

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELLIS HADNOT and DEPARTMENT OF VETERANS AFFAIRS,
OLIN E. TEAGUE VETERANS ADMINISTRATION CENTER, Temple, TX

*Docket No. 99-1495; Submitted on the Record;
Issued February 16, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

On June 28, 1995 appellant filed a claim for stress and depression sustained in the performance of his duties as a computer programmer analyst. By letter dated September 27, 1995, the Office advised appellant that it needed further information on his claim including a detailed description of the employment conditions and incidents to which he attributed his illness. By decision dated December 4, 1995, the Office found that fact of injury was not established, as appellant had not submitted a statement describing the events that allegedly resulted in his depressive condition.

Appellant requested a hearing, which was held on September 23, 1997. By decision dated November 26, 1997, an Office hearing representative found that the evidence did not establish that appellant sustained an injury in the performance of duty, as he had not submitted a statement on factors of employment to which he attributed his condition. This decision was accompanied by a cover letter dated December 1, 1997, signed by the Office hearing representative advised appellant of the case record's return to the Office and of his appeal rights.

By letter dated December 2, 1998, appellant, through his attorney, requested reconsideration of the Office hearing representative's decision. Accompanying this request was an affidavit from appellant describing factors of his employment to which he attributed his condition and a medical report from his attending physician. This request for reconsideration was stamped as received by the Office on December 1, 1998. By decision dated December 7, 1998, the Office found that appellant's request for reconsideration was not filed within the one-year time limit set forth at 20 C.F.R. § 10.138(b)(2) and that it did not demonstrate clear evidence of error.

By letter dated December 18, 1998, appellant, through his attorney, requested reconsideration of the Office's December 7, 1998 decision. His attorney noted that the cover letter accompanying the Office hearing representative's decision was dated December 1, 1997 and that he inadvertently dated his reconsideration letter December 2, 1998, even though it was telefaxed to the Office on November 30, 1998 and delivered to the Office on December 1, 1998. By decision dated January 8, 1999, the Office found that appellant's request for reconsideration was not filed within the one-year time limit set forth at 20 C.F.R. § 10.138(b)(2) and that it did not demonstrate clear evidence of error.

The only Office decisions before the Board on this appeal are the Office's January 8, 1999 and December 7, 1998 decisions denying appellant's requests for reconsideration on the basis that they were not filed with the one-year time limit set forth by 20 C.F.R. § 10.138(b)(2) and did not present clear evidence of error. Since more than one year elapsed between the date of the Office's most recent merit decision on November 26 or December 1, 1997 and the filing of appellant's appeal on March 4, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.¹

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 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).²

The Board finds that appellant's request for reconsideration was timely filed within the one-year limit set forth at 20 C.F.R. § 10.138(b)(2).

Although appellant's request for reconsideration was dated December 2, 1998, it is stamped as received by the Office on December 1, 1998. This date stamping by the Office establishes that the request for reconsideration was in fact filed on December 1, 1998.

¹ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board is filed within one year of the date of the Office final decision being appealed.

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

An Office hearing representative's decision, from which reconsideration was requested, was dated November 26, 1997. However, the cover letter accompanying this decision and containing appellant's appeal rights was also dated December 1, 1997. The Board finds that the Office hearing representative's decision was mailed to appellant on December 1, 1997.

Where an Office hearing representative prepares his decision on one date, which appears on the decision, but does not mail it to appellant until a later date appearing on a cover letter accompanying the decision, the date of issuance, for purposes of computing when time begins to run to file a request for reconsideration, will be considered the date of mailing. This is consistent with the Office's regulation in place at the time of the Office's December 7, 1998 decision, which stated that the Office hearing representative "shall terminate the hearing by mailing a copy of the decision, setting forth the basis therefor, to the claimant's last known address and to the claimant's representative, if any."³ It is also consistent with Board decisions finding that an Office decision was not properly issued where it was sent to an incorrect address⁴ or where the decision was not sent to the claimant's authorized representative.⁵

As the Office hearing representative's November 26, 1997 decision was not properly issued until it was mailed to appellant on December 1, 1997, appellant's request for reconsideration filed with the Office on December 1, 1998 was timely under 20 C.F.R. § 10.138(b).⁶ The case will, therefore, be remanded to the Office to consider appellant's timely request for reconsideration under the appropriate standard of review.

³ 20 C.F.R. § 10.136.

⁴ *Tammy J. Kenow*, 44 ECAB 619 (1993).

⁵ *Thomas H. Harris*, 39 ECAB 899 (1988).

⁶ See *John B. Montoya*, 43 ECAB 1148 (1992) for a discussion of the computation of the beginning and ending dates of this one-year limit.

The decisions of the Office of Workers' Compensation Programs dated January 8, 1999 and December 7, 1998 are set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
February 16, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member