

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DELORES E. SANDERS-CHAMPION and U.S. POSTAL SERVICE,
POST OFFICE, Royal Oak, MI

*Docket No. 97-2706; Submitted on the Record;
Issued July 3, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.¹

The Office accepted appellant's claim for back and chest strain with left trapezius spasm. Appellant began receiving appropriate benefits. By decision dated September 16, 1991, the Office terminated appellant's compensation benefits, stating that the evidence established that the disability resulting from the November 7, 1989 employment injury had ceased. The Office found that the opinion of the impartial medical specialist, Dr. Michael E. Holda, a Board-certified orthopedic surgeon, dated April 17, 1991 that appellant had recovered from the November 7, 1989 employment injury and could return to work constituted the weight of the evidence. Appellant subsequently requested an oral hearing before an Office hearing representative which was not held because, by decision dated April 30, 1992, the Office hearing representative vacated the September 16, 1991 decision, and remanded it for the Office to refer appellant to another impartial medical specialist. The Office hearing representative found that Dr. Holda's opinion was not probative because Dr. Holda appeared to be associated with the referral physician and it did not appear he was chosen using the proper rotation system.

By decision dated August 27, 1992, the Office suspended benefits finding that appellant did not appear for an appointment for an examination by another impartial medical specialist. Appellant requested an oral hearing before an Office hearing representative but, by decision dated November 22, 1994, the Office hearing representative vacated the Office's August 27, 1992 decision finding that appellant did not refuse to be examined or obstruct an examination and payment of appellant's compensation benefits should be resumed. The Office referred

¹ In an Order Vacating Prior Board Order and Reinstating Appeal dated March 9, 1999, Docket No. 97-2706, the Board found that it had jurisdiction to hear appellant's appeal as appellant timely and properly informed the Board that she had referred to the wrong date of the Office's decision she was appealing.

appellant to another impartial medical specialist, Dr. Michael E. Kosinski, a Board-certified orthopedic surgeon, who in a report dated January 18, 1995, opined that was not disabled and could work. By decision dated March 21, 1995, the Office terminated benefits based on Dr. Kosinski's opinion. Appellant requested an oral hearing before an Office hearing representative which was held on November 29, 1995. By decision dated March 14, 1996, the Office hearing representative affirmed the Office's March 21, 1995 decision.

By letter dated March 12, 1997, which was date stamped received on March 17, 1997, appellant requested reconsideration of the Office's decision.

By decision dated May 27, 1997, the Office denied appellant's reconsideration request as untimely and found that the evidence submitted presented no clear evidence of error on the part of the Office.

The Board finds that appellant's March 12, 1997 request for reconsideration was timely filed and that the case is not in posture for decision.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² The Office will not review a decision denying or terminating a benefits unless the application for review is filed within one year of the date of that decision.³ When an application for review is untimely, the Office takes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁴ Timeliness of the request for reconsideration is determined by the postmark on the envelope, if it is available, but if it is not available, the date of the letter should be used.⁵

In the present case, the envelope in which appellant mailed her request for reconsideration is not in the record, and the date of appellant's letter must be used. The date on the letter is March 12, 1997; therefore, appellant's request for reconsideration is timely, as it was filed within one year of the Office's March 14, 1996 decision. The Office's denial of appellant's reconsideration request as untimely therefore was in error.

To require the Office to reopen a case for reconsideration, 20 C.F.R. § 10.138(b)(1) provides, in relevant part, that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and the specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by: (1) showing that the Office erroneously applied or interpreted a point of law; (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁶ Section 10.138(b)(2)

² 5 U.S.C. § 8128(a).

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

⁴ *Thankamma Matthews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a) (August 1994).

⁶ 20 C.F.R. § 10.138(b)(1).

provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.⁷

In support of her March 12, 1997 request for reconsideration, appellant submitted medical reports from her treating physician, Dr. Howard L. Dubin, an osteopath, dated August 20 and November 28, 1995, a physical capacities evaluation from Dr. Dubin dated June 18, 1996, and a decision from the Social Security Administration dated September 24, 1996 awarding appellant disability benefits commencing November 8, 1989. Because the Office erroneously applied the clear evidence of error test, it did not analyze the evidence appellant submitted pursuant to section 10.138(b)(1) and (b)(2). The case must therefore be remanded for the Office to review the evidence appellant submitted and make the proper analysis pursuant to section 10.138(b)(1) and (2). The Office shall then issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated May 27, 1997 is hereby vacated and remanded for further consideration consistent with this opinion.

Dated, Washington, D.C.
July 3, 2000

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ 20 C.F.R. § 10.138(b)(2).