

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANGEL M. LEBRON, JR. and U.S. POSTAL SERVICE,
MAINTENANCE ENGINEERING & OPERATIONS, Phoenix, AZ

*Docket No. 98-2364; Submitted on the Record;
Issued April 20, 2000*

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 denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed, and appellant failed to present clear evidence of error.

The Board has duly reviewed the case record on appeal and finds that the Office improperly determined that appellant's November 4, 1997 request for reconsideration was not timely filed.

On June 26, 1996 the Office issued a schedule award for a five percent permanent impairment of appellant's right upper extremity. Appellant subsequently filed a timely request for review of the written record. In a decision dated November 4, 1996 and finalized on November 6, 1996, the Office's hearing representative affirmed the prior decision dated June 26, 1996.

By letter postmarked November 4, 1997, appellant filed a request for reconsideration accompanied by additional medical evidence. In a decision dated April 29, 1998, the Office denied appellant's request for reconsideration, pursuant to 5 U.S.C. § 8128(a), on the grounds that his application for review was not timely filed, and that he failed to present clear evidence of error. Appellant subsequently filed an appeal with the Board on July 29, 1998.

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.¹ This section vests the Office with

¹ 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

discretionary authority to determine whether it will review an award for or against payment of compensation.² The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ One such limitation is that a claimant must file his or her application for review within one year of the date of the decision denying or terminating benefits.⁴ 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 section 8128(a).⁵

In its April 29, 1998 decision, the Office noted that its most recent merit decision was issued on November 4, 1996, and that appellant's request for reconsideration was postmarked November 4, 1997. The Office explained that, in order to satisfy the one-year time limitation imposed by 20 C.F.R. § 10.138(b)(2), appellant's request for reconsideration should have been postmarked no later than November 3, 1997. Consequently, the Office concluded that appellant's request for reconsideration was untimely by one day.

The Board finds that the Office erred in two respects with regard to the timeliness of appellant's request for reconsideration. First, although the hearing representative's decision is dated November 4, 1996, the decision was not issued and finalized until November 6, 1996. Consequently, appellant's November 4, 1997 request for reconsideration was filed within one year of the hearing representative's decision issued on November 6, 1997. Moreover, the Office erred in computing the time period within which appellant was required to file his request for reconsideration. While the Office's procedure manual provides that the one-year time limitation for requesting reconsideration begins to run on the date of the original Office decision,⁶ the Board has long held that the date of the event from which the designated period of time begins to run shall not be included when computing the time period. However, the last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday.⁷ With this in mind, if the Office had properly issued its prior decision on November 4, 1996, the one-year time period for filing a request for reconsideration would have commenced on November 5, 1996, and the last day of that time period would have been November 4, 1997. As previously noted, appellant's request for reconsideration was postmarked November 4, 1997.

Inasmuch as the Office's most recent merit decision was finalized on November 6, 1996 and appellant's request for reconsideration was postmarked November 4, 1997, his request is considered timely.⁸ On reconsideration, appellant submitted a number of additional medical reports from his most recent treating physician as well as a copy of an April 1, 1997 second

² 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." 5 U.S.C. § 8128(a).

³ See 20 C.F.R. § 10.138.

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ See *Leon D. Faidley, Jr.*, *supra* note 1.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (May 1996).

⁷ *John B. Montoya*, 43 ECAB 1148, 1151 (1992).

⁸ *Willie H. Walker, Jr.*, 45 ECAB 126, 131 (1993).

opinion evaluation obtained by the Office subsequent to the issuance of its November 6, 1996 merit decision. On remand, the Office should review the newly submitted evidence and appellant's 12-page request for reconsideration to determine whether appellant has provided sufficient evidence or argument to warrant merit review of his claim under 20 C.F.R. § 10.138(b).⁹

The April 29, 1998 decision of the Office of Workers' Compensation Programs is hereby reversed and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
April 20, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁹ Section 10.138(b)(1) provides that a claimant may obtain review of the merits of the 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). Additionally, section 10.138(b)(2) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim. 20 C.F.R. § 10.138(b)(2).