



On appeal appellant, through his attorney, contends that the hearing representative committed various errors in denying appellant's claim and that, the Office delayed responding to his November 12, 2008 reconsideration request, thereby depriving appellant of his right to have his claim reviewed on the merits.

### **FACTUAL HISTORY**

On October 24, 2005 appellant, then a 56-year-old financial management specialist, filed an occupational disease claim alleging that he sustained depression and an anxiety disorder caused or aggravated by his federal employment. He first started to experience anxiety and depression in December 2000. Appellant attributed his condition to chronic obstructive pulmonary disease and work-related stress. He listed various causes for his emotional condition including, two on-the job injuries that caused constant pain while attempting to perform his job. Specific aspects of his work were very stressful, his duties on a particular project were undefined and he received directions from more than one person. Appellant contended that he had to meet impossible and unrealistic deadlines, did not have sufficient staff to help with his work, and had not received appropriate training. He also alleged instances of harassment and a hostile work environment.

By decision dated August 21, 2006, the Office denied appellant's claim finding that his injury did not arise in the performance of duty.

On September 14, 2006 appellant requested a hearing which was held on December 12, 2007.

In a decision dated February 25, 2008, an Office hearing representative affirmed the August 21, 2006 denial of appellant's claim. The hearing representative found that appellant did not establish a compensable work factor.

In a facsimile transmittal dated March 18, 2009, appellant, through his attorney, inquired about when he could "expect a decision on the Request for Reconsideration dated November 12, 2008." Appellant's attorney was concerned that the Office's delay in deciding the reconsideration request would deprive the Board of jurisdiction to review the merits of the February 25, 2008 decision. By letter dated March 27, 2009, the Office informed counsel that appellant had not submitted any request for reconsideration and that there had been no activity on his claim since April 7, 2008.

By letter dated November 12, 2008, received by the Office on March 31, 2009, appellant requested reconsideration, through his attorney.<sup>2</sup> Counsel alleged several errors by the hearing representative and submitted a statement from Charlotte Casey. The employing establishment responded to appellant's request for reconsideration, contending that appellant failed to establish that the hearing representative erred in denying his claim for an emotional condition.

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<sup>2</sup> Appellant's attorney also submitted a "print history" indicating that he mailed the November 12, 2008 letter on the same date to the Office at London, Kentucky.

In a June 23, 2009 decision, the Office denied appellant's request for reconsideration without reviewing the merits of the case. It noted that the issues raised by counsel were previously addressed and that Ms. Casey's statement was irrelevant to the claim.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>4</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>5</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>6</sup>

### **ANALYSIS**

The Board finds that the Office improperly failed to review the merits of appellant's claim.

In a February 25, 2008 decision, the hearing representative affirmed the denial of appellant's claim. Appellant's attorney submitted a copy of a letter dated November 12, 2008 requesting reconsideration. He also submitted a print history record offering further support that he mailed this letter on that date to the London, Kentucky district Office. However, the Office indicated that it received this request on March 31, 2009.

The Board has found that in the absence of evidence to the contrary, it is presumed that a notice mailed in the ordinary course of business was received in due course by the intended recipient. This presumption is commonly referred to as the mailbox rule. It arises when the record reflects that the notice was properly addressed and duly mailed.<sup>7</sup> The Board has held that the presumption of receipt under the mailbox rule applies equally to claimants and the Office alike. Provided that the conditions which give rise to the presumption remain the same, namely, evidence of a properly addressed letter together with evidence of proper mailing, the mailbox rule may be used to establish receipt by the Office.<sup>8</sup>

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<sup>3</sup> 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b)(2).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(b).

<sup>7</sup> *Kenneth E. Harris*, 54 ECAB 502, 505 (2003).

<sup>8</sup> *Id.*; see also *Larry L. Hill*, 42 ECAB 596 (1991).

In the instant case, appellant, through counsel, submitted sufficient evidence to establish that he mailed a request for reconsideration on November 12, 2008. The request for reconsideration was properly addressed to the Office, mailed in the due course of business and properly addressed to the Office at its London, Kentucky address. Counsel submitted a print history detailing correspondence sent from his office on that date. His correspondence to the Office is listed on that date. There is no evidence to rebut the presumption that a letter properly addressed and mailed in the due course of business, such as in the course of counsel's practice, arrived at the mailing address in due course. Accordingly, the Board finds that appellant, filed a request for reconsideration on November 12, 2008.

Office procedures provide that if a reconsideration decision is delayed beyond 90 days, and the delay would jeopardize a claimant's ability to seek a merit review of his claim before the Board, the Office should conduct a merit review and issue a decision so as to protect appellant's right to appeal.<sup>9</sup> In this case, appellant filed his appeal of the hearing representative's February 25, 2008 decision on November 12, 2008. The Office did not issue its decision denying appellant's request for reconsideration until June 23, 2009, over 90 days after the request was filed. It did not review the merits of appellant's case in denying reconsideration. As appellant had until February 24, 2009 to file an appeal with the Board requesting reconsideration of the merits of his case<sup>10</sup> and 90 days after the November 12, 2008 letter, February 9, 2009 would have allowed him adequate time to request review of the merits of his appeal. The Office's delay in issuing a decision jeopardized appellant's appeal rights by effectively preventing appellant from obtaining merit review of the February 25, 2008 decision. This action was not consistent with the provisions of the Office's procedure manual.

The Board will set aside the June 23, 2009 decision and remand the case to the Office for merit review of the February 25, 2008 decision. Following this and such other development of the record as it deems necessary, the Office shall issue an appropriate merit decision.

### CONCLUSION

The Board finds that the Office abused its discretion in refusing to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

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<sup>9</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (May 1996); see also Ronald A. Eldridge, 53 ECAB 218 (2001).

<sup>10</sup> The February 25, 2008 decision was issued prior to November 19, 2008; accordingly, appellant had one year to request reconsideration before this Board. See *supra* note 1.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 23, 2009 is set aside and the case is remanded for action consistent with the terms of this decision.

Issued: July 19, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board