

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY HAMLETT and U.S. POSTAL SERVICE,
POST OFFICE, Gilbert, AZ

*Docket No. 02-1749; Submitted on the Record;
Issued March 24, 2003*

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 filed and failed to demonstrate clear evidence of error.

On September 2, 1997 appellant, then a 34-year-old letter carrier, filed a traumatic injury claim alleging that she sustained an injury while lifting parcels on August 27, 1997 in the performance of duty. The Office accepted the claim for sprained lumbar region.¹ Appellant stopped work and returned intermittently to light duty beginning October 8, 1997. On February 4, 1999 appellant filed a claim for compensation for continuing disability from February 2 to 4, 1999.

By decision dated March 29, 1999, the Office denied appellant's claim for continuing disability on the grounds that the evidence of record established that she no longer suffered residuals or had any continuing disability as a result of the accepted injury of August 27, 1997. The Office decision was based on the opinions of Dr. Michael Winer, a Board-certified orthopedic surgeon and attending physician and Drs. Zoran Maric and Borislav Stojic, Board-certified orthopedic surgeons and Office referral physicians. Each physician concluded that there was no evidence of physical limitations resulting from work-related disability and that magnetic resonance imaging (MRI) scans and x-rays performed to date provided mild disc bulging but no significant abnormality. The Office referral physicians both concluded that appellant was fit for regular duty with no restrictions. Dr. Winer opined that appellant should seek a change in job description to a job less physically demanding because of her degenerative disc disease.

¹ The Board notes that appellant has filed eight separate claims with the Office, six of which have been accepted for various injuries related to her federal employment. Appellant also filed a recurrence of disability claim dated April 7, 1999, in relation to the August 27, 1997 injury. The record does not reflect that a disposition has been made in that case.

In a letter dated April 17, 1999, appellant requested an oral hearing. A hearing was held on August 4, 1999 and additional evidence was submitted in support of appellant's claim on September 23, 1999.

By decision dated December 1, 1999, an Office hearing representative affirmed the March 29, 1999 decision. The Office hearing representative found that the medical evidence of record failed to support that appellant's disability on or after February 2, 1999, as being in any way causally related to the accepted employment injury sustained on August 27, 1997.

In a letter dated April 30, 2001, received by the Office on May 3, 2001, appellant, through her attorney, Kathi G. Hamby, requested reconsideration. Appellant's attorney argued that appellant submitted a request for reconsideration on November 30, 2000, however, never received a decision. Ms. Hamby further argued that appellant's accepted condition should be upgraded to symptomatic annular tears at L3-4 and L4-5 and asymptomatic tears at L5-S1 based on an August 9, 1999 discography and findings in a December 15, 1999 report from Dr. Thomas Grade, a Board-certified anesthesiologist. Ms. Hamby asserted that this evidence supported a merit review of the case. Appellant's attorney further argued that the Office hearing representative in the last merit decision improperly relied on the opinions of Office referral physicians because their reports were not based on the complete medical record.

Appellant subsequently submitted a certified mail receipt, which indicated that her regional Office received correspondence on November 30, 2000, which she argued contained her November 30, 2000 request for reconsideration.

By decision dated February 25, 2002, the Office denied appellant's request on the grounds that the request was untimely and failed to present clear evidence of error.

The only Office decision before the Board on this appeal is the February 25, 2002 decision denying appellant's request for reconsideration. More than one year has elapsed between the date of the Office's most recent merit decision on December 1, 1999, which affirmed the denial of appellant's claim for continuing disability related to the August 27, 1997 injury and the filing of appellant's appeal on June 3, 2002. The Board lacks jurisdiction to review the merits of appellant's claim.²

The Board has reviewed the record and finds that the case is not in posture for decision.

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵ The Office, through its regulations, has imposed limitations on the exercise of

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

³ 5 U.S.C. § 8128(a).

⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of

its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated 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.⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁷

In this case, the Office considered the date of appellant's request for reconsideration of the December 1, 1999 decision to be April 30, 2001, the date appellant's counsel inquired about the status of an earlier November 30, 2000 request for reconsideration. The Office acknowledged in its decision that appellant's representative wrote in her cover letter on April 30, 2001 that the reconsideration request was originally sent to the District Office on November 30, 2000. The Office further noted that in her correspondence, the representative provided a "date" of November 30, 2000 and a date "resubmitted" as April 30, 2001. The Office found that the April 30, 2001 request of the merit decision was untimely.

It is well established that, in the absence of evidence to the contrary, there is a presumption that a properly addressed notice mailed in the ordinary course of business is received by the addressee.⁸ The presumption of receipt under the "mailbox rule" applies equally to the Office as well as to claimants.⁹ In this case, the reconsideration request from appellant's representative dated April 30, 2001 purports that it was previously mailed in the ordinary course of business on November 30, 2000. The record reflects that appellant submitted a postal receipt, evidencing that she mailed correspondence to the correct address of her regional Office on November 30, 2000, which allegedly contained the November 30, 2000 reconsideration request. Although the original request dated November 30, 2000 is not contained in the record, the mailbox rule raises a presumption of receipt by the Office. In the February 25, 2002 decision, the Office does not discuss the presumption created by the mailbox rule, nor does it cite evidence rebutting the presumption. The Board will therefore remand the case for proper consideration of whether appellant has submitted a timely request for reconsideration. After such further development as it deems necessary, the Office should issue an appropriate decision.

compensation at any time on his own motion or on application."

⁶ 20 C.F.R. § 10.607(a).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, supra note 4.

⁸ See, e.g., *Jimmy O. Gilmore*, 37 ECAB 257, 262 (1985).

⁹ *Bonnye Matthews*, 45 ECAB 657 (1994); *Larry L. Hill*, 42 ECAB 596 (1991).

The decision of the Office of Workers' Compensation Programs dated February 25, 2002 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
March 24, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member