

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AMJAD A. RANA and U.S. POSTAL SERVICE,
SURBURAN ANNEX, Gaithersburg, MD

*Docket No. 01-710; Submitted on the Record;
Issued February 6, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

On December 17, 1996 appellant, then a 35-year-old mailhandler, filed a traumatic injury claim (Form CA-1) alleging that on that date¹ he injured his back and part of his left and right shoulders when a coworker hit him in the back with an all-purpose container filled with mail.²

In a decision dated September 30, 1997, the Office denied appellant's traumatic injury claim on the grounds that the evidence failed to establish fact of injury. The Office found that there was insufficient evidence to support a medical condition resulting from the alleged work incidents or exposures. Appellant failed to submit any rationalized medical opinion on how his injury was related to the alleged employment incident.

In a letter dated February 26, 1999, appellant requested reconsideration of a December 22, 1997 decision and submitted an August 11, 1997 by Dr. Alexandros D. Powers, an attending Board-certified neurological surgeon, and a March 5, 1998 statement signed by William Agosto in support of his request. Appellant contends on appeal that he did not receive the September 30, 1997 decision until March 5, 1998 and submitted Mr. Agosto's statement noting that he gave appellant a copy of the decision for claim numbers 25-0509002 and 25-0508104 on March 5, 1998.

In a letter dated February 26, 1999, appellant's counsel, without a signed authorization form, requested reconsideration of the September 30, 1997 decision and submitted evidence in support. The evidence included Mr. Agosto's March 5, 1998 statement, a January 29, 1999

¹ After filing his CA-1 form, appellant later changed the date the injury from December 17 to December 7, 1996.

² This was assigned claim number 25-0508104.

report by Dr. Baljeet S. Sethi, an attending Board-certified neurologist, a February 8, 1999 report by Dr. Ayub K. Ommaya, a Board-certified neurological surgeon, and supplementary reports dated December 10, 1996 and July 29, 1997 by Dr. Powers. Appellant's counsel contends that the appeal is timely as appellant did not receive a copy of his decision until March 5, 1998.

In a report dated December 10, 1996, Dr. Powers noted that appellant related that on December 7, 1996 a coworker pushed a mail bin weighing approximately 200 pounds into his back and that he "began to experience a reemergence of the symptomatology." Dr. Powers noted normal reflexes, no clonus or Hoffman's and "[p]alpation of the paraspinal muscles shows some mild firmness bilaterally with only minimal tenderness to deep palpation."

In a July 29, 1997 report, Dr. Powers noted that appellant complained of "low back discomfort after his most recent injury of December." Dr. Powers noted that a repeat magnetic resonance imaging (MRI) scan would be performed due to appellant's complaints regarding symptoms which could be due to his lumbar spine.

In a January 29, 1999 report, Dr. Sethi noted that appellant was injured on the job on December 7, 1996 and had complaints of lower back pain. Based upon a physical examination and review of Dr. Powers' reports, Dr. Sethi opined:

"[Appellant] suffered significant pain in the lower back and radicular symptoms in the lower extremity which appear to be secondary to dis[c] disease and clinically consistent with the diagnosis of lumbosacral radiculopathy. This appears to be related to the trauma sustained in the injury at work on December 7, 1996."

In his report dated February 8, 1999, Dr. Ommaya noted that an injury history including cervical problem which began in August 1991 due to an accident at work and that he suffered a low back injury on December 7, 1996 when he was struck in the back by an all-purpose mail container weighing approximately 2,000 pounds. Dr. Ommaya indicated that appellant complained of back problems since the December 7, 1996 accident and noted difficulty in micturating.

In a decision dated April 8, 1999, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to present clear evidence that the Office's September 30, 1997 decision was erroneous. The Office also rejected appellant's argument that he did not receive the decision until March 5, 1998. The Office noted that there is a presumption that a notice mailed to a claimant in the ordinary course of business is deemed to have been received by appellant, absent evidence to the contrary.

In a letter dated June 2, 1999, appellant's counsel appealed to the Board.

On April 13, 2000 the Board set aside the April 8, 1999 decision and remanded for further consideration as the decision did not pertain to the correct file number for which appellant's counsel supplied authorization.³ The Board noted that appellant filed reconsideration

³ This appeal was assigned docket number 99-1997.

of a decision dated December 22, 1997 for claim number 25-0509002 and that his counsel requested reconsideration of the September 30, 1997 decision for claim number 25-0508104.

By decision dated October 13, 2000, the Office found appellant's request was untimely and failed to establish clear evidence of error.

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The only decision before the Board in this appeal is the October 13, 2000 decision, in which the Office denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error. Since more than one year has elapsed between the date of the Office's merit decision dated September 30, 1997 and the filing of appellant's appeal on January 16, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.⁴

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁵ the Office's regulations provide that a claimant's application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office." To be entitled to a merit review of an Office decision denying or terminating a benefit, an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish on its face that such decision was erroneous.⁷

In its October 13, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. Appellant was issued appeal rights with the September 30, 1997 decision, which stated that, if he requested reconsideration of the decision, such request must be made in writing to the Office within one year of the date of the decision. The Board finds that appellant's argument that he did not receive this decision until March 5, 1998 is not supported by the evidence. It is a well-established principle that absent evidence to the contrary, a decision mailed to an individual in the ordinary course of business is presumed received by that individual when it appears from the record that the notice was properly addressed and duly mailed.⁸ Although appellant has presented an argument that the decision was not duly mailed,

⁴ 20 C.F.R. § 501.3(d)(2).

⁵ 5 U.S.C. §§ 8101-8193. 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 application." 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(a).

⁷ 20 C.F.R. § 10.607(b).

⁸ *Newton D. Lashmett*, 45 ECAB 181 (1993).

his contentions are not sufficiently persuasive to overcome the presumption of the receipt. Mr. Agosto's statement that he gave appellant a copy of the decision on March 5, 1998 is not probative evidence that appellant did not receive the decision prior to that date and there is no evidence to show that the decision was not mailed to appellant. Therefore, the presumption of receipt under the "mailbox rule" is triggered. As appellant's February 26, 1999 reconsideration request was outside the one-year time limit, which began the day after September 30, 1997, appellant's application for review was untimely.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether the application establishes "clear evidence of error." The Office will reopen a claimant's case for merit review notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of the Office.⁹

In support of his February 26, 1999 request for reconsideration, appellant submitted reports from Drs. Sethi, Ommaya and Powers. The Office in its October 13, 2000 decision determined that none of the evidence submitted on reconsideration established that the Office's September 30, 1997 decision was in error or raised a substantial question as to the correctness of that decision.

The additional evidence submitted with appellant's request for reconsideration does not establish clear evidence of error in the Office's September 30, 1997 decision. None of the medical reports are sufficient to establish that appellant's condition was causally related to his alleged work injury. The reports by Dr. Powers, which are the most contemporaneous to the alleged incident, all fail to contain a diagnosis and merely note that appellant's symptomatology was reemerging. The reports by Drs. Ommaya and Sethi were produced approximately two years after the alleged work injury and note complaints of back problems. The reports submitted by appellant fail to contain a rationalized medical opinion, supported by objective evidence, on the issue of how appellant's condition was related to the alleged employment incident.¹⁰ Therefore, as appellant has not raised a substantial question as to the correctness of the merit decision or presented evidence, which on its face shows that the Office made an error, appellant has failed to establish clear evidence of error.

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *Gary J. Watling*, 52 ECAB ____ (Docket No. 00-634, issued March 1, 2001).

The decision of the Office of Workers' Compensation Programs dated October 13, 2000 is hereby affirmed.

Dated, Washington, DC
February 6, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member