

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

ROBERT K. CARTER, Appellant

and

**U.S. POSTAL SERVICE, SHARED SERVICE
CENTER, Pittsburgh, PA, Employer**

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**Docket No. 05-1126
Issued: September 2, 2005**

Appearances:
Robert K. Carter, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On April 25, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 31, 2005 nonmerit decision denying his reconsideration request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's October 29, 2003 decision denying his schedule award claim. Because more than one year has elapsed between the last merit decision and the filing of this appeal on April 25, 2005, the Board lacks jurisdiction to review the merits of this claim.¹

ISSUE

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

¹ See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On August 31, 2001 appellant, then a 43-year-old distribution clerk, filed a traumatic injury claim alleging that he sustained injuries on that date when he pinned his left ankle between two pallet jacks and fell on his left shoulder. The Office accepted that appellant sustained a contusion of the left elbow and sprains of the left shoulder, wrist and ankle. On January 15, 2003 Dr. David Hillsgrove, an attending Board-certified orthopedic surgeon, performed left shoulder arthroscopy and subacromial decompression procedures which were authorized by the Office.²

Appellant claimed that he was entitled to schedule award compensation due to his August 31, 2001 employment injury. By decision dated October 29, 2003, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he was entitled to schedule award compensation.

By letter and appeal form dated February 15, 2004 and received by the Office on February 19, 2004, appellant requested reconsideration of the Office's October 29, 2003 decision. He asserted that he had continuing symptoms, including constant pain in his left shoulder and swelling and weakness in his left ankle. In support of his request, he submitted numerous documents including two November 2003 reports of Dr. Hillsgrove, a September 2003 physical therapy report and the findings of magnetic resonance imaging scan testing obtained on November 12, 2003.³ It does not appear from the record that the Office responded to this reconsideration request at the time.

By letter dated March 20, 2005, appellant indicated that he was resubmitting his reconsideration request and enclosed copies of the February 15, 2004 letter and appeal form that he had previously submitted.⁴ These documents were received by the Office on March 29, 2005. He also submitted numerous other documents, including reports of Dr. Hillsgrove and his physical therapist.⁵

By decision dated March 31, 2005, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error. The Office indicated that appellant did not file a reconsideration request until March 2005.

² Appellant stopped work on August 31, 2001 and returned to full-duty work in February 2002. He then stopped work for his surgery and returned to full-duty work in May 2003.

³ Appellant submitted a number of reports of Dr. Hillsgrove and his physical therapist which had previously been of record.

⁴ Appellant indicated that this represented the fourth time he had submitted a reconsideration request. He also submitted a copy of a February 19, 2004 postmark on an envelope addressed to the Office.

⁵ Most of these documents had previously been submitted to the Office.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.⁶ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.⁷ The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁸

With respect to the protection of a claimant's appeal rights, the Office procedure manual provides in relevant part:

"The ECAB [Employees' Compensation Appeals Board] will accept appeals filed up to one year from the date of the last merit decision. The Board has noted that when a reconsideration decision is delayed beyond one year, the claimant's right to review of the original decision by [the Board] is abrogated. In *Carlos Tola* (42 ECAB 337 [1991]), [the Board] found that the Office's issuance of a nonmerit decision after more than 90 days following appellant's request for reconsideration was not consistent with Board procedures. In *Tony J. Fosko* (35 ECAB 644 [1984]), [the Board] remanded the case for a review on the merits, ruling that when [the Office] took 10 months to deny an application for review, it had effectively used up the claimant's time to appeal to the Board.

"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. There is no obligation to conduct a merit review on insufficient evidence if the maximum one-year time limit for requesting review by the Board will have expired within the 90[-]day period following the [Office's] receipt of the claimant's reconsideration request."⁹

⁶ 20 C.F.R. § 10.607(a).

⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁸ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (January 2004). See *Geoma R. Munn*, 50 ECAB 242 (1999); *Debra E. Stoler*, 43 ECAB 561 (1992) (remanding cases for merit review where the Office delayed issuance of reconsideration decisions).

ANALYSIS

The Office accepted that appellant sustained a contusion of the left elbow and sprains of the left shoulder, wrist and ankle and he claimed entitlement to schedule award compensation. The most recent merit decision is the Office's October 29, 2003 denial of appellant's schedule award claim. Appellant filed a request for reconsideration of the Office's October 29, 2003 decision on February 19, 2004.¹⁰ The Office did not issue a decision on appellant's request for reconsideration until March 31, 2005. This delay of more than 1 year constituted more than a 90-day delay and jeopardized appellant's right to have the Board review the merits of his claim. Therefore, the Office should have issued a decision on the merits of appellant's claim in conformance with its procedures.¹¹ For these reasons, the Office improperly refused to reopen appellant's case for further review of the merits of his claim and the case should be remanded to the Office for merit review.

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's case for further review of the merits of his claim. The case will be remanded to the Office for a proper merit review of appellant's schedule award claim to be followed by an appropriate merit decision.

¹⁰ He later resubmitted this request in March 2005.

¹¹ See *supra* note 9 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 31, 2005 decision is reversed. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: September 2, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board