

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**R.R., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
New Orleans, LA, Employer**

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**Docket No. 06-767  
Issued: September 11, 2006**

*Appearances:*

*Bettye L. Richardson, for the appellant  
Miriam D. Ozur, Esq., for the Director*

Oral Argument July 12, 2006

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On February 14, 2006 appellant filed a timely appeal of the November 25, 2005 decision of the Office of Workers' Compensation Programs, which denied further merit review on the basis that his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated August 7, 1997 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

**ISSUE**

The issue is whether the Office properly found that the issue presented was clear evidence of error. On appeal, appellant argues that he timely filed a request for an oral hearing in August 1997.

**FACTUAL HISTORY**

This case is before the Board for the third time. In a May 11, 2000 decision, the Board found that the Office properly denied appellant's request for a hearing under section 8124 of the

Federal Employees' Compensation Act.<sup>1</sup> In the second appeal, the Board found that the Office properly found that appellant's June 11, 2000 request for reconsideration was untimely filed and did not establish clear evidence of error.<sup>2</sup> The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

In a letter dated February 18, 2005, appellant requested reconsideration and an oral hearing before the Office. He advised that he was enclosing a copy of his request for oral hearing dated August 21, 1997, which was addressed and sent to the U.S. Department of Labor, the Office, Dallas, Texas, on August 21, 1997. He further stated that the "[a]ffidavit from Attorney Cameron's office along with the letter dated August 21, 1997 *show clear evidence of error on the part of the Office which [c]laimant is therefore requesting review.*" (Emphasis in the original.) Enclosed were a copy of an August 21, 1997 letter from Attorney Nelson W. Cameron, Esq., addressed to the Office, 525 Griffin Street, Suite 100, Dallas, Texas 75202, which indicated that the claimant was a client and had authorized him to request an oral hearing on his behalf in regard to the Office's August 7, 1997 decision. In a November 1, 1999 affidavit, Bonnie Rains, secretary to Mr. Cameron, indicated that her daily mail-log sheet of August 22, 1997 showed that the August 21, 1997 letter of Mr. Cameron was placed in the outgoing regular mail on August 22, 1997 and that it was customary for the regular mail to be picked up daily by a U.S. postal carrier. A copy of the August 20, 1997 daily log was provided, which contained appellant's name. With his reconsideration request, appellant also submitted various copies of medical records and coworker statements, which were previously of record.

In an April 28, 2005 letter, the Office advised appellant that it could not rule on appellant's February 18, 2005 request for an oral hearing.

By decision dated November 25, 2005, the Office denied appellant's request for reconsideration finding that it was untimely filed and did not establish clear evidence of error. The Office found that appellant had not presented any legal argument which established an error in the previous decisions of the Office nor did he present pertinent new evidence addressing the issue of causal relationship as outlined in the August 7, 1997 Office decision.

An oral argument was held before the Board on July 12, 2006 at which appellant contended that he timely filed his request for an oral hearing in August 1997.

### **LEGAL PRECEDENT**

Section 8128(a) of the Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.<sup>4</sup> The Office, through

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<sup>1</sup> Docket No. 99-602 (issued May 11, 2000).

<sup>2</sup> Docket No. 02-695 (issued June 18, 2003).

<sup>3</sup> 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>5</sup> One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.<sup>6</sup> In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents clear evidence of error on the part of the Office in its most recent merit decision.<sup>7</sup>

The Board has found that when a request for a hearing under section 8124(b)(1) and for reconsideration under section 8128 of the Act are simultaneously made, the Office must properly consider a claimant's request for a hearing first to avoid creating a conflict with the requirements of section 8124(b)(1) that a hearing may be granted only before review under section 8128(a).<sup>8</sup>

The Board has held that the Office's delay in processing appellant's request for a hearing effectively denied appellant the opportunity to obtain merit review of his claim, and thus, constituted an abuse of discretion.<sup>9</sup>

### ANALYSIS

The Office found that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>10</sup> The most recent merit decision in this case was the Office's August 7, 1997 decision. Since appellant's February 18, 2005 request for reconsideration was submitted more than one year after this decision, it was untimely. Consequently, appellant must demonstrate clear evidence of error on the part of the Office in denying his claim for compensation.<sup>11</sup>

Appellant has contended that his request for an oral hearing in 1997 was timely filed. He submitted the August 21, 1997 letter from his attorney, an affidavit from counsel's secretary, who noted that appellant was a client and that her daily mail-log indicated that the letter was sent; and a copy of the log. The Office never addressed appellant's argument and evidence in support of the procedural error pertaining to his request for an oral hearing in August 1997. The Director has argued that the showing that appellant should have been granted an oral hearing does not constitute clear evidence of error as it does not raise any doubt as to the denial of his

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<sup>5</sup> 20 C.F.R. § 10.607 (1999).

<sup>6</sup> 20 C.F.R. § 10.607(a) (1999).

<sup>7</sup> 20 C.F.R. § 10.607(b) (1999).

<sup>8</sup> See *Mary G. Allen*, 40 ECAB 190 (1988).

<sup>9</sup> *Marilyn F. Wilson*, 51 ECAB 234 (1999). See also *Brian R. Leonard*, 43 ECAB 255, 259-60 (1991).

<sup>10</sup> *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

<sup>11</sup> 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB \_\_ (Docket No. 03-2223, issued January 9, 2004).

August 7, 1997 compensation claim, which was based on insufficient evidence. The Board notes, however, that a claimant is entitled to a hearing as a matter of right if the request for a hearing is filed within the requisite 30 days after the date of issuance of the Office's decision on the claimant's claim for compensation and before a request for reconsideration under section 8128.<sup>12</sup> The Office was obligated to make a finding on appellant's argument of whether he had timely filed a request for an oral hearing on August 21, 1997.<sup>13</sup> The Office's failure to do so, in this instance, created a delay which compromised appellant's opportunity to obtain a merit review before the Board.<sup>14</sup> Consequently, on remand, the Office should evaluate the evidence and argument appellant submitted on reconsideration and determine whether he had timely requested a hearing of the August 7, 1997 decision and issue an appropriate decision. In the event the Office denies appellant's request for a hearing, the Office should grant appellant a merit review.<sup>15</sup>

### **CONCLUSION**

The Board finds that the Office did not address appellant's evidence and argument that he had timely filed a request for a hearing on August 21, 1997. Accordingly, the Board will remand the case for the Office to review this argument and evidence and to undertake any appropriate additional development it deems necessary.

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<sup>12</sup> *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

<sup>13</sup> *Supra* note 8.

<sup>14</sup> *Supra* note 9.

<sup>15</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 25, 2005 decision of the Office of Workers' Compensation Programs is affirmed in part and the case remanded to the Office for further proceedings consistent with this opinion of the Board.

Issued: September 11, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board