

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of HARRY JACOBS and DEPARTMENT OF VETERANS AFFAIRS,  
MEDICAL CENTER, Lyons, N.J.

*Docket No. 96-1437; Submitted on the Record;  
Issued September 28, 1998*

---

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and failed to show clear evidence of error.

In the present case, the Office accepted that appellant sustained a tear of the right shoulder in the performance of duty on December 16, 1992. By decision dated August 18, 1994, the Office determined that the diagnoses of cervical herniated nucleus pulposus and cervical spondylosis had not been established as causally related to the employment injury. In a decision dated September 20, 1994, the Office denied modification of its prior decision.

In a decision dated January 12, 1996, the Office stated that it had received a request for reconsideration by facsimile on October 18, 1995. The Office found that the request for reconsideration was untimely and failed to show clear evidence of error.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.<sup>1</sup> Since appellant filed his appeal on April 11, 1996 the only decision over which the Board has jurisdiction on this appeal is the January 12, 1996 decision denying his request for reconsideration.

The Board has reviewed the record and finds that the case is not in posture for decision.

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office

---

<sup>1</sup> 20 C.F.R. § 501.3(d).

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

with discretionary authority to determine whether it will review an award for or against compensation.<sup>4</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>5</sup> As one such limitation, the Office has 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.<sup>6</sup> 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).<sup>7</sup>

In the present case, the Office considered the date of the request for reconsideration to be October 18, 1995, the date it received a fax from appellant's representative requesting reconsideration. The date of the letter, however, is August 2, 1995. The letter from appellant's representative provides the correct address of the Office, and above the Office address states: "Via Fax & Regular Mail."

It is well established that, in the absence of evidence to the contrary, there is a presumption that a properly addressed notice mailed in the ordinary course of business is received by the addressee.<sup>8</sup> The presumption of receipt under the "mailbox rule" applies equally to the Office as well as to claimants.<sup>9</sup> In this case, the record contains a letter requesting reconsideration from appellant's representative dated August 2, 1995, which is properly addressed and indicates in the letter that it was mailed in the ordinary course of business. Although the original of the letter is not contained in the record, the mailbox rule raises a presumption of receipt by the Office. In the January 12, 1996 decision, the Office does not discuss the presumption created by the mailbox rule, nor does it cite evidence rebutting the presumption. The Board will therefore remand the case for proper consideration of whether appellant has submitted a timely request for reconsideration. After such further development as it deems necessary, the Office should issue an appropriate decision.

---

<sup>4</sup> Under section 8128 of the Act, "[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."

<sup>5</sup> 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 point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

<sup>6</sup> 20 C.F.R. § 10.138(b)(2).

<sup>7</sup> *See Leon D. Faidley, Jr., supra* note 3.

<sup>8</sup> *See, e.g., Jimmy O. Gilmore, 37 ECAB 257, 262 (1985).*

<sup>9</sup> *Bonnye Matthews, 45 ECAB 657 (1994); Larry L. Hill, 42 ECAB 596 (1991).*

The decision of the Office of Workers' Compensation Programs dated January 12, 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.  
September 28, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member