

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRITTON C. HAMPTON and U.S. POSTAL SERVICE, MEMPHIS
PROCESSING & DISTRIBUTION CENTER, Memphis, Tenn.

*Docket No. 97-2446; Submitted on the Record;
Issued May 20, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied, as untimely, appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On January 9, 1995 appellant, a 39-year-old flat sorter machine operator/clerk, filed a Form CA-2, claim for compensation, claiming she had sustained an emotional condition which she first became aware of on September 24, 1993. Appellant claimed that she began to suffer from depression and anxiety due to physical and psychological stresses at work.

By decision dated October 20, 1995, the Office found that appellant failed to establish that she sustained an emotional condition in the performance of duty. The Office found that appellant failed to establish the specific factors of employment to which she attributed her disability and it, therefore, denied appellant compensation for her alleged emotional condition.

By letter dated October 31, 1995, appellant requested a written examination of the record by an Office hearing representative.

By decision dated May 8, 1996, the Office hearing representative found that while appellant had established a compensable factor of employment, the medical evidence was insufficient to establish that she sustained an emotional condition in the performance of duty. The appeal rights attached to the hearing representative's May 8, 1996 decision, advised appellant of the one-year time limitation period on requesting reconsideration.

By letter dated May 3, 1997, received by the Office on May 13, 1997, appellant requested reconsideration and submitted additional medical and factual information to support her claim. The envelope in which the request was sent was not made a part of the record.

By decision dated May 22, 1997, the Office denied reconsideration. The Office found that appellant filed her request for reconsideration after the one-year time limit for filing, set forth in 20 C.F.R. § 10.138(b)(2), expired. The Office stated that it had reviewed appellant's

case under 20 C.F.R. § 10.138(a) to determine whether she had presented clear evidence that the Office's final merit decision was erroneous and had concluded that she had not presented such evidence.

Because more than one year has elapsed from the date of the Office's last merit decision on May 8, 1996, to the date of filing of appellant's appeal with the Board on July 22, 1997 the Board lacks jurisdiction to review the Office hearing representative's May 8, 1996 decision.¹ The only decision which the Board may review on appeal is the May 22, 1997 decision, of the Office which denied appellant's request for reconsideration. Since this decision is not a merit decision, the only issue before the Board is whether the Office, in its May 22, 1997 decision, abused its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) on the basis that her application for review was not timely filed in accordance with 20 C.F.R. § 10.138(b)(2) and did not present clear evidence of error on the part of the Office.

The Board finds that the Office improperly denied as untimely appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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 compensation at any time on his own motion or on application. The Secretary, in accordance with facts found on review, may

(1) end, decrease, or increase the compensation awarded; or award compensation previously refused or discontinued.”²

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).³ As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that the Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision. 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 a hearing request should apply to

¹ See 20 C.F.R. § 501.3(d)(2); see also *Herbert E. Widincamp*, 32 ECAB 1090 (1981).

² 5 U.S.C. § 8128(a). This section does not entitle a claimant to review as a matter of right. *Gregory Griffin*, 41 ECAB 186 (1989); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ 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).

applications for review.⁴ Accordingly, timeliness is determined by the postmark on the envelope, if available. Otherwise the date of the letter itself should be used.⁵

In the instant case, the Office failed to make as part of the record the envelope, in which appellant's request for reconsideration was received. Therefore, the Office should have turned to the date of the letter itself, May 3, 1997, as evidence that appellant's request for reconsideration of the Office's May 8, 1996 decision, was timely. The date of the letter was clearly within the one-year deadline, which expired on May 8, 1997.

The Board will, therefore, set aside the Office's May 22, 1997 decision, denying as untimely appellant's request for reconsideration and will remand the case to the Office for the purpose of exercising its discretionary authority under 5 U.S.C. § 8128(a). On remand, the Office should consider appellant's May 3, 1997 request for reconsideration, along with any argument or evidence submitted in support thereof, and should determine whether appellant may obtain review of the merits of her claim under 20 C.F.R. § 10.138(b)(1).⁶

The decision of the Office of Workers' Compensation Programs dated May 22, 1997 is set aside and the case remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
May 20, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3(a) (January 1990).

⁵ *Douglas McLean*, 42 ECAB 759 (1991); *William J. Kapfhammer*, 42 ECAB 271 (1990); see *Lee F. Barrett*, 40 ECAB 892 (1989).

⁶ See *supra* note 3.