

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DAVID SHULER and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, MIAMI FLIGHT CONTROL  
CENTER, Miami, FL

*Docket No. 98-1965; Submitted on the Record;  
Issued February 22, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

On August 7, 1994 appellant, then a 32-year-old air traffic controller, dialed in to get a signal and received a very loud tone in his right ear. He stopped working the next day and received continuation of pay from August 8 through September 21, 1994. Appellant subsequently submitted medical reports indicating that he had tinnitus and headaches. In a December 1, 1994 decision, the Office denied appellant's claim on the grounds that the evidence of record failed to establish a causal relationship between the employment injury and the claimed condition.

In a December 20, 1994 letter, appellant requested a hearing before an Office hearing representative which was held on October 26, 1995. In a January 16, 1996 decision, the Office hearing representative found that appellant had failed to submit rationalized medical evidence to establish that his headaches, dizziness, depression and disability were causally related to his work. He therefore affirmed the Office's December 1, 1994 decision. In an undated letter, appellant's attorney requested reconsideration. In a May 22, 1996 decision, the Office denied appellant's request for reconsideration on the grounds that the request did not raise substantive legal questions nor include new and relevant evidence and therefore was insufficient to warrant review of its prior decisions. In a January 15, 1997 letter, appellant's attorney again requested reconsideration. In a February 20, 1997 merit decision, the Office denied appellant's request for modification of its prior decisions.

Appellant again requested reconsideration in a letter dated February 20, 1998. He indicated that the request was submitted to the Office by a facsimile machine and by letter on February 20, 1998.

In a March 10, 1998 decision, the Office denied appellant's request for reconsideration as untimely and not containing clear evidence of error in its prior decisions.

The Board finds that the Office improperly denied appellant's request for reconsideration as untimely.

Under section 8128(a) the Federal Employees' Compensation Act,<sup>1</sup> the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations<sup>2</sup> which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."<sup>3</sup> In *Leon D. Faidley, Jr.*,<sup>4</sup> the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

The Office issued its last merit decision on February 20, 1997. Appellant's attorney requested reconsideration in a letter dated February 20, 1998. The Office, in its procedures, has indicated that in determining whether a request for reconsideration is timely filed, the postmark date on the envelope of the request will be used to judge timeliness. If the envelope is not contained in the case record, the date of the letter will be used.<sup>5</sup> In the present case, the record submitted on appeal does not contain an envelope with a postmark. The letter requesting reconsideration, however, is dated February 20, 1998, exactly one year after the Office's last merit decision. Appellant's request for reconsideration therefore was timely filed within the procedures of the Office. The decision of the Office will be set aside and the case returned to the Office for reconsideration based upon the proper standard to be applied in this case.

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> 20 C.F.R. § 10.138(b).

<sup>3</sup> 20 C.F.R. § 10.138(b)(2).

<sup>4</sup> 41 ECAB 104 (1989).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a) (May 1991).

The decision of the Office of Workers' Compensation Programs, dated March 10, 1998, is hereby set aside and the case remanded for further action in conformance with this decision.

Dated, Washington, D.C.  
February 22, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member