United States Department of Labor
Employees' Compensation Appeals Board

WILLIE M. JOHNSON, Appellant	)	
	)	**Docket No. 04-1991**
and	)	**Issued: January 31, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Hackensack, NJ, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 9, 2004 appellant filed a timely appeal of a June 30, 2004 decision of the Office of Workers' Compensation Programs, denying his request for reconsideration. Pursuant to 20 C.F.R. § 501.3, the Board has jurisdiction over decisions issued within one year of the filing of the appeal. As the June 30, 2004 decision is the only decision within one year of the filing of this appeal, the Board's jurisdiction is limited to a review of that decision.

ISSUE

The issue is whether the Office properly denied appellant's September 18, 2003 request for reconsideration.

FACTUAL HISTORY

The case was before the Board on a prior appeal.[1] The Office accepted a concussion and scalp contusion in the performance of duty on November 20, 1980. By decision dated April 24,

[1] Docket No. 01-2127 (issued June 12, 2002).

2000, the Office terminated his compensation benefits. The Board reviewed a May 11, 2001 Office decision and found that appellant had submitted sufficient evidence on reconsideration to warrant a merit review of the claim. The case was remanded to the Office for a merit decision.

By decision dated October 30, 2002, the Office denied modification of the April 24, 2000 termination decision. Appellant requested reconsideration by letter dated November 6, 2002. In a decision dated January 7, 2003, the Office determined that the evidence submitted was not relevant and was insufficient to warrant further merit review of the claim.[2]

In a letter dated September 18, 2003, appellant, through his authorized representative, requested reconsideration of the October 30, 2002 decision.[3] The letter is marked as received on September 29, 2003; the record does contain a postmark date. Appellant also submitted a report dated September 5, 2003 from Dr. Alan Clark, a psychiatrist and neurologist.

On June 30, 2004 the Office issued a decision with respect to the reconsideration request. In the decision, the Office initially stated that to require the Office to reopen the case, appellant must either submit relevant evidence or legal contentions not previously considered, or demonstrate that there was "clear evidence of error" by the Office. With respect to the evidence, the Office noted appellant's arguments and stated that no other factual or medical evidence was received. As to the basis for the decision, the Office stated that appellant did not present any new evidence, cited Board case law with respect to the "clear evidence of error" standard, and found "the evidence submitted does not support this." The Office then cited case law for the proposition that, if new evidence lacks probative value, the Office may deny modification of the prior decision. The decision further stated that material which is repetitive of that already in the record is not a sufficient basis to reopen a case. The Office concluded: "modification of prior decision is unwarranted as the various arguments submitted have not demonstrated 'clear evidence of error' on the part of the Office, and have insufficient probative value to warrant modification of the prior decision in this case."

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] the Office's regulation provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously

[2] The conclusion of the decision stated that the evidence was insufficient to warrant modification of the October 3, 2002 decision, but the "basis for decision" discussion reported by the Office indicated that the Office found that evidence insufficient to warrant merit review of the claim.

[3] Appellant requested an appeal to the Board on May 16, 2003, docketed as No. 03-1340. By order dated September 30, 2003, the Board dismissed the appeal as appellant's representative intended to pursue reconsideration before the Office.

[4] 5 U.S.C. § 8128(a) (providing that "[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").

considered by the Office.[5] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[6]

Section 8128(a) does not entitle a claimant to a review of an Office decision as a matter of right.[7] The Office has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.[8] The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[9] In accordance with this holding the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[10]

ANALYSIS

In this case, appellant submitted a September 18, 2003 request for reconsideration of an October 30, 2002 Office merit decision. A request for reconsideration may be timely if filed within one year of a merit decision, and if timely, the Office then considers the request for reconsideration and the evidence submitted under 20 C.F.R. § 10.606(b)(2). A determination is made as to whether the request is sufficient to warrant reopening the claim for merit review. If it is not, then an appropriate decision is issued denying the request for reconsideration without review of the merits of the claim. If the request for reconsideration is sufficient to reopen the claim, then the merits of the claim are reviewed and a merit decision issued. Only if the reconsideration request is untimely, that is, filed more than one year after a merit decision, will the Office use a "clear evidence of error" standard to determine if the case should be reopened because appellant has demonstrated clear evidence of error by the Office in its decision.

The June 30, 2004 Office decision appeared to apply a "clear evidence of error" standard to the request for reconsideration, although no findings were made as to the timeliness of the reconsideration request.[11] The decision contained a reference to duplicative evidence not requiring further review, but the decision did not review the evidence and make a finding that merit review was denied because appellant did not meet the requirements of section 10.606(b)(2). The Office appeared to review the claim and find that modification was not

[5] 20 C.F.R. § 10.606(b)(2).

[6] 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[7] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[8] 20 C.F.R. § 10.607(a).

[9] *Leonard E. Redway*, 28 ECAB 242 (1977).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[11] The decision made reference to case law for the proposition that duplicative evidence is not sufficient to warrant reopening the claim, but the Office did not provide further explanation or discuss specific evidence.

warranted because the evidence was of limited probative value and did not demonstrate "clear evidence of error" by the Office. It is not clear what specific evidence was reviewed, as the Office also stated that no new evidence was submitted and did not discuss any specific evidence submitted on reconsideration. The record shows that new evidence was submitted, including a September 5, 2003 report from Dr. Clark.

The use of a "clear evidence of error" standard is not appropriate in this case because the request for reconsideration was timely filed. The request was dated September 18, 2003, and no postmark was kept in the record.[12] Since September 18, 2003 was within one year of a merit decision dated October 30, 2002, appellant filed a timely request for reconsideration. Therefore the request for reconsideration and the evidence submitted should have been reviewed under section 10.606(b)(2) to determine if a merit review was warranted. The case will be remanded to the Office for a proper consideration of the reconsideration request and the evidence submitted. After such further development as is deemed necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that the June 30, 2004 Office decision did not properly address the issues raised and provide appropriate findings with respect to appellant's September 18, 2003 request for reconsideration.

[12] The date of the letter is used if the envelope bearing the postmark is not available. *See Algimantas Bumelis*, 48 ECAB 679 (1997).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 30, 2004 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 31, 2005
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member