United States Department of Labor
Employees' Compensation Appeals Board

H.F., Appellant	)	
and	)	**Docket No. 08-2352**
	)	**Issued: May 4, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Citrus Heights, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 28, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 11, 2008 nonmerit decision, denying his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year elapsed between the last merit decision dated July 13, 2007 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely and failed to demonstrate clear evidence of error.

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

On May 4, 2006 appellant, a 48-year-old city carrier, filed a claim for right hand injuries allegedly due to his employment activities.[2] By decision dated September 22, 2006, the Office denied his claim, finding that the evidence was insufficient to establish that he had sustained an injury under the Federal Employees' Compensation Act.

On October 3, 2006 appellant requested reconsideration. In a January 5, 2007 decision, the Office denied merit review.

On May 23, 2007 appellant again requested reconsideration and submitted additional medical evidence from his treating physician, Dr. James T. Lin, a Board-certified neurologist. In a merit decision dated July 13, 2007, the Office denied modification of the September 22, 2006 decision, on the grounds that the evidence of record did not contain a diagnosed condition that was causally related to employment activities.

Appellant submitted a letter dated November 28, 2007, which provided as follows:

> "Enclosed, is the physician information that was necessary to indicate how I was injured while on the job. Please, let me know if further information is required to open this claim."

In an enclosed report dated July 10, 2007, Dr. Lin provided a history of injury indicating that appellant had hurt his right hand at work on March 25, 2003; diagnosed right upper extremity overuse syndrome; and provided work restrictions.

In a December 8, 2007 report, Dr. Lin provided examination findings. After reviewing the results of an electromyogram study, he diagnosed right carpal tunnel syndrome, chronic mild irritation of the C6-7 region and cervical radiculopathy.

In a letter to the Office dated June 13, 2008, appellant stated:

> "Enclosed is the relevant information to reflect a reoccurrence of prior injury, medical documentation obtained from my physician. I apologize, for the delay in obtaining this information due to the schedule of my physician in preparing the information required."

On July 23, 2008 appellant submitted a letter requesting reconsideration, together with an appeal request form and supporting documentation. He stated that he had submitted the enclosed reports from his treating physician on June 13, 2008 but upon telephoning the Office, was told that the additional evidence was rejected because he did not state an appeal. Appellant submitted reports from Dr. Lin dated January 14 and May 13, 2008 addressing his right hand condition.

[2] Appellant filed a notice of recurrence (Form CA-2a) pursuant to a prior File No. xxxxxx087, alleging that his right hand pain began on March 26, 2005, when he began performing the duties of a supervisor. On August 10, 2006 the Office informed appellant that his claim would be developed as an occupational disease claim, as he had alleged new work factors as the cause of his condition.

By decision dated August 11, 2008, the Office denied appellant's July 23, 2008 request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT

The Act[3] provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[4]

The application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[5] With regard to the contents of a request for reconsideration, the Office's procedure manual states, while no special form is required, the request must be in writing, identify the decision and the specific issues for which reconsideration is being requested and be accompanied by relevant new evidence or argument not considered previously.[6]

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.[7] 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.[8]

20 C.F.R. § 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[9] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office of how the

[3] 5 U.S.C. § 8101 *et seq.*

[4] 20 C.F.R. § 10.605.

[5] *Id*. at § 10.606.

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2a (October 2005).

[7] 20 C.F.R. § 10.607(a).

[8] *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

[9] *See Alberta Dukes*, 56 ECAB 247 (2005); *see also Leon J. Modrowski*, 55 ECAB 196 (2004).

evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[10]

Office procedures provide that an application for review includes any written communication from a claimant or representative which requests a hearing, reconsideration or appeal of a formal decision; no special form is necessary. A claimant who expresses or implies disagreement with a formal decision, without requesting a specific action, should be advised of the basis of the decision and reminded to exercise rights of appeal if further action is desired. Office procedures also provide that any file in which a complaint about a formal decision is received should be reviewed informally to assess whether the action leading to the complaint was correct and the Office should determine through correspondence with the claimant whether the inquiry in effect constitutes a request for exercise of appeal rights.[11]

ANALYSIS

In its August 11, 2008 decision, the Office found that appellant failed to file a timely application for review. However, it did not acknowledge appellant's letters dated November 28, 2007 and June 13, 2008 as requests for reconsideration or objections to the July 13, 2007 decision or inquire whether his letters, in effect, constituted a request for exercise of appeal rights.[12] Rather, the Office regarded his July 23, 2008 letter as an untimely request for reconsideration. The Board finds that the Office abused its discretion in failing to take timely action in accordance with its own procedures, thereby exhausting appellant's right to review the merits of the case by the Board. Therefore, the August 11, 2008 decision must be set aside and remanded for an appropriate decision.[13]

On November 28, 2007 three months after the Office's July 13, 2007 merit decision, appellant submitted a letter, together with new medical evidence, which he determined to be necessary to indicate how he was injured on the job. He asked the Office to let him know if further information was required to "open this claim." On June 13, 2008 well within the one-

[10] *See Alberta Dukes, supra* note 9.

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Review Process*, Chapter 2.1600.3(b) (October 2005).

[12] *Id.*

[13] Office procedures provide that, when a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, the Office should conduct a merit review. That is, the basis of the original decision and any new evidence should be considered and, if there is no basis to change the original decision, an order denying modification (rather than denying the application for review) should be prepared. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (October 2005).

year filing period, he submitted another letter, which he stated provided the relevant medical evidence information "to reflect a reoccurrence of prior injury." The record does not contain a response to either letter. Office procedures provide that, when a claimant expresses or implies disagreement with a formal decision, without requesting a specific action, the Office should inform him to exercise rights of appeal if further action is desired. Office procedures also provide that, when a complaint about a formal decision is received, the Office should determine through correspondence with the claimant whether the inquiry in effect constitutes a request for exercise of appeal rights.[14] In this case, the Office failed to follow its own procedures. Although appellant expressed disagreement with the Office's denial of his claim and indicated a desire to "reopen" his claim, the Office did not contact him to ascertain whether his November 28, 2007 or June 13, 2008 letters were intended to be requests for reconsideration.[15] As a result, the decision denying appellant's request for reconsideration was delayed until August 11, 2008, thereby depriving him of the opportunity to obtain merit review before the Board.

The Board notes that the Office evaluated appellant's reconsideration request using the standard for untimely requests, namely the "clear evidence of error" standard. Had the Office determined that either the November 28, 2007 or the June 13, 2008 letter was intended to be a request for merit review, the request would have been subject to evaluation under the standard used for a timely request. Therefore, its failure to follow its procedures subjected appellant to a more stringent standard that might have been necessary.

CONCLUSION

The Board finds that the Office's failure to follow its own procedures created a delay in its ruling on appellant's request for reconsideration, which deprived him of the opportunity to obtain merit review before the Board. Therefore, the August 11, 2008 decision must be set aside and remanded for an appropriate decision.

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *supra* note 11.

[15] The Board notes that an application for review includes any written communication from a claimant or representative which requests a hearing, reconsideration or appeal of a formal decision; no special form is necessary. Federal (FECA) Procedure Manual, Part 2 -- Claims, *supra* note 11. The Board has held that there is no requirement that the word "reconsideration" appear in a reconsideration request. *See Gladys Mercado*, 52 ECAB 255 (2001). *See also Connie Trotter* (docket No. 04-2210, issued November 18, 2005) (where her claim had recently been denied, the Board found that claimant's letter to the Office indicating that she was submitting the" medical evidence needed as to the injury," constituted a valid and timely request for reconsideration).

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for an appropriate decision.

Issued: May 4, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board