

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SALVATORE ESPOSITO and U.S. POSTAL SERVICE,
POST OFFICE, Hauppauge, N.Y.

*Docket No. 97-346; Submitted on the Record;
Issued September 28, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration under 5 U.S.C. § 8128(a) 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 abused its discretion in finding that appellant's reconsideration request was untimely filed.

On September 19, 1994 appellant, a 39-year-old letter carrier, was attacked and choked while attempting to deliver mail. The Office accepted appellant's claim for contusions of the throat. Thereafter appellant filed a claim for an emotional condition which allegedly developed as a consequence of the attempted strangulation.

By decision dated April 26, 1995, the Office rejected appellant's claim finding that the evidence of record failed to establish that appellant's diagnosed agitated depression was causally related to his September 19, 1994 injury. The Office found that the medical evidence submitted in support lacked a rationalized explanation of the causal relationship between appellant's agitated depression and his September 19, 1994 strangulation injuries.

By letter to the Office dated April 22, 1996, appellant's representative, Charles Pollina, stated: "This office represents [appellant] and on his behalf, I request reconsideration of the rejection of his claim for compensation dated April 26, 1995." In support of the request appellant's representative submitted several medical reports.

By letter dated April 25, 1996, the Office advised appellant's representative that it was unable to find a release or a retainer from the claimant authorizing Mr. Pollina as his representative, and that therefore, the Office could not honor his request for reconsideration.

By letter dated May 1, 1996, Mr. Pollina responded to the Office's April 25, 1996 letter and enclosed a designation of Mr. Pollina as his representative signed by appellant on November 22, 1995.

By decision dated July 16, 1996, the Office denied the request for reconsideration characterizing Mr. Pollina's May 1, 1996 letter as a new request for reconsideration. The Office found it did not receive this request for reconsideration within one year of April 26, 1995 and hence that it was untimely, and that the evidence accompanying the request for reconsideration did not contain clear evidence that the April 26, 1995 decision was in error.

The only decision before the Board on this appeal is the July 16, 1996 decision of the Office in which it declined to reopen appellant's case for a review on its merits because the request was not timely filed and did not show clear evidence of error. Since more than one year has elapsed from the date of the issuance of the Office's April 26, 1995 merit decision to the date of the filing of appellant's appeal on October 15, 1996, the Board lacks jurisdiction to review that decision.¹

Under section 8128(a) of the Federal Employees' Compensation Act² 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. Section 10.138(b)(2) 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." In *Leon D. Faidley, Jr.*,³ the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

In the present case, the evidence establishes that the Office received an April 22, 1996 request for reconsideration of its April 26, 1995 decision on April 24, 1996. The Office preliminarily found that this request was not a valid request for the reason that the attorney who submitted the request for reconsideration did not appear to be appellant's authorized representative at the time of the filing of the request. On May 7, 1996 when the Office received Mr. Pollina's follow-up letter, accompanied by a document appointing Mr. Pollina as appellant's representative, the Office considered this to be a second request for reconsideration and found that the request was not timely filed. The Board finds that Mr. Pollina's May 1, 1996 letter was not a request for reconsideration. The only request for reconsideration of record is dated April 22, 1996.

The Office's regulation on representation of claimants, found at 20 C.F.R. § 10.142, states that appointment of a representative "shall be made in writing or on the record at the hearing." As evidenced by the appointment of Mr. Pollina signed by appellant on November 22, 1995 but submitted to the Office on May 7, 1996, appellant considered Mr. Pollina to be his

¹ See 20 C.F.R. § 501.3(d).

² 5 U.S.C. § 8128(a).

³ 41 ECAB 104 (1989).

authorized representative at the time the April 22, 1996 letter requesting reconsideration was filed with the Office. The Board notes that there is no requirement that the Office actually have the authorization in hand at the time an authorized representative acts on behalf of a claimant. The representative only needs to show that he was authorized to act on behalf of the claimant at the time such action was undertaken.⁴ In the instant case, Mr. Pollina was clearly authorized to act on behalf of appellant at the time the April 22, 1996 request for reconsideration was made; hence, he was appellant's representative and the request was timely made. Therefore, the Office must reconsider the claim and the evidence submitted in support of the request on its merits.

Therefore, the decision of the Office of Workers' Compensation Programs dated July 16, 1996 is hereby set aside, and the case is remanded for a full reconsideration of appellant's claim on its merits.

Dated, Washington, D.C.
September 28, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁴ See *Ira D. Gray*, 45 ECAB 445 (1994) (representative was authorized to act on behalf of the claimant at the time the initial action was undertaken; the Office merely had no authorization in hand).