

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT SWIFT and U.S. POSTAL SERVICE,  
POST OFFICE, Fort Worth, Tex.

*Docket No. 96-828; Submitted on the Record;  
Issued May 6, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

The Board has duly reviewed the case record and finds that the Office did not abuse its discretion in failing to reopen appellant's case for merit review.

This case has been before the Board on two prior occasions. The procedural history indicates that on March 27, 1990, the Office accepted appellant's claim for aggravation of depression with anxiety. On September 19, 1990 the employing establishment offered appellant a modified limited-duty assignment consistent with restrictions provided by his physicians. By letter dated September 21, 1990, the Office advised appellant that the limited-duty assignment offered by the employing establishment was suitable work, that he had 30 days to accept the position or provide an explanation of his reasons for refusing, and informed him that he would not be entitled to further compensation if he refused an offer of suitable employment or failed to report for work when scheduled. Appellant did not respond, and by decision dated November 5, 1990, the Office terminated his compensation effective October 21, 1990 on the grounds that he had refused a valid job offer. Following appeal, by order dated February 28, 1991,<sup>1</sup> the Board granted appellant's motion to dismiss on the grounds that he wished to pursue a hearing before the Office. By decision dated April 24, 1991, an Office hearing representative denied appellant's hearing request as untimely. Appellant then requested reconsideration, and by decision dated March 9, 1992, the Office denied his request, finding that, pursuant to 20 C.F.R. § 10.138(b)(2), the request had not been filed within one year of the November 5, 1990 decision and did not show clear evidence of error pursuant to 20 C.F.R. § 10.138(a). Appellant appealed to the Board, and by decision dated February 5, 1993, the Board affirmed the Office's decision.

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<sup>1</sup> Docket No. 91-612.

On April 28, 1993 the Board denied appellant's petition for reconsideration. The facts and background of the case contained in the prior Board orders and decision are incorporated herein by reference.

On February 10, 1993 appellant again requested reconsideration and submitted two medical reports. He contended that he had not timely received the job offer, which was not suitable, and had not received the September 21, 1990 Office letter advising him that the offer was suitable. By decision dated June 17, 1993, the Office denied appellant's request, finding it untimely under section 10.138(b)(2) and that clear evidence of error had not been shown pursuant to section 10.138(a). The Office noted that the job offer was suitable and that appellant had been timely advised of such. The Office further found that the medical evidence submitted in support of appellant's request was irrelevant to the issue of whether he had declined an offer of suitable work. On September 29, 1995 appellant again requested reconsideration, contending that his representative had timely requested reconsideration of the November 5, 1990 decision on January 14, 1991. He reiterated that he had not received the September 19, 1990 job offer or the September 21, 1990 Office letter. By decision dated December 5, 1995, the Office denied appellant's request, finding that, pursuant to 20 C.F.R. § 10.138(b)(2), it had not been filed within one year of the November 5, 1990 decision and did not show clear evidence of error pursuant to 20 C.F.R. § 10.138(a). The instant appeal follows.

The only decision before the Board is the Office's December 5, 1995 decision denying appellant's request for reconsideration of the November 5, 1990 decision. Because more than one year had elapsed between the issuance of this decision and January 22, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the November 5, 1990 Office decision.<sup>2</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>3</sup> The Office 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.<sup>4</sup> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.<sup>5</sup>

The Board finds that as more than one year had elapsed from the date of issuance of the Office's November 5, 1990 merit decision and appellant's request for reconsideration dated September 29, 1995, his request for reconsideration was untimely. The Board further finds that the arguments made by appellant in support of this request do not raise a substantial question as to the correctness of the Office's November 5, 1990 merit decision. Regarding his contention

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<sup>2</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2); see also *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>5</sup> *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

that he timely requested reconsideration, the January 14, 1991 letter from his representative does not specifically request reconsideration and does not identify a decision which he wishes the Office to review.<sup>6</sup> Regarding his contention that he did not receive the September 19, 1990 job offer or the September 21, 1990 Office letter advising him that the offer was suitable, under the “mailbox rule,” it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual, and copies of these letters show appellant’s correct address.<sup>7</sup> As appellant has not, by the submission of factual and medical evidence, raised a substantial question as to the correctness of the Office’s November 5, 1990 decision, he has failed to establish clear evidence of error, and the Office did not abuse its discretion in denying a merit review of his claim.

The decision of the Office of Workers’ Compensation Programs dated December 5, 1995 is hereby affirmed.

Dated, Washington, D.C.  
May 6, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

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<sup>6</sup> 20 C.F.R. § 10.138(b)(1); *see Mary E. Hite*, 42 ECAB 641 (1991).

<sup>7</sup> *See Clara T. Norga*, 46 ECAB 473 (1995).