

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OFELIA R. SANCHEZ and U.S. POSTAL SERVICE,
POST OFFICE, San Antonio, Tex.

*Docket No. 96-1670; Submitted on the Record;
Issued April 28, 1998*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for review of the written record; and (2) whether the Office properly denied appellant's request for reconsideration.

In a decision dated November 21, 1994, the Office denied appellant's claim for carpal tunnel syndrome on the grounds that the medical evidence of record was insufficient to establish that a medical condition resulted from the accepted incidents or exposures that occurred in the performance of duty. In an attached statement of appeal rights, the Office advised appellant that any request for an examination of the written record must be made within 30 days of the date of the decision. The Office further advised that any request for reconsideration must be made within one year of the date of the decision. In a letter postmarked October 5, 1995, appellant requested a "written hearing."

In a letter dated October 16, 1995, appellant requested reconsideration of her claim. The Office date stamped this request on October 23, 1995.

In a decision dated December 13, 1995, the Office found that appellant did not make her request for review of the written record within 30 days of the Office's November 21, 1994 decision and therefore she was not entitled to a review of the written record as a matter of right. The Office considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue of fact of injury could be addressed through the reconsideration process.

In a letter dated February 6, 1996, appellant requested a written reconsideration of her claim.

In a decision dated March 22, 1996, the Office denied appellant's request for reconsideration as untimely and failing to show clear evidence of error.

The Board finds that the Office properly denied appellant's request for review of the written record.

Any claimant not satisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A review of the written record must be requested in writing within 30 days of the date of issuance of the decision. A claimant is not entitled to a review if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.¹

The Office rejected appellant's claim for compensation in a decision dated November 21, 1994. Appellant requested review of the written record by letter postmarked October 5, 1995. As appellant did not make her request within 30 days of the Office's final decision, the Office properly found that appellant's request was untimely and that she was not entitled to a review of the written record as a matter of right.

With respect to oral hearings before an Office hearing representative, the Board has held that the Office, in its broad discretionary authority in the administration of the Federal Employees' Compensation Act, has the power to hold hearings in circumstances where no legal provision was made for such hearings, and that the Office must exercise its discretion in deciding whether to grant a hearing.² The Board has specifically held that the Office has the discretion to grant or deny a hearing request when the request is made after the 30-day period for requesting a hearing.³ 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.⁴ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely, are a proper interpretation of the Act and Board precedent.⁵

In 1987 the Office revised its regulations implementing the Act to afford any claimant not satisfied with a decision of the Office an opportunity for a review of the written record in lieu of an oral hearing.⁶ With this revision, the Office enlarged the scope of its discretionary authority. The same discretion that the Office may exercise with respect to requests for oral hearings also extends to requests for review of the written record. The Office has the power to grant a review of the written record in circumstances where no legal provision is made for such review, and the Office must exercise its discretion in deciding whether to grant a review of the written record. Specifically, the Office has the discretion to grant or deny a request for review of the written record when the request is made after the 30-day period for requesting review. In

¹ 20 C.F.R. §§ 10.131(a)-131(b).

² *Johnny S. Henderson*, 34 ECAB 216 (1982).

³ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁴ *Rudolph Bermann*, 26 ECAB 354 (1975).

⁵ See *Henry Moreno*, 39 ECAB 475 (1988); *Shirley A. Jackson*, 39 ECAB 540 (1988).

⁶ 20 C.F.R. § 10.131(b); see *Michael J. Welsh*, 40 ECAB 994 (1989).

such a case, the Office will determine whether a discretionary review of the written record should be granted and, if not, will so advise the claimant with reasons.

In its December 13, 1995 decision, the Office stated that it considered the matter in relation to the medical issue involved and was denying appellant's untimely request for review of the written record on the basis that the issue could be resolved through the reconsideration process. The Board finds that the Office properly exercised its discretion in denying appellant's untimely request for review of the written record.⁷

The Board also finds that appellant's October 16, 1995 reconsideration request was timely filed.

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."⁸

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁹ As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that the Office 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.¹⁰ This regulation, however, does not specify when an application is "filed" for the purpose of determining timeliness. The Office has therefore administratively decided that the test used in 20 C.F.R. § 10.131(a) for determining the timeliness of hearing requests should apply to applications for review.¹¹ Accordingly, timeliness is determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used.

⁷ The Board has often held that the denial of an oral hearing on this ground is a proper exercise of the Office's discretion; *see, e.g., Jeff Micono*, 39 ECAB 617 (1988).

⁸ 5 U.S.C. § 8128(a).

⁹ 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, a claimant may obtain review of the merits of his 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. 20 C.F.R. § 10.138(b)(1).

¹⁰ *But see Leonard E. Redway*, 28 ECAB 242, 246 (1977) (a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous).

¹¹ Federal (FECA) Procedure Manual, Part 2 – Claims, *Reconsiderations*, Chapter 2.1602.3(a) (May 1996).

The case record does not contain the envelope that accompanied appellant's October 16, 1995 request for reconsideration. The date of the letter itself must therefore be used to determine the timeliness of this request. As the date of this request falls within the one-year period following the Office's November 21, 1994 decision, the Board finds that appellant filed this request in a timely manner. As further evidence of timeliness, the request bears a date stamp from the regional Office of October 23, 1995, which is within the one-year period following the November 21, 1994 decision.

The Board will set aside the Office's March 22, 1996 decision and will remand the case to the Office for the purpose of exercising its discretionary authority under 5 U.S.C. § 8128(a) with respect to appellant's October 16, 1995 request for reconsideration. On remand, the Office shall address any argument or evidence submitted in support of appellant's October 16, 1995 request for reconsideration or submitted subsequently, and issue an appropriate decision on her claim under 20 C.F.R. § 10.138(b)(1).

The December 13, 1995 decision of the Office of Workers' Compensation Programs is affirmed. The March 22, 1996 decision of the Office is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, D.C.
April 28, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member