

FACTUAL HISTORY

On August 6, 2003 appellant, then a 44-year-old mail processing clerk, filed a Form CA-2, occupational disease claim, alleging that lifting tubs of mail and pulling heavy equipment caused painful tendinosis in her left shoulder. The employing establishment controverted the claim, noting that appellant had returned to limited duty on July 9, 2003 following accepted rotator cuff surgery on her right shoulder. Appellant stopped work on July 10, 2003 and returned to limited duty on August 20, 2003.

In support of her claim, appellant submitted an undated statement describing her left shoulder condition and submitted unsigned reports dated July 14 and August 6, 2003 in which Dr. Terrence R. Lock, a Board-certified orthopedic surgeon, noted her complaint of left shoulder pain. Examination findings included full range of motion with impingement signs.

By letters dated September 12, 2003, the Office informed appellant of the evidence needed to support her claim and asked the employing establishment to respond. In statements dated September 23 and 30, 2003, appellant described her job duties, noted that she had always worked overtime, and stated that, in May 2003, while vacuuming at home, she experienced such a sharp pain in her left shoulder that she had to stop and rest. In an October 8, 2003 report, Dr. Lock advised that he took appellant off work due to the pain in her left shoulder, noting that the left upper extremity had become her dominant side due to the right shoulder surgery.

By decision dated November 5, 2003, the Office denied the claim on the grounds that the evidence was contradictory regarding how appellant injured her left shoulder and that the medical evidence did not provide a rationalized opinion regarding how employment factors caused the condition. On November 19, 2003 appellant requested a review of the written record and submitted a November 12, 2003 report in which Dr. Lock reiterated his previous conclusions.

In a decision dated March 19, 2004, an Office hearing representative affirmed the November 5, 2003 decision, noting that Dr. Lock did not provide sufficient explanation to support that appellant's left shoulder condition and disability were caused by employment factors. On July 8, 2004 appellant requested reconsideration and submitted a July 22, 2003 ultrasound of the left shoulder which demonstrated intrasubstance changes within the mid supraspinatus tendon with no evidence of a full thickness rotator cuff tear. In a July 2, 2004 report, Dr. Lock opined that work "could have" increased her symptoms. By decision dated August 6, 2004, the Office denied modification of the prior decision.

In a request dated August 4, 2005 and received by the Office on August 9, 2005, appellant requested reconsideration and submitted additional medical evidence including an October 8, 2003 report from Dr. Lock. By decision dated September 27, 2005, the Office found that appellant's reconsideration request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.¹ The Office 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.² When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.³ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607 of Office regulations,⁴ if the claimant's application for review shows "clear evidence of error" on the part of the Office. In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.⁵

Board precedent and Office procedures require that in determining timeliness of a reconsideration request, if the envelope bearing the postmark is not available, the date of the letter itself is used.⁶

ANALYSIS

The last merit decision in this case was issued on August 6, 2004. Appellant dated her request for reconsideration August 4, 2005. While this was not received by the Office until August 9, 2005, the envelope in which appellant mailed her August 2005 reconsideration request is not in the record before the Board. Therefore, the date of the letter is used to determine timeliness. The Board finds that appellant's August 4, 2005 reconsideration was timely filed. The case will be remanded for the Office to adjudicate appellant's reconsideration request in accordance with the criteria set forth in sections 10.606 and 10.608 of the Office's regulations.⁷ After any further development as it deems necessary, the Office shall issue an appropriate decision.

CONCLUSION

The Board finds that the Office improperly denied appellant's request for reconsideration on the grounds that it was untimely filed.

¹ 5 U.S.C. §§ 8101-8193.

² 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

³ *Cresenciano Martinez*, 51 ECAB 322 (2000).

⁴ 20 C.F.R. § 10.607.

⁵ *Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

⁶ *Algimantas Bumelis*, 48 ECAB 679 (1997); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3b(1) (January 2004).

⁷ 20 C.F.R. §§ 10.606, 10.608.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 27, 2005 be vacated and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: March 8, 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