

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY L. BETRO and DEPARTMENT OF LABOR, OCCUPATIONAL
SAFETY & HEALTH ADMINISTRATION, Sacramento, CA

*Docket No. 97-2123; Submitted on the Record;
Issued January 5, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

Appellant, a 47-year-old industrial hygienist, filed a Form CA-2 claim for benefits on October 6, 1992, alleging that he had sustained an ear infection, an ear-drainage condition and employment-related hearing loss due to frequent air travel and that he became aware this condition was caused or aggravated by his employment on September 18, 1992. The employing establishment controverted the claim, contending that appellant was never required to travel by plane and was provided with regular hours in which to travel by car.

In support of his claim, appellant submitted a March 11, 1993 report from Dr. John Champlin, a Board-certified family practitioner and appellant's treating physician. Dr. Champlin indicated that appellant had experienced mild intermittent problems with eustachian tube dysfunction (ear infection) in the past. He stated, however, that these problems had significantly worsened in the months preceding September 5, 1992, and that this exacerbation coincided with his employment-related traveling by air on a regular basis. Dr. Champlin stated that appellant was likely to have additional problems with his ear condition if he was required to fly on a regular basis.

In a report dated November 5, 1992, Dr. Richard D. Fantozzi, a Board-certified otolaryngologist, stated that he had treated appellant in September 1992 for significant ear fluid resulting from the flu and air travel. Dr. Fantozzi diagnosed a significant septal fracture and advised appellant to repair this condition.

By decision dated October 27, 1993, the Office denied appellant's claim for benefits, finding that he failed to submit medical evidence sufficient to establish that his ear condition was caused or aggravated by factors of employment.

By letter dated October 1, 1994, appellant requested that the Office reopen his claim. In the heading of the letter, appellant clearly stated, in block letters, that his home address was 7592 Linden Way, Ave., Citrus Heights, CA. 96510. This was the same address listed in the heading of the Office's October 27, 1993 decision. In support of his request, appellant submitted a September 15, 1994 report from Dr. Malcolm Ettin, a Board-certified otolaryngologist. Dr. Ettin stated that appellant had underwent surgery for placement of tubes for chronic eustachian tube dysfunction in December 1993. He related that appellant stated his symptoms had been aggravated by air travel and changing altitudes. Dr. Ettin opined that a patient with eustachian tube dysfunction would have an aggravation of his symptoms due to a change of altitude during flying or traveling by car. He advised that appellant's flying would have aggravated and been directly responsible for increasing his symptoms of pain, discomfort, middle ear fluid and hearing loss.

By decision dated January 20, 1995, the Office affirmed its previous decision, finding that appellant failed to submit evidence sufficient to warrant modification. In the heading of the decision, the Office indicated that appellant's address was 4312 Calcutta Way, Sacramento, CA, the address appellant had previously stated on his claim form but had since changed. The Office had evidently been notified of this change because it had listed his current home address at that time, 7592 Linden Way, Ave., Citrus Heights, CA, 96510 in its October 27, 1993 decision.¹

By letter dated August 13, 1996, appellant claimed that he never received any response to his October 1, 1994 request to have his claim reopened and requested that the Office notify him as to what had transpired following his submission of the request. Accompanying his request was a copy of the October 1, 1994 request for reconsideration of the Office's October 27, 1993 decision, which listed his current home address at the time, 7592 Linden Way, Ave., Citrus Heights, CA, 96510.

By decision dated November 21, 1996, the Office denied appellant's August 13, 1996 request for reconsideration of its January 20, 1995 decision. The Office found that appellant filed his request for reconsideration after the one-year time limit for filing, set forth in 20 C.F.R. § 10.138(b)(2), expired. The Office stated that it had reviewed appellant's case under 20 C.F.R. § 10.138(a) to determine whether he had presented clear evidence that the Office's final merit decision was erroneous, and had concluded that he had not presented such evidence.

Because more than one year has elapsed from the date of the Office's last merit decision on January 20 1995, to the date of filing of appellant's appeal with the Board on February 19, 1997, the Board lacks jurisdiction to review the Office's January 20 1995 decision which

¹ The Board notes that appellant obtained another new address subsequent to this decision, 4964 Kennington Drive, Sacramento, CA, 95841. The Office properly listed this address in its November 21, 1996 decision, which appellant received.

affirmed the Office's October 27, 1993 decision denying appellant's claim.² The only decision which the Board may review on appeal is the November 21, 1996 decision of the Office which denied appellant's request for reconsideration as untimely.

On appeal to the Board, appellant contends that he did not receive a copy of the Office's January 20, 1995 decision denying reconsideration of his claim.

The Office determined in this case that appellant failed to file a timely application for review. The Office stated in its November 21, 1996 decision that it had issued its last merit decision in this case on January 20, 1995, and that appellant requested reconsideration on August 13, 1996; thus, the Office found that appellant's reconsideration request was untimely as it was outside the one-year time limit.

The Board finds that the case is not in posture for decision, as the record contains substantial evidence that the Office erred by failing to mail a copy of its January 20, 1995 decision to appellant's proper address, and that therefore, the January 20, 1995 decision was never properly issued. As the January 20, 1995 decision was not properly issued, appellant's August 13, 1996 request for reconsideration must be considered timely.

It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.³ The presumption arises after it appears from the record that the notice was duly mailed and the notice was properly addressed.⁴ The Board has held that when a claimant maintains he did not receive notice of hearing, and the only evidence of notification shows an incorrect address, the presumption of receipt does not arise.⁵ This principle applies with equal force to all Office documents bearing on a claimant's entitlement to compensation; *e.g.*, an Office decision. In the instant case, the record contains presumptive, but convincing, evidence that the Office mailed its January 20, 1995 decision to appellant's old address, 4312 Calcutta Way, Sacramento, CA, 95843, despite the fact that appellant had provided the Office with notification of his new address. This evidence is derived from the Office's October 27, 1993 decision which, in the heading, properly listed appellant's new home address, 7592 Linden Way, Ave., Citrus Heights, CA, 96510. This listing by the Office of appellant's correct address, in October 1993, plainly indicates that appellant provided notice that he had changed his address and that the Office had actual knowledge of the new address at that time, and therefore erred in listing the old address in its January 20, 1995 decision. Accordingly, the Board finds that the Office's failure to list appellant's new home address in its January 20, 1995 decision, which provides presumptive evidence that the decision was not mailed to the correct address, supports appellant's contention on appeal that he never received a response to his October 1, 1994 letter.⁶ The Board therefore

² See 20 C.F.R. § 501.3(d)(2); *see also* *Herbert E. Widincamp*, 32 ECAB 1090 (1981).

³ *Edward Thomas Johnson*, 35 ECAB 910, 913 (1984); *George F. Gidicsin*, 36 ECAB 175, 178 (1984).

⁴ *See Jimmy O. Gilmore*, 37 ECAB 257, 262 (1985).

⁵ *Samuel Smith*, 41 ECAB 226 (1989).

⁶ *See Michelle R. Littlejohn*, 42 ECAB 463 (1991).

finds based on the evidence of record that the Office's January 20, 1995 decision was not properly issued.

Accordingly, the Board will set aside the Office's November 21, 1996 decision denying as untimely appellant's request for reconsideration. On remand, the Office should consider appellant's August 13, 1996 request for reconsideration, along with any argument or evidence submitted in support thereof, and determine whether his ear condition was caused or aggravated by factors of employment.

The November 21, 1996 decision of the Office of Workers' Compensation Programs is hereby vacated and remanded to the Office for a determination on the issue of whether appellant's ear condition was caused or aggravated by factors of employment.

Dated, Washington, D.C.
January 5, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member