

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

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**J.C., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Rochester, NY, Employer**

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**Docket No. 08-877**

**Issued: February 11, 2009**

*Appearances:*

*Linda Temple, for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

COLLEEN DUFFY KIKO, Judge

MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On February 4, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated June 13, 2007, which denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the most recent merit decision of April 5, 2005 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 determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

**FACTUAL HISTORY**

On January 24, 2000 appellant, then a 38-year-old letter carrier, sustained injury when he slipped on an icy sidewalk and fell injuring his right shoulder, wrist and hip. The Office accepted his claim for right shoulder strain and bursitis and authorized arthroscopic surgery, which was performed on August 11, 2000. On November 21, 2002 appellant underwent an

acromioplasty of the right shoulder with joint debridement and anterior capsulorrhaphy. He did not stop work but returned to a limited-duty position and worked intermittently thereafter. On March 15, 2003 the employing establishment noted that appellant returned to full-time restricted-duty work.

On July 25, 2003 appellant filed a CA-2a, notice of recurrence of disability, alleging that on June 11, 2003 he had worsening pain in the right shoulder and neck. In a decision dated November 13, 2003, the Office denied appellant's claim for a recurrence of disability. On January 31, 2004 appellant requested reconsideration and submitted medical evidence. On March 29, 2004 the Office denied modification of the November 13, 2003 decision. Appellant submitted additional medical evidence.

By decision dated August 10, 2004, the Office found that appellant's actual earnings as a full-time light-duty carrier, effective March 11, 2003, fairly and reasonably represented his wage-earning capacity. As the pay in that position was equivalent to the pay rate for the position appellant held at the time of his injury, no loss of wages occurred.<sup>1</sup>

In a letter dated March 26, 2005 and received by the Office on April 7, 2005, appellant requested reconsideration of the March 29, 2004 decision. The envelope containing the request was not retained in the record. Appellant asserted that he submitted sufficient evidence to support his claim for recurrence of disability on June 11, 2003. He also submitted medical evidence.

In a decision dated July 6, 2005, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and he did not present clear evidence of error by the Office.

In an appeal form dated July 8, 2005, appellant requested reconsideration of the Office decision dated April 5, 2005, which denied his recurrence of disability of August 4, 2004. He also submitted medical evidence.

On August 2, 2005 appellant requested an oral hearing with regard to the Office decision dated July 6, 2005.

In a decision dated August 16, 2005, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing. The Branch of Hearings and Review found that, since appellant had previously requested reconsideration on the same issue, he was not entitled to an oral hearing as a matter of right.

On September 19, 2005 appellant appealed the July 6, 2005 decision to the Board. In an order dated June 5, 2006, the Board noted that the Office failed to produce the case record and remanded the case for reconstruction and proper assemblage of the case record. The Board

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<sup>1</sup> On August 24, 2004 appellant filed a CA-2a, claim for a recurrence of disability, alleging that on August 4, 2004 his right shoulder came out of the joint. In a decision dated April 5, 2005, the Office denied appellant's claim for a recurrence of disability beginning on August 4, 2004.

advised that, to fully protect appellant's appeal rights, an appropriate decision should be issued.<sup>2</sup> Appellant submitted additional medical evidence.

In a decision dated June 13, 2007, the Office denied appellant's application for reconsideration of the March 29, 2004 decision on the grounds that the request was not timely and that he did not present clear evidence of error by the Office.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued."<sup>3</sup>

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).<sup>4</sup> This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the employing establishment within the time period allowed.<sup>5</sup>

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.<sup>6</sup>

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<sup>2</sup> Docket 05-1986 (issued June 5, 2006).

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> *Id.* at § 10.607(b).

## ANALYSIS

The Office issued a decision on June 13, 2007, in compliance with the Board's remand order of June 5, 2006 to fully protect appellant's appeal rights. It denied reconsideration of its prior March 29, 2004 decision on the grounds that appellant's request for reconsideration dated March 26, 2005 and received on April 7, 2005 was untimely filed. The Board finds that April 7, 2005 is the date the Office received the reconsideration request.

The one-year time limitation begins to run on the date following the date of the original Office decision.<sup>7</sup> A right to reconsideration within one year accompanies any merit decision on the issues.<sup>8</sup> The Board notes that the Office's procedure manual, Chapter 2.1602.3(b)(1), provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope.<sup>9</sup> The procedure manual provides that timeliness is determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used.<sup>10</sup>

The Board notes that the envelope containing the reconsideration request was not retained in the record and the letter requesting reconsideration was dated March 26, 2005. For this reason the Board finds that the reconsideration request was timely. Appellant, timely filed his request for reconsideration within one year of the March 29, 2004 merit decision. The Office improperly denied his reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.<sup>11</sup>

## CONCLUSION

The Board finds that appellant's March 26, 2005 request for reconsideration was timely filed.

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<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a) (January 2004).

<sup>8</sup> *Id.*; *Larry J. Lilton*, 44 ECAB 243 (1992).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004). *See* 20 C.F.R. § 10.607(a).

<sup>10</sup> *See* Federal (FECA) Procedure Manual, *id.*

<sup>11</sup> *See Donna M. Campbell*, 55 ECAB 241 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 13, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further proceedings consistent with this opinion.

Issued: February 11, 2009  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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