

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROGER G.J. ROGERS and DEPARTMENT OF AGRICULTURE,
KALMATH NATIONAL FOREST, Yreka, CA

*Docket No. 00-812; Submitted on the Record;
Issued April 10, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not present clear evidence of error.

On August 23, 1996 appellant, then a 48-year-old civil engineer, filed a notice of occupational disease alleging that he had contracted viral hepatitis C while in the performance of duty.

By decision dated November 18, 1996, the Office denied appellant's claim for compensation.

By letter dated January 10, 1997, appellant requested reconsideration.

By merit decision dated June 18, 1997, the Office denied appellant's request for reconsideration.

By letter dated September 11, 1997, appellant requested reconsideration.

By merit decision dated December 19, 1997, the Office denied appellant's request for reconsideration.

By letter dated December 16, 1998, appellant requested an extension to January 1, 1999, in which to submit additional evidence supporting his request for reconsideration. By letter dated December 30, 1998, appellant stated that he was submitting pertinent evidence concerning his request for reconsideration. The letter was stamped received on January 6, 1999. In support of his request, appellant submitted medical reports from Drs. Stephen H. Fugaro, John R. Lake and Richard LaCom.

By letter dated June 14, 1999, the Office responded to a congressional inquiry:

“On December 16, 1998 [appellant] sent a certified letter to this Office requesting a new reconsideration of his claim. The certified letter was received in our Office on December 21, 1998. Although the request did not meet the one-year time limitation, [appellant’s] reconsideration request will be referred to another senior claims examiner for review.”

In a nonmerit decision dated June 16, 1999, the Office denied appellant’s request on the grounds that his letter “dated on January 6, 1999” was not filed within one year of the Office’s November 18, 1996 decision.

The Board finds that this case is not in posture for decision.

Section 8128(a) of the Federal Employees’ Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).³ As one such limitation, the Office has stated that it 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.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁵

In implementing the one-year time limitation, the Office’s procedures provide that the period for requesting reconsideration begins on the date of the original Office decision, in this case November 18, 1996. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁶ The Office issued its last merit decision on December 19, 1997, which denied appellant’s request for reconsideration of its June 18, 1997 decision, which denied appellant’s request for reconsideration of its November 18, 1996 decision denying benefits. Inasmuch as the Office issued its most recent merit decision on December 19, 1997 and not on November 18, 1996 the Office erred in its June 16, 1999 decision, by finding that appellant’s request for reconsideration was filed more than two years beyond the one-year limitation.

¹ 5 U. S. C. § 8128(a).

² *Veletta C. Coleman*, 48 ECAB 367 (1997).

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, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606.

⁴ 20 C.F.R. § 10.607.

⁵ *See Veletta C. Coleman*, *supra* note 2.

⁶ *Veletta C. Coleman*, *supra* note 2; *Larry L. Lilton*, 44 ECAB 243 (1992).

Section 10.607(a) provides that if an application for reconsideration is submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, other evidence such as certified mail receipts may be used to establish the mailing date.⁷

The record contains evidence that appellant's letter dated December 16, 1998 was certified as sent to the Office on that date, although not received until December 21, 1998. Because this letter was certified as sent on December 16, 1998, the Board finds that it was filed within the one-year time limitation of section 8128(a).

However, in this letter appellant does not directly request reconsideration. He states instead:

"In response to your compensation order denying modification of a prior order ... dated December 19, 1997, I hereby request an additional 14-day extension to be granted until January 1, 1999 to compile and submit additional evidence that will relate to my request for reconsideration of my application under my appeal rights."

Similarly, in the December 30, 1998 letter, received by the Office on January 6, 1999 appellant did not directly request reconsideration. He merely stated that he was "currently submitting additional medical evidence that is pertinent to my application for reconsideration under my appeal rights."

Nonetheless, the Office construed both letters as a request for reconsideration. In a memorandum dated March 16, 1999, a claims examiner stated that he informed the Congressman's office that appellant had requested reconsideration on December 16, 1998, but that the request was not received until December 29, 1998, "which means [appellant] did not meet the statutory time limitation." This same information was faxed to the Congressman's office. Similarly, in its June 14, 1999 response to the congressional inquiry, the Office termed appellant's December 16, 1998 certified letter a request for reconsideration.

Because the Office accepted appellant's December 16, 1998 letter as a request for reconsideration and this letter was postmarked within one year from the last merit decision dated December 19, 1997, the Board finds that the Office erred in denying appellant's request as untimely filed and lacking clear evidence of error. Thus, the case must be remanded for the Office to consider whether the evidence submitted by appellant in support of his request for reconsideration is sufficient to require a merit review under the appropriate standard.⁸

⁷ 20 C.F.R. § 10.607(a).

⁸ See 20 C.F.R. § 10.606(b).

The June 16, 1999 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
April 10, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member