# United States Department of Labor
# Employees' Compensation Appeals Board

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| **ANNETTE I. WOOD, Appellant** | ) | |
| **and** | ) | **Docket No. 05-1007** |
| | ) | **Issued: August 15, 2005** |
| **U.S. POSTAL SERVICE, POST OFFICE, New Smyrna Beach, FL, Employer** | ) | |

*Appearances:*
*Annette I. Wood, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On March 28, 2005 appellant filed a timely appeal from the July 23 and November 24, 2004 nonmerit decisions of the Office of Workers' Compensation Programs, which denied, respectively, her request for a review of the written record and her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review these two nonmerit decisions. Because the Board has no jurisdiction to review any Office decision issued more than one year prior to the filing of the appeal, the Board may not review the Office's July 20, 2001 decision denying appellant's claim for compensation.

### ***ISSUES***

The issues are: (1) whether the Office properly denied appellant's June 22, 2004 request for review of the written record; and (2) whether the Office properly denied appellant's August 22, 2004 request for reconsideration.

## ***FACTUAL HISTORY***

On May 22, 2001 appellant, then a 41-year-old postal clerk, filed a claim for compensation alleging that she sustained an injury in the performance of duty that day when her postal vehicle was involved in an automobile accident.

In a decision dated July 20, 2001, the Office accepted that the incident occurred as alleged but denied appellant's claim on the grounds that the medical evidence did not establish that a condition was diagnosed in connection with the incident.[1] In an attached statement of appeal rights, the Office notified her that any request for review of the written record must be postmarked within 30 days of the date of that decision. The Office also notified appellant that any request for reconsideration must be made within one year of the date of that decision.

In a letter postmarked June 22, 2004, appellant requested a review of the written record.

In a decision dated July 23, 2004, the Office found that she was not entitled to a review of the written record as a matter of right because she did not make her request within 30 days of the July 20, 2001 decision. The Office further considered the matter and denied appellant's request because she could equally well pursue the issue by requesting reconsideration and submitting evidence not previous considered establishing that she sustained an injury as alleged.

In a letter dated August 22, 2004, appellant requested reconsideration. She explained that she was seeking to have three medical bills paid. Appellant explained how these unpaid medical bills were causing her credit problems and how she felt the Office was giving her the run around. She submitted all the documents she had pertaining to her accident on May 22, 2001.

In a decision dated November 24, 2004, the Office denied appellant's request for reconsideration. The Office found that her request was untimely and failed to show clear evidence of error in the July 20, 2001 decision denying her claim.

## ***LEGAL PRECEDENT -- ISSUE 1***

Section 8124(b)(1) of the Federal Employees' Compensation Act provides:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) 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."[2]

A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats, an oral hearing or a review of the written record.[3] The hearing request must be sent within 30 days (as determined by postmark or other carrier's date

[1] A duty status report diagnosed an unspecified muscle strain.

[2] 5 U.S.C. § 8124(b)(1).

[3] 20 C.F.R. § 10.615 (1999).

marking) of the date of the decision for which a hearing is sought.[4] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[5] In such a case the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[6]

## ***ANALYSIS -- ISSUE 1***

When the Office issued its July 20, 2001 decision denying appellant's claim for compensation for failure to submit certain medical evidence, it notified her that she had 30 days to request review of the written record. The Board notes that the Office's decision was properly addressed and so legal presumption is that appellant duly received this decision and the attached statement of appeal rights notifying her of the applicable time limitations.[7] Because she made her June 22, 2004 request for review of the written record more than 30 days after the Office's July 20, 2001 decision, the Board finds that appellant is not entitled to a review of the written record as a matter of right. The Office further considered her request and correctly indicated that appellant did not need a review of the written record to pursue the issue raised by the July 20, 2001 decision; she could pursue this issue through the reconsideration process. As the reconsideration process does offer an alternate forum for pursuing the issue raised by the Office's July 20, 2001 decision, the Board finds that the Office properly denied a discretionary review of the written record.[8] The Board will, therefore, affirm the Office's July 23, 2004 decision.

[4] *Id*. at § 10.616(a).

[5] *Herbert C. Holley*, 33 ECAB 140 (1981).

[6] *Rudolph Bermann*, 26 ECAB 354 (1975).

[7] It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. *George F. Gidicsin*, 36 ECAB 175 (1984) (when the Office sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice). This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. *Michelle R. Littlejohn*, 42 ECAB 463 (1991). The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee. *See Larry L. Hill*, 42 ECAB 596 (1991). *See generally* Annotation, *Proof of Mailing by Evidence of Business or Office Custom*, 45 A.L.R. 4th 476, 481 (1986).

[8] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

## ***LEGAL PRECEDENT -- ISSUE 2***

Section 8128(a) of the 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."[9]

The Office, through regulations, has imposed limitations on the exercise of its discretionary under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 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 Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[10]

## ***ANALYSIS -- ISSUE 2***

Because appellant made her August 22, 2004 request for reconsideration more than one year after the Office's July 20, 2001 decision denying her claim for compensation, her request is untimely filed. She may obtain a merit review of her claim by demonstrating clear evidence of error in the Office's July 20, 2001 decision.

The Board finds, however, that appellant's August 22, 2004 request for reconsideration does not show clear evidence of error in the Office's July 20, 2001 decision. Nothing she submitted cures the deficiency noted in that decision, namely, the absence of a medical report identifying a specific diagnosed condition in connection with the May 22, 2001 employment incident. As appellant's untimely request for reconsideration fails to show clear evidence of error in the Office's July 20, 2001 decision, the Board finds that the Office properly denied her request. The Board will affirm the Office's November 24, 2004 decision.

[9] 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.607 (1999).

## ***CONCLUSION***

The Board finds that the Office properly denied appellant's June 22, 2004 request for review of the written record and her August 22, 2004 request for reconsideration.[11]

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 24 and July 23, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 15, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[11] It is clear from these requests and from her appeal to this Board that appellant seeks to have the Office pay three unpaid medical bills from Bert Fish Medical Hospital, EVAC Ambulance and New Smyrna Beach Radiology. These are bills for the emergency medical services that were provided immediately following her motor vehicle accident on May 22, 2001. The Board notes that the record contains a Form CA-16, Authorization for Examination and/or Treatment, dated May 31, 2001 and made out to the Bert Fish Medical Center. In the absence of an Office decision on the matter, the Board currently has no jurisdiction to decide whether the Office must pay these bills.