

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JERRY GARRETT and U.S. POSTAL SERVICE,  
MAIN POST OFFICE, Winchester, KY

*Docket No. 98-2626; Submitted on the Record;  
Issued May 15, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

On August 2, 1994 appellant, then a 41-year-old mail carrier, filed a notice of traumatic injury and claim for compensation, Form CA-1, alleging that he injured his knee and leg that date after he fell in the employing establishment's vestibule.<sup>1</sup> Appellant stopped work and did not return.<sup>2</sup> By letter dated November 18, 1995, the employing establishment controverted the claim.

By decision dated April 9, 1996, the Office denied benefits because the record was devoid of any medical evidence.

Appellant timely requested a hearing before an Office hearing representative. Appellant submitted medical evidence in support of his claim and provided a statement dated April 23, 1996 describing his injury.

On November 19, 1996 an Office hearing representative held a hearing at which appellant had the opportunity to testify.

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<sup>1</sup> The record reveals that appellant filed a claim on July 22, 1994 alleging that he injured his knees as a result of a slip and fall on a recently painted sidewalk. On November 18, 1994 the Office accepted this claim for strain of both knees. The July 22, 1994 claim, however, is not before the Board on this appeal.

<sup>2</sup> The record reveals that on September 11, 1995 appellant retired on disability.

By decision dated January 23, 1997, the Office hearing representative found that appellant failed to establish a causal relationship between his back condition and the August 2, 1994 incident.<sup>3</sup>

On April 20, 1997 appellant requested reconsideration and submitted a medical report that had been previously submitted.

By decision dated May 14, 1997, the Office conducted a merit review but again found that the medical evidence was insufficient to warrant modification of the prior decision.

On May 14, 1998 appellant's attorney inquired as to the status of appellant's January 1, 1998 reconsideration request. On May 26, 1998 an Office claims examiner telephoned appellant's counsel and advised him that the Office had no record of any such correspondence and to resubmit it. In response, on May 28, 1998 appellant's attorney sent by both fax and mail a copy of the January 1, 1998 letter, requesting reconsideration and a new medical report from Dr. David Pursley dated October 2, 1997. The January 1, 1998 letter was addressed to the appropriate district Office and indicated that courtesy copies were sent to the employing establishment and to appellant. In this letter appellant's attorney requested reconsideration and argued that Dr. Pursley's October 2, 1997 report was new and material evidence. By letter dated May 27, 1998, appellant's counsel argued that he sent the reconsideration request and the enclosures accompanying it on or about January 1, 1998 by ordinary mail, postage prepaid to the Office. He further stated that the letter was never returned to him and he had every belief that the Office had received it. Appellant's counsel also noted that his May 14, 1998 letter, which was received by the Office, was mailed to the same address as the one mailed on January 1, 1998.

By decision dated June 2, 1998, the Office found that appellant's May 28, 1998 reconsideration was untimely filed and there was no evidence that the prior decision was in error.

The Board finds that the Office erred in finding that appellant's reconsideration request was untimely.

The only decision before the Board is the Office's June 2, 1998 decision denying appellant's request for reconsideration of the May 14, 1997 decision. Because more than one year had elapsed between the issuance of the decisions dated May 14 and January 23, 1997 and April 9, 1996 and August 26, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review those Office decisions.<sup>4</sup>

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<sup>3</sup> Although appellant initially claimed a knee injury on his CA-1 claim form, appellant subsequently alleged that the origin of all of his problems, including numbness in his legs and toes was a result of a back condition caused by his two falls. Several physicians concluded that appellant's medical problems were caused by transverse myelitis. They did not address the causal relationship between the August 2, 1994 work incident and his medical conditions. Dr. Pursley disagreed with the diagnosis of transverse myelitis and concluded that appellant had significant lesions in the thoracic spine at the T8-9 level. Dr. Pursley opined that, when appellant fell at work, he damaged his thoracic spine, rupturing the T8 disc, which caused numbness and pain in the legs.

<sup>4</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

Section 8128(a) of the Federal Employees' Compensation Act<sup>5</sup> 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 payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may -- (1) end, decrease, or increase the compensation awarded; or (2) award compensation previously refused or discontinued.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that “the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision.” 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).<sup>6</sup>

On appeal, appellant's counsel argues that the “mailbox rule” is applicable in this case. The record reveals that, on May 14, 1998, appellant's attorney inquired about the status of a January 1, 1998 reconsideration request he submitted to the Office. When advised by an Office claims examiner on May 26, 1998 that the Office had no record of the request, the attorney immediately both faxed and mailed, with the enclosures, a copy of the January 1, 1998 letter, in which he specifically requested reconsideration and presented arguments. The original of this letter is not contained in the case record, but the “mailbox rule” raises a presumption that the Office received this letter, as the copy shows a proper address and the attorney indicated it was mailed in the ordinary course of his business.<sup>7</sup> The Board, therefore, finds that the January 1, 1998 request was duly mailed and represents a timely request for reconsideration. Consequently, the June 2, 1998 Office decision is vacated and the case is remanded to the Office for a determination whether appellant may obtain review of the merits of his claim under 20 C.F.R. § 10.138(b)(1).

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<sup>5</sup> 20 C.F.R. § 8128(a).

<sup>6</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>7</sup> See *Bonnye Mathews*, 45 ECAB 657 (1994) (where the Board found that the “mailbox rule” raised a presumption, which was not rebutted, that the Office received the original letter, as the copy showed a proper address and the attorney indicated that the letter was mailed in the ordinary course of business); see also *Joan F. Martin*, 51 ECAB \_\_\_\_ (Docket No. 98-687, issued October 13, 1999); *Larry L. Hill*, 42 ECAB 596 (1991).

The decision of the Office of Workers' Compensation Programs dated June 2, 1998 is hereby set aside and the case is remanded for further development consistent with this opinion.

Dated, Washington, D.C.  
May 15, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member