18, 1996, the Office found that appellant's request for reconsideration and the evidence submitted was not sufficient to warrant merit review of the claim.

The Board has reviewed the record and finds that the Office abused its discretion in refusing to reopen the claim for merit review.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.¹ Since appellant filed his appeal on April 3, 1996, the only decision over which the Board has jurisdiction on this appeal is the January 18, 1996 decision denying his request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office's regulations provides that a claimant may

¹ 20 C.F.R. § 501.3(d).

² 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

obtain review of the merits of the claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.³ Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.⁴

In this case, appellant submitted a report dated October 24, 1995 from Dr. David Weiss, an osteopath, who provided a history and results on examination. Dr. Weiss opined that appellant had a 43 percent permanent impairment to the right arm, citing provisions of the 4th ed. of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. This evidence was clearly relevant to the schedule award issue in this case, and was not previously considered by the Office. Appellant had submitted new and pertinent evidence and therefore he was entitled to a review on the merits of his claim under section 10.138(b)(1).

The Board notes that in the January 18, 1996 Office decision, the claims examiner asserts that the December 5, 1995 request for reconsideration from appellant's representative cannot be considered a valid request because only a claimant may request reconsideration.⁵ The claims examiner concludes that 20 C.F.R. § 10.144, which states that "a representative, appointed and qualified as provided in this part, may make or give on behalf of the claimant any request or notice relative to any proceeding before the Office under the Act, including hearings and review," does not confer on the representative the authority to request reconsideration. There is no basis for such a conclusion. The clear language of the regulation, as well as Board precedent, establish that an authorized representative may request reconsideration.⁶

Since appellant has submitted new and relevant evidence, the case will be remanded to the Office for an appropriate decision on the merits the claim.

³ 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁵ The claims examiner concluded that in this case there was a valid reconsideration request because appellant, upon inquiry from the Office, submitted a December 29, 1995 letter acknowledging that he was requesting reconsideration.

⁶ *See, e.g., Ira D. Gray*, 45 ECAB 445 (1994), where a valid request for reconsideration was submitted by a representative. The Board found that the representative had been authorized to represent the claimant at the time of the request, even though the Office had not yet received the written authorization.

The decision of the Office of Workers' Compensation Programs dated January 18, 1996 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
August 27, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member