

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTY EMBRY and DEPARTMENT OF COMMERCE,
BUREAU OF CENSUS, Jeffersonville, IN

*Docket No. 98-2573; Submitted on the Record;
Issued May 5, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

This is the second appeal in the case. By decision dated December 3, 1996, the Board determined that appellant had established an employment incident on December 3, 1992 as alleged, but the medical evidence was insufficient to establish an injury causally related to the employment incident. The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

By decision dated June 1, 1998, the Office determined that appellant had submitted an untimely request for reconsideration that failed to show clear evidence of error.

The Board has reviewed the record and finds that appellant submitted a timely request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.³ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ As one such limitation, the Office has stated

¹ 5 U.S.C. § 8128(a).

² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁴ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against

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.⁵ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁶

In the present case, the Office determined that appellant did not request reconsideration until appellant's representative submitted a letter dated March 23, 1998. The March 23, 1998 letter, however, asserted that a December 30, 1996 request for reconsideration had previously been submitted and a copy of this letter was enclosed. A review of the December 30, 1996 letter indicates that it was addressed both to the Board and to the regional Office.⁷

The initial question present is whether the December 30, 1996 letter from appellant's representative constituted a request for reconsideration. The letter noted that the Board had issued a decision dated December 3, 1996, and stated that the purpose of the letter was to determine if appellant has "the right to reopen her case on remand and to request reconsideration from the district Office by submitting additional medical opinion evidence on the above issue." Appellant's representative further stated that, if she did not have that right, it should be considered a petition for reconsideration before the Board, but if she did have the right to request reconsideration, then appellant "would ask that the case be remanded to the [d]istrict Office." Since appellant clearly did have the right to reopen her case, the Board finds that appellant's letter must properly be considered as a request for reconsideration.

The case record submitted to the Board does not verify receipt of the December 30, 1996 letter by the regional Office. The only copy found is the copy that was enclosed with appellant's March 23, 1998 letter. The letter does, however, include the proper address for the regional Office. The Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an addressee in the ordinary course of business was received by the addressee.⁸ This presumption applies equally to the Office and claimant's representatives.⁹ In this case, the record contains a properly addressed request for reconsideration, with no probative evidence rebutting the presumption of receipt by the Office.

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).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ *See Leon D. Faidley, Jr., supra* note 2.

⁷ The Board received the letter and considered it a timely petition for reconsideration; an order denying the petition was issued on June 12, 1997.

⁸ *See Larry L. Hill*, 42 ECAB 596, 600 (1991).

⁹ *Bonnye Matthews*, 45 ECAB 657 (1994) (properly addressed request for reconsideration and indication from the attorney that it was mailed in the course of business was sufficient to establish presumption of receipt).

The Board finds that, under the mailbox rule, there is a presumption of receipt by the Office in this case.¹⁰ Accordingly, it is found that appellant did submit a December 30, 1996 request for reconsideration. As this is within one year of the last merit decision, appellant has submitted a timely request for reconsideration and the Office must consider the request under 20 C.F.R. § 10.138(b)(1). The case will be remanded for an appropriate decision by the Office.

The decision of the Office of Workers' Compensation Programs dated June 1, 1998 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

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

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ The December 30, 1996 letter states that the representative authorization was enclosed. It is presumed under the mailbox rule that the Office received such authorization, and the Board notes that the Director does not contest that appellant's representative was duly authorized.