

W.K., Appellant

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

Appearances:

Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

On February 15, 2003 appellant, a 64-year-old carrier, filed a claim for compensation alleging that his bilateral knee osteoarthritis was a result of walking in the course of his federal employment. In a decision dated July 19, 2005, the Office of Workers' Compensation Programs accepted that appellant sustained a temporary aggravation of degenerative joint disease in his knees and found that said aggravation resolved by December 30, 2003, the date he retired.

Appellant, through his duly authorized attorney, appealed the Office's July 19, 2005 decision to the Board. In his September 9, 2005 notice of appeal, the attorney requested that the Board provide a copy of the case record for his inspection.

Without responding to the attorney's request to inspect a copy of the case record, the Board reached a decision on January 10, 2006 affirming the Office's July 19, 2005 decision. The Board sent a certified copy of its decision to appellant.

On April 30 and May 23, 2007 appellant's attorney contacted the Board's Docket section to ask why it had not provided him a copy of the case record. It was only then that he learned of the Board's decision. The attorney advised that he had received no correspondence from the Board since November 10, 2005. On May 23, 2007 the attorney explained that his client now had no remedy: "A decision was issued without providing notice to appellant nor I, more than a year has gone by and we are now out of time for him to even request a Reconsideration."

On June 27, 2007 the Board issued an order finding that its January 10, 2006 decision was improperly issued and void *ab initio* because the Docket section had ignored the attorney's request to inspect a copy of the case record. The Board reinstated the appeal.

On July 27, 2007 the Director of the Office filed a petition for reconsideration requesting that the Board set aside its June 27, 2007 order. The Director argued that the Board's order contained an error of law as it was not appropriate and had no basis under the Federal Employees' Compensation Act, its implementing regulations or Board precedent. The Director argued that the Board had jurisdiction to issue its January 10, 2006 decision, that the "error" of not providing a copy of the record to appellant's attorney was harmless and presented no due process concern because counsel already had copies of the relevant contents of the case file, and that the Board's decision became final upon expiration of 30 days from the date of the filing of the order. The Director asked the Board to remand the case to the Office, which would then issue a merit reconsideration determination to preserve appellant's appeal rights.

The standard for granting a petition for reconsideration is that the Board's decision contains an error of fact or law.¹

The Board has duly considered the matter and finds that the Director's petition for reconsideration should be granted. However, the Board will modify its prior order of June 27, 2007 and affirm the order as modified. Apart from counsel's request to inspect the case record, there is clear precedent to support that the Board did not properly issue its January 10, 2006 decision. In this regard, the Board did not send a copy of that decision to appellant's attorney.

The Board's *Rules of Procedure* mandate that a copy of the Board's decision "shall be sent by the Board to all parties in interest."² The Board's docket file contains a certified-mail receipt showing that the Board's Docket section sent a copy of the January 10, 2006 decision to appellant, but there is no such receipt to show that the Board sent a copy to appellant's authorized attorney.³ The Board's Docket section failure to send a copy of its January 10, 2006 decision to appellant's attorney explains counsel's April 30, 2007 assertion that he received no such decision from the Board.

In *Nathaniel Milton*,⁴ the Board sent a copy of its September 30, 1992 decision to the claimant but did not send a copy to the claimant's attorney. Noting that it should have recognized the attorney and should have sent her a copy of the decision, the Board, in an order dated October 28, 1992, reissued its decision.

¹ See *Virginia Faye Gabbert* (Byron Lowell Gabbert), 21 ECAB 149 (1969); *Piotr W. Gul*, 17 ECAB 714 (1966).

² *Id.* at § 501.6(a); see at *id.* § 501.11(a) (in any proceeding before the Board, a party may appear in person, or by counsel or any other duly authorized person, including any accredited representative of an employee organization, and such representative when accepted shall continue to be recognized unless he should abandon such capacity, withdraw, or appellant or intervenor directs otherwise).

³ See *id.* at § 501.10(c) (any notice or order required under this part to be given or served shall be by certified or registered mail or by personal service).

⁴ 44 ECAB 187 (1992) (*order reissuing decision*).

In *Ralph W. Moody*,⁵ the Board explicitly held that a decision is not issued until it is mailed. The Board found that its February 5, 1991 decision was not mailed to the claimant until March 6, 1991. Under these circumstances, the Board held that the date of issuance of the decision was March 6, 1991. To hold otherwise, the Board explained, would foreclose the claimant, through no fault of his own, from filing a petition for reconsideration within 30 days. Where evidence, such as a postmark, establishes that the decision was not sent on the day the decision was dated, the Board held that the decision is considered to be issued on the date the decision was mailed by the Board. Further, the Board found that its decision did not become final until 30 days after the date of issuance. The Board therefore dismissed the claimant's April 17, 1991 petition for reconsideration as untimely.

Applying *Ralph W. Moody* to the present case, the Board finds that it never issued the January 10, 2006 decision because the Board never sent a copy to appellant's duly authorized attorney. Having never been issued, the decision never became final and, as a result, the Board never relinquished jurisdiction of the case.

In *Bertha Keeble*,⁶ the Board mailed its April 8, 1991 decision to appellant at an incorrect address and the decision was returned as not deliverable. Appellant filed a petition for reconsideration on June 28, 1991. The Board found that where the decision was not properly mailed within 30 days of being filed, appellant was deprived of his right to file a petition for reconsideration, resulting in a loss of due process. Holding that the decision was not properly issued, the Board, in an order dated January 19, 1994, "reissued" its decision to restore appellant's right to file a timely petition for reconsideration.

In *Melissa D. Cantrell*,⁷ the Board issued a November 27, 2002 order dismissing the appeal on the grounds that the claimant failed to furnish the information necessary for the Board to properly process her appeal. Three months later, on February 27, 2003, the Board vacated that order and reinstated the appeal on the grounds that it had the completed AB-1 form in its possession all along, so the order dismissing the appeal was void *ab initio* and the Board had not relinquished its jurisdiction.

The Board finds that, since its Docket section did not properly issue the January 10, 2006 decision, the appeal remains open until a decision is properly issued. To that extent, the Board's June 27, 2007 order must be modified to reflect that the basis for reopening the appeal was due not to the Board's oversight of the record inspection request, but because the January 10, 2006 decision was not properly issued by the Docket section.

Simply "reissuing" the Board's January 10, 2006 decision would restore appellant's right to file a petition for reconsideration, as in *Bertha Keeble*, but it would not restore the attorney's opportunity to inspect the case record and file a pleading on behalf of his client prior to any decision by the Board. The appropriate remedy, as noted in the June 27, 2007 order, is to vacate the improperly issued January 10, 2006 decision and reinstate the appeal, as in *Melissa D. Cantrell*. The Director argues that appellant's attorney already had copies of the relevant

⁵ 44 ECAB 375 (1993) (*order dismissing petition for recon.*).

⁶ 45 ECAB 355 (1994) (Alternate Member Michael E. Groom, dissenting).

⁷ Docket No. 03-46 (issued June 19, 2003).

contents of the case file, but it is not for the Director or the Board to decide what contents are relevant to counsel's representation of his client or any argument to be made.

The Director also argues that the Office must rely on the finality of Board decisions and that the Board's June 27, 2007 order ignores the possible jurisdictional consequences. The issue of finality was fully presented in *Bertha Keeble*.⁸ While it is true that an improperly issued decision of the Board may cause administrative disruption,⁹ such inconveniences are rare and do not outweigh the Board's interest in protecting appellant's right to due process. The Director argues too broadly that "any action" taken by the Office during the nearly two years that the Board has continued to retain jurisdiction of this case would be null and void. However, he has not identified any Office decision that is affected by the Board's June 27, 2007 order. The Director's contention regarding the possible jurisdictional consequences of the Board's June 27, 2007 order does not overcome appellant's right to due process.

Because the Board's Docket section did not properly issue the January 10, 2006 decision, the Board will deny that portion of the Director's petition for reconsideration to set aside the June 27, 2007 order vacating that decision and reinstating the appeal. The appeal docketed as Docket No. 05-1888 will go forward.

IT IS HEREBY ORDERED THAT the Director's July 27, 2007 petition for reconsideration is granted. The Board's June 27, 2007 order is modified to reflect that the Board did not properly issue its January 10, 2006 decision. The June 27, 2007 order is affirmed as modified. The appeal docketed as No. 05-1888 shall go forward.

Issued: August 4, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

⁸ *Supra* note 5 (dissenting opinion).

⁹ See *Charles R. McPhail*, Docket No. 99-1763 (issued December 4, 2001) (where the Board, by order, remanded the case for reconstruction of the case record and an appropriate decision and, in a later appeal, by order, remanded the case for a decision on the merits, the Board held that both its prior orders were void *ab initio* because the case file relevant to the first order had been intermingled with another case file and the Board had retained jurisdiction over that appeal since its April 14, 1999 filing, rendering null and void two Office decisions issued in the meantime).