

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARGARETTA HICKMAN and U.S. POSTAL SERVICE,  
POST OFFICE, San Diego, CA

*Docket No. 98-1213; Submitted on the Record;  
Issued March 14, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied, as untimely, appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On October 22, 1984 appellant, a 39-year-old mail clerk, injured her lower back while lifting a sack of mail. She filed a claim for benefits on the date of injury, which the Office accepted for lumbar strain and herniated disc at L4-5. The Office paid her compensation for total disability for appropriate periods and placed her on the periodic rolls.

On January 9, 1994 appellant accepted a light-duty job with the employing establishment as a modified distribution clerk. By decision dated April 12, 1994, the Office found that appellant's wage-earning capacity was represented by her actual earnings of \$336.74 per week as a modified distribution clerk as of January 9, 1994 and that she had no loss of wage-earning capacity due to her employment injury.

On December 19, 1994 appellant, filed a Form CA-2 claim for benefits, alleging that she sustained a recurrence of disability, which was caused or aggravated by her October 22, 1984 employment injury.

By decision dated June 6, 1995, the Office denied appellant compensation for a recurrence of her accepted lower back injury. The Office also denied authorization for back surgery.

By letter dated June 21, 1995, appellant requested an oral hearing, which was held on September 12, 1996.

By decision dated October 28, 1996, the Office affirmed the previous decision denying the claim for recurrence of disability and authorization for surgery.

By letter dated January 28, 1997, appellant's attorney requested reconsideration.

By decision dated March 6, 1997, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

By letter and facsimile dated October 28, 1997, appellant's attorney requested reconsideration and submitted additional medical and factual information to support her claim.

By decision dated December 3, 1997, the Office denied appellant's October 28, 1997 request for reconsideration of its October 28, 1996 decision. The Office found that appellant failed to file her request for reconsideration within the one-year time limit for filing, set forth in 20 C.F.R. § 10.138(b)(2). The Office stated that, in the instant case, the one-year time limit expired on October 27, 1997 and that, therefore, appellant's request, "filed on October 28, 1997, is untimely." The Office further found that it had reviewed appellant's case under 20 C.F.R. § 10.138(a) to determine whether she had presented clear evidence that the Office's final merit decision was erroneous and had concluded that she had not presented such evidence.

The Board finds that the Office improperly denied as untimely appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application. The Secretary, in accordance with facts found on review, may

(1) end, decrease, or increase the compensation awarded; or award compensation previously refused or discontinued."<sup>1</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>2</sup> As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that the Office will not review a decision denying or terminating benefits

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<sup>1</sup> 5 U.S.C. § 8128(a). This section does not entitle a claimant to review as a matter of right. *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>2</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, a claimant may obtain review of the merits of his 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. 20 C.F.R. § 10.138(b).

unless the application for review is filed within one year of the date of that decision.<sup>3</sup> This regulation, however, does not specify when an application is “filed” for the purpose of determining timeliness. The Office has, therefore, administratively decided that the test used in 20 C.F.R. § 10.131(a) for determining the timeliness of a hearing request should apply to applications for review.<sup>4</sup> Accordingly, timeliness is determined by the postmark on the envelope, if available. Otherwise the date of the letter itself should be used<sup>5</sup>; in the instant case, the Office relied on the date of the letter and facsimile from appellant’s attorney, October 28, 1997.

The Office stated that appellant filed her reconsideration request on October 28, 1997, with accompanying new evidence but found that they were received outside of the one-year time period for requesting reconsideration, which expired on October 27, 1997. The Board, however, has held that, in computing a time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday.<sup>6</sup> Therefore, the one-year time period following the October 28, 1996 decision began running on the day after the decision, October 29, 1996 and the last day would be October 28, 1997.<sup>7</sup> Accordingly, the reconsideration request and the accompanying evidence which, as found by the Office, were filed on October 28, 1997, were filed within one year of the October 28, 1996 decision and were, therefore, timely. The Office, therefore, erred in determining that appellant failed to file a timely application for review.

Accordingly, the Board will set aside the Office’s December 3, 1997 decision denying as untimely appellant’s request for reconsideration and will remand the case to the Office for the purpose of exercising its discretionary authority under 5 U.S.C. § 8128(a). On remand, the Office should consider appellant’s October 28, 1997 request for reconsideration, along with any argument or evidence submitted in support thereof and should determine whether appellant may obtain review of the merits of her claim under 20 C.F.R. § 10.138(b)(1).<sup>8</sup>

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<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602, para. 3(b) (January 1990) (the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant’s application for review shows “clear evidence of error” on the part of the Office).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602, para. 3(a) (January 1990).

<sup>5</sup> *Douglas McLean*, 42 ECAB 759 (1991); *William J. Kapfhammer*, 42 ECAB 271 (1990); *see Lee F. Barrett*, 40 ECAB 892 (1989).

<sup>6</sup> *See John B. Montoya*, 43 ECAB 1148 (1992); *Marguerite J. Dvorak*, 33 ECAB 1682 (1982); *see also* FECA Program Memorandum No. 250 (January 29, 1979).

<sup>7</sup> October 28, 1997 fell on a Tuesday and was not a legal holiday.

<sup>8</sup> *See supra* note 3.

The decision of the Office of Workers' Compensation Programs dated December 3, 1997 is set aside and the case remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.  
March 14, 2000

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member