

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSEMARIE T. THOMPSON and U.S. POSTAL SERVICE,
POST OFFICE, Pittsburgh, PA

*Docket No. 00-2719; Submitted on the Record;
Issued March 4, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's May 15, 2000 request for reconsideration on the grounds that it was untimely and failed to show clear evidence of error.

In a decision dated May 14, 1999, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office found that the evidence appellant submitted was insufficient to support her contention that she suffered greater than a 10 percent loss of use of her left arm, for which she received a schedule award. In an attached statement of review rights, the Office notified appellant that any request for reconsideration must be made "within one year of the date of the decision."

In a letter dated May 11, 2000 but postmarked May 15, 2000, appellant submitted evidence and requested reconsideration.

In a decision dated May 25, 2000, the Office denied appellant's request. The Office found that the request was not filed within a year of the previous decision. The Office also found that no argument was made for clear evidence of error.

An appeal to the Board must be mailed no later than one year from the date of the Office's final decision.¹ Because appellant mailed her August 29, 2000 appeal more than one year after the Office's May 14, 1999 merit decision, the Board has no jurisdiction to review that decision. The only decision that the Board may review is the Office's May 25, 2000 decision denying appellant's May 15, 2000 request for reconsideration. Therefore, the only issue before the Board is whether the Office abused its discretion in denying that request.

The Board finds that the Office abused its discretion in denying appellant's May 15, 2000 request for reconsideration.

¹ 20 C.F.R. § 501.3(d) (time for filing); *see id.* at § 501.10(d)(2) (computation of time).

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.”²

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. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the employing establishment within the time period allowed.³ The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁴

The most recent decision on the merits of appellant's claim was the Office's May 14, 1999 decision denying an additional schedule award. As the statement of review rights attached to that decision explained, appellant had one year from the date of the decision, or until May 14, 2000, to make any request for reconsideration. Appellant's request was postmarked on May 15, 2000, ostensibly one day after the time limitation had expired. It was for this reason that the Office found appellant's request untimely and applied the “clear evidence of error” standard.

As the calendar shows, however, the one-year period for filing a request for reconsideration fell on May 14, 2000, a Sunday. In modern common law it is commonly understood in judicial and quasi-judicial or administrative proceedings that when the last day to perform an act falls on a nonbusiness day the time is extended to the next regular business day.⁵ The Board has applied this rule to determine questions of timeliness arising under the Act.⁶ Appellant, therefore, had until May 15, 2000 to make her request for reconsideration. Because her request was postmarked on May 15, 2000, the Board finds that her request was timely filed.

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of the standards described

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a) (1999).

⁴ *Id.* at § 10.607(b).

⁵ *Robert E. Kennedy*, 20 ECAB 349, 350 (1969) (quoting *Wirtz v. Local Union 169*, 246 F. Supp. 741 (D.C. Nev. 1965)).

⁶ *John B. Montoya*, 43 ECAB 1148 (1992) (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, Sunday or legal holiday).

in section 10.606(b)(2) of the regulations.⁷ Section 10.606(b)(2) provides that an application for reconsideration, including all supporting documents, must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁸ If the Office grants reconsideration, the case is reopened and reviewed on its merits. Where the request is timely but fails to meet at least one of the standards described, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁹

The Board will set aside the Office's May 25, 2000 decision and remand the case to the Office for a proper exercise of its discretionary authority under 5 U.S.C. § 8128(a). On remand, the Office shall determine whether appellant's May 15, 2000 request for reconsideration, together with any argument or evidence submitted in support thereof, meets at least one of the standards for obtaining a merit review of her claim under section 10.606(b)(2) of the regulations. The Office shall then issue an appropriate final decision.

The May 25, 2000 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
March 4, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ 20 C.F.R. § 10.608(a).

⁸ *Id.* at § 10.606(b)(2).

⁹ *Id.* at § 10.608.