

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BENITO A. PEREZ and DEPARTMENT OF THE AIR FORCE,  
SAN ANTONIO AIR LOGISTICS CENTER, KELLY AIR FORCE BASE, Tex.

*Docket No. 97-887; Submitted on the Record;  
Issued January 7, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen appellant's claim for further reconsideration on the merits of his claim, on the basis that his request for reconsideration was not timely filed within the one-year time limitation period and did not show clear evidence of error, constituted an abuse of discretion.

In the present case, appellant, a molder, filed a claim on March 30, 1995 alleging that his work over the past two years requiring the use of a handheld grinder and sandblaster caused bilateral carpal tunnel syndrome and bilateral subacromial bursitis. The Office denied appellant's claim by decision dated October 18, 1995 on the grounds that fact of injury was not established. In an accompanying memorandum to the Director, the claims examiner stated that the evidence of record supported a finding that the claimed events, incidents or exposure occurred at the times, places and in the manners alleged; however, a medical condition resulting from the accepted trauma was not supported by the medical evidence. By decision dated November 15, 1996, the Office found that appellant's request for reconsideration dated November 6, 1996 was untimely filed and did not present clear evidence of error.

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

Section 8128(a) of the Federal Employees' Compensation Act<sup>1</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>2</sup> The Office, through its regulations, has

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>3</sup> 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.<sup>4</sup> 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).<sup>5</sup>

In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>6</sup> The Office issued its merit decision in this case on October 18, 1995 wherein it denied appellant's claim for carpal tunnel and subacromial bursitis.

The Office did not properly evaluate all of the evidence in the record to determine whether appellant filed a timely application for review. In a letter dated October 1, 1996, appellant requested that the Office reconsider his claim. Appellant submitted additional medical reports substantiating the diagnosis of carpal tunnel syndrome. The Office received appellant's October 1, 1996 letter by fax on November 6, 1996. The Office found appellant's request for reconsideration untimely because the faxed copies of the request for reconsideration were received on November 6, 1996.

On November 6, 1996 the Office also, however, received a copy of a receipt for certified mail, addressed to the Office, from appellant dated October 3, 1996. In determining timeliness of a request for reconsideration, the Board has held that the provisions of 20 C.F.R. § 10.131(a) for determining the timeliness of a hearing request should apply to applications for review.<sup>7</sup> Accordingly, timeliness is determined by the postmark on the envelope, if available. Otherwise the date of the letter itself should be used.<sup>8</sup>

In the instant case, the record does not contain an original copy of appellant's request for reconsideration dated October 1, 1996, nor the envelope in which the request was mailed. The record does contain, however, a copy of appellant's certified post office receipt purportedly showing that appellant mailed his request for reconsideration on October 3, 1996, which would be within the one-year time limitation. The Board has previously found that a copy of a certified

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<sup>3</sup> 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 point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2).

<sup>5</sup> *See* cases cited *supra* note 2.

<sup>6</sup> *Larry L. Lilton*, 44 ECAB 243 (1992).

<sup>7</sup> *Douglas McLean*, 42 ECAB 759 (1991).

<sup>8</sup> *William J. Kapfhammer*, 42 ECAB 271 (1990).

post office receipt showing timely mailing can be the basis for determining the timeliness of a request for reconsideration.<sup>9</sup>

As the Office did not consider in this case whether the certified return receipt dated October 3, 1996 established that appellant's October 1, 1996 letter requesting reconsideration was timely filed, the case is not in posture for a decision. On remand the Office shall review the evidence of record to determine whether appellant's request for reconsideration dated October 1, 1996 was timely filed. After such further development as necessary, the Office shall issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated November 15, 1996 is hereby set aside and the case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.  
January 7, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

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<sup>9</sup> *Supra* note 7.