

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHARLES J. PRUDENCIO and DEPARTMENT OF THE AIR FORCE,  
HOLLOMAN AIR FORCE BASE, N.M.

Docket No. 90-338; Submitted on the Record; Issued March 5, 1990

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying an oral hearing under section 8124(b)(1) of the Federal Employees' Compensation Act; and (2) whether the Office abused its discretion in denying appellant's request for a merit review under section 8128(a) of the Act on the ground that the request was not timely filed within the one-year time limitation period set forth in section 10.138(b)(2) of the implementing federal regulations.

On February 3, 1988 appellant, then a 38-year-old temporary carpentry worker, sustained an employment injury while shoveling. The Office of Workers' Compensation Programs accepted that appellant sustained a left arm sprain and approved continuation of pay from February 4 through 5, 1988, when the employing establishment terminated his temporary appointment. The Office also paid temporary total disability compensation from February 6 through March 29, 1988.

On May 23, 1988 appellant filed a claim<sup>1</sup> asserting that although he was released from treatment at the employing establishment's hospital on March 29, 1988, he continued to be disabled thereafter due to left shoulder pain which had never subsided since the date of the injury.

By compensation order dated August 17, 1988 the Office rejected the claim, finding that the evidence failed to establish any disability after March 29, 1988 causally related to the February 3, 1988 employment injury.

By letter dated September 21, 1988, postmarked September 22, 1988, appellant requested an oral hearing before an Office hearing representative.

By decision dated December 1, 1988 the Office denied the hearing request, finding that appellant was not entitled to a hearing as a matter of right because he failed to request a hearing within 30 days of the Office's prior decision and that he may "equally well pursue [his] claim by

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<sup>1</sup> The claim was filed on a Form CA-2a, "Notice of Employee's Recurrence of Disability and Claim

requesting reconsideration and submitting medical evidence which establishes that [his] disability subsequent to March 29, 1988 [was] causally related to the February 3, 1988 work injury."

By an undated letter, received by the Office on October 23, 1989, appellant requested reconsideration and submitted additional evidence. Appellant stated that he was aware that the request was not being filed in a timely manner but that the delay in filing was due to difficulties in obtaining legal assistance.

By letter decision dated November 1, 1989 the Office denied the request for reconsideration on the ground that the request was not received within the one-year time limitation period set forth in 20 C.F.R. § 138(b)(2).

As the Office's August 17, 1988 decision was issued more than one year prior to the filing of this appeal on November 20, 1989, the Board's jurisdiction is limited to review of the Office December 1, 1988 and November 1, 1989 decisions.<sup>2</sup>

The Board finds that the Office did not abuse its discretion in denying a hearing under section 8124(b)(1) of the Act.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant for compensation not satisfied with a decision of the Secretary under subsection (a)<sup>3</sup> of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>4</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>5</sup> Appellant's hearing request was dated September 21, 1988, more than 30 days after the date of the Office's prior decision dated August 17, 1988, he was not entitled to a hearing as a matter of right.

Even when the hearing request is not timely, the Office has the discretion to grant the hearing request, and must exercise that discretion.<sup>7</sup> In the present case the Office determined that the issues may be resolved by submitting additional medical evidence and requesting

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<sup>2</sup> See 20 C.F.R. § 501.3(d); *Jimmy O. Gilmore*, 37 ECAB 257 (1985).

<sup>3</sup> 5 U.S.C. § 8124(a) provides that the Office "shall determine and make a finding of facts and make an award for or against payment of compensation...."

<sup>4</sup> 5 U.S.C. § 8124(b)(1).

<sup>5</sup> See *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982). See also 20 C.F.R. § 10.131.

<sup>6</sup> Section 10.131(a) of the implementing federal regulations, 20 C.F.R. § 10.131(a), provides that a hearing request is deemed "made" as of the date of the postmark of the request. See *Lee F. Barre*, 40 ECAB \_\_\_\_ (Docket No. 89-538, issued May 9, 1989). Appellant's hearing request was postmarked September 22, 1988.

<sup>7</sup> *Garner*, *supra* note 5.

reconsideration. The Board finds that the Office did not abuse its discretion under the circumstances of this case.

The Board further finds that the Office failed to properly exercise its discretion, pursuant to section 8128(a) of the Act and section 138(b)(2) of the implementing federal regulations, in denying appellant's request for a merit review.

Under section 8128(a) of the Act,<sup>8</sup> the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations<sup>9</sup> which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."<sup>10</sup> In *Leon D. Faidley, Jr.*<sup>11</sup> the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's Procedure Manual provides:

"The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] 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 decision by the Employees' Compensation Appeals Board, and any *de novo* decision following action by the Board, but does not include prerecoupment hearing/review decisions."<sup>12</sup>

The Office issued its last "decision denying or terminating a benefit," *i.e.*, merit decision, on August 17, 1988. As the Office did not receive the application for review until October 23, 1989, the application was not timely filed. Appellant stated that he was unable to timely file the application due to difficulty in finding legal assistance. However, section 10.138(b)(2) is unequivocal in setting forth the time limitation period and does not indicate that late filing may be excused by extenuating circumstances. The Office properly found that appellant had failed to timely file the application for review.

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<sup>8</sup> 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. § 10.138(b)(1)-(2).

<sup>10</sup> 20 C.F.R. § 10.138(b)(2)(eff. June 1, 1987).

<sup>11</sup> 41 ECAB \_\_\_\_ (Docket No. 89-611, issued October 26, 1989).

<sup>12</sup> FECA Procedure Manual, Part 2, Chapter 2-1602, para. 3a.

However, the Office may not deny an application for review based solely on the ground that the application was not timely filed. For proper exercise of the discretionary authority granted under section 8128(a) of the Act,<sup>13</sup> when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.<sup>14</sup>

The Office's November 1, 1989 decision denying the application for review does not indicate that it exercised its discretion to determine whether the application presented clear evidence that the Office's final merit decision was erroneous. Therefore, the case must be remanded to the Office for a proper exercise of its discretion.<sup>15</sup>

The decision of the Office of Workers' Compensation Programs dated December 1, 1988 denying a hearing is affirmed; the decision of the Office dated November 1, 1989 denying a merit review is set aside, and the case remanded for further proceedings to be followed by a *de novo* decision.

Dated, Washington, D.C.  
March 5, 1990

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>13</sup> 5 U.S.C. § 8128(a).

<sup>14</sup> *Gregory Griffin*, 41 ECAB \_\_\_\_ (Docket No. 89-1457, issued November 6, 1989), *petition for recon. denied*, 41 ECAB \_\_\_\_ (issued February 7, 1990). *See, e.g.*, Federal (FECA) Procedure Manual, Chapter 2-1602, Para 3b, which indicated: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error."

<sup>15</sup> *See id.*



MEMO TO DIRECTOR (cont.)

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application was not timely filed. For proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.<sup>1</sup>

In reviewing the factual and medical evidence of record it has been determined that clear evidence was present at the time the decision was issued on August 17, 1988 and the Office's decision was erroneous.

The Memorandum for the Director which accompanied the August 17, 1988 decision concluded that the "Evidence presented is not sufficient to establish the claim for recurrence." A recurrence of disability is defined as a work stoppage that occurs after an employee has returned to work following a preceding period of disability, and is the result of (1) a spontaneous return of the symptoms of a previous injury without an intervening cause, or (2) a return or increase of disability due to a consequential injury.<sup>2</sup> The factual evidence of record indicates that the claimant was a temporary carpentry worker whose temporary appointment terminated on February 5, 1988. The claimant never returned to work subsequent to February 3, 1988.

The Office indicated in its August 17, 1988 decision that the medical records from Holloman AFB Hospital indicated that the claimant was released from care with no restrictions effective March 29, 1988. The only medical record in file that indicates that the claimant was able to resume regular duty on March 29, 1988 was on Form CA-17, Duty Status Report, signed by Joan M. Vest, PA (Physician's Assistant). But, this form was not countersigned by a physician, and therefore, cannot be considered as valid medical evidence. The medical evidence submitted subsequent to the referenced CA-17, signed by a physician, supports continuing disability beyond March 29, 1988.

The above referenced factual and medical evidence was on file at the time the August 17, 1988 decision was made. Therefore, there is clear evidence that the Office's decision August 17, 1988 was erroneous. Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After

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<sup>1</sup>Federal (FECA) Procedure Manual Chapter 2-1602, Para 3b, which indicated: "The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error."

MEMO TO DIRECTOR (cont.)

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the Office has determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment.<sup>3</sup> This holds true where, as here, the Office later decides that it erroneously denied the claim.

Therefore, a Compensation Order, Vacating the August 17, 1988 decision will be issued and that compensation for the period March 30, 1988 through September 1, 1988 will be authorized (the file contains CA-8's claiming compensation through September 1, 1988). In order for the claimant to receive compensation beyond September 1, 1988, he must submit a claim for continuing compensation (via form CA-8) for lost wages as a result of his work related injury.

March 26, 1990

Memorandum for: MARIE C. KALB  
Claims Manager

from: JANE KAY  
Claims Manager

Subject: ECAB REMAND, PRUDENCIO

In the case of Charles Prudencio, A16-138697, the ECAB agreed that the request for reconsideration was not timely filed, but remanded it for "proper exercise of discretionary authority granted under section 8128a of the Act...the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the final merit decision was erroneous.