

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN C. BRUNETTE and U.S. POSTAL SERVICE,
POST OFFICE, Southfield, Mich.

*Docket No. 96-2353; Submitted on the Record;
Issued March 1, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly adjudicated appellant's March 23, 1996 request for "a review of my file;" and (2) whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability on November 1, 1995 causally related to his accepted January 26, 1995 acute lower back sprain.

On January 26, 1995 appellant, then a 28-year-old window clerk, filed a traumatic injury claim, alleging that on that day when he bent over to pick up a tub of mail he injured his lower back. By decision dated July 27, 1995, the Office accepted appellant's claim for acute lower back sprain.¹

On November 1, 1995 appellant filed a claim for a recurrence of disability, alleging that on November 1, 1995 he sustained a recurrence of disability causally related to his accepted January 26, 1995 acute lower back sprain. Appellant stated that he believed his condition was related to the January 26, 1995 injury because his pain was in the same area of his lower back. The employing establishment indicated that appellant stopped work at the beginning of his shift on November 1, 1995 and returned to work on November 2, 1995. By letter dated November 29, 1995, the Office requested detailed factual and medical evidence from appellant.

By decision dated February 23, 1996, after receiving no response to its November 29, 1995 request for additional information, the Office denied appellant's recurrence of disability claim. The Office found that the evidence of record failed to establish that appellant's claimed recurrence of disability on November 1, 1995 was causally related to his accepted January 26, 1995 acute lower back sprain.

By letter dated March 23, 1996 and sent to the Cleveland, Ohio district office of the Office, appellant requested "a review of my file." In a separate letter, also dated March 23,

¹ Appellant was granted continuation of pay from January 27 through 31, 1995.

1996, and sent to the Office's Branch of Hearings and Review in Washington, D.C. appellant requested "a review of my file." In support of his requests for review, appellant stated that the documents accompanying his requests were provided in response to the Office's earlier request for additional information. Appellant submitted 16 documents with his requests.

By decision dated April 29, 1996, the Office's Branch of Hearings and Review denied appellant's request finding that his request for a hearing or a review of the written record was filed more than 30 days after the issuance of the Office's February 23, 1996 decision and, therefore, was untimely filed. The Office's Branch of Hearings and Review exercised its discretion and further determined that the issue in the case could be addressed by requesting reconsideration from the district office and submitting evidence to establish that appellant's claimed recurrence of disability on November 1, 1995 was causally related to his accepted January 26, 1995 acute lower back sprain.

No action was taken on appellant's March 23, 1996 letter received by the Cleveland, Ohio district office.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that, before review under section 8128(a), a claimant who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary.² As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.³ In the present case, appellant's hearing request was postmarked March 27, 1996, more than 30 days after the date of the Office's February 23, 1996 decision and appellant was not entitled to a hearing as a matter of right. The Office's Branch of Hearings and Review exercised its discretion and further considered the hearing request but determined that appellant could equally well pursue his claim by requesting reconsideration. Therefore, the Board finds that the Office properly denied appellant's request for a hearing under section 8124.

The Board has held that when a request for a hearing under section 8124(b)(1) and for reconsideration under section 8128 of the Act are simultaneously made, the Office must properly consider a claimant's request for a hearing first to avoid creating a conflict with the requirements of section 8124(b)(1) that a hearing may be granted only before review under section 8128(a).⁴ This was properly done in the instant case.

However, the Board finds that appellant's letter dated March 23, 1996 received by the Office's Cleveland, Ohio district Office on March 25, 1996, well within the time limitation for filing a request for reconsideration of the Office's February 23, 1996 decision, constitutes a

² See 5 U.S.C. § 8124(a).

³ See *Charles J. Prudencio*, 41 ECAB 499, 501 (1990); see also 20 C.F.R. § 10.131.

⁴ *Mary G. Allen*, 40 ECAB 190 (1988) (where the Board remanded the case to the Office to consider appellant's request for reconsideration under section 8128(a) following the denial of a hearing by the Branch of Hearings and Review); *Luis E. Colon*, 43 ECAB 1143 (1992).

timely request for reconsideration which was still before the Office pending a final decision. For this reason, the Board will remand the case to the Office for an appropriate final decision on appellant's March 23, 1996 request for reconsideration.⁵

Accordingly, the decision of the Office of Workers' Compensation Programs dated April 29, 1996 is affirmed. The decision dated February 23, 1996 is set aside.⁶

Dated, Washington, D.C.
March 1, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁵ *Supra*, note 4.

⁶ In light of the Board's disposition of this case, it is unnecessary for the Board to address the second issue.