

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KAREN M. REID and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Louisville, KY

*Docket No. 00-2112; Submitted on the Record;  
Issued May 3, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

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

In a decision dated October 20, 1998, the Office terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2) because she refused an offer of suitable employment.<sup>1</sup>

Appellant requested reconsideration.

In a decision dated April 13, 2000, the Office denied appellant's request because it was untimely and failed to show clear evidence of error. The Office explained that appellant's request was dated October 12, 1999 but was faxed to the Office on December 27, 1999, more than one year after the October 20, 1998 decision terminating compensation. Although appellant's attorney asserted that he mailed the original on October 12, 1999, the Office stated that it had no record of receipt: "The request for reconsideration is not shown to have been received within one year of the last merit review of the claim."

Having found appellant's request to be untimely, the Office noted that none of the medical records submitted specifically commented on appellant's ability to perform the job that was offered to her. As the evidence did not address the issue on which compensation benefits were denied, the evidence was found to be immaterial and not sufficient to establish clear evidence of error.

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

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<sup>1</sup> Appellant mailed her appeal to the Board on May 20, 2000, more than a year after the Office's October 20, 1998 decision. The Board, therefore, has no jurisdiction to review whether the Office properly terminated appellant's compensation. 20 C.F.R. §§ 501.3(d), 501.10(d)(2) (time for filing appeal, 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."<sup>2</sup>

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(a) provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The regulation continues:

"If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date."<sup>3</sup>

The Office found appellant's request for reconsideration to be untimely because it was faxed on December 27, 1999, more than a year after its October 20, 1998 decision terminating compensation, and there was no record of any earlier receipt. The Board has carefully examined the case file and finds that the Office did, in fact, receive appellant's request for reconsideration prior to the facsimile transmission of December 27, 1999. The original letter requesting reconsideration can be found at page 54 of the record. The Office date-stamped this letter October 25, 1999, showing receipt after the October 20, 1999 deadline, but as 20 C.F.R. § 10.607(a) makes clear, it is the date of mailing, not the date of receipt, that determines whether a request is timely.

The record does not include the envelope that carried appellant's request, so the best evidence to establish the date of mailing is unavailable. Other evidence must therefore be used. The letter itself is dated October 12, 1999, and appellant's attorney has advised that he mailed the letter on that date. The Board finds that this evidence is sufficient to establish that appellant sent her request for reconsideration within one year of the Office's October 20, 1998 decision terminating compensation.

The Board will set aside the Office's April 13, 2000 decision denying appellant's request as untimely. The Board will remand the case to the Office for a proper exercise of its

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.607(a) (1999).

discretionary authority under 5 U.S.C. § 8128(a) and for an appropriate final decision on appellant's timely request for reconsideration.<sup>4</sup>

The April 13, 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  
May 3, 2002

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>4</sup> Timely requests require a different standard of review. *Compare* 20 C.F.R. § 10.606(b) (1999) (timely requests) with 20 C.F.R. § 10.607(b) (untimely requests).