United States Department of Labor
Employees' Compensation Appeals Board

G.G., Appellant	)	
and	)	**Docket No. 06-1977**
	)	**Issued: January 8, 2007**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, LASSEN VOLCANIC NATIONAL PARK, Mineral, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 23, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 19, 2006 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 has elapsed from the most recent merit decision dated February 15, 2005 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for review of the merits under 5 U.S.C. § 8128 on the grounds that his request was not timely filed and did not establish clear evidence of error.

FACTUAL HISTORY

On April 10, 1999 appellant, then a 52-year-old park ranger, sustained a left shoulder derangement, a left shoulder acromioclavicular joint separation and subacrimonial impingement syndrome in the performance of his duty. The Office accepted the claim. Appellant stopped work on August 30, 2003 after surgery on his shoulder and has not returned to duty. The surgery was performed by Dr. Thomas E. Daniel, an orthopedic surgeon. Appellant accepted mandatory retirement when he turned 57. On December 5, 2003 he was cleared to return to work with restrictions on overhead lifting and lifting, pulling, pushing or carrying more than 20 pounds.

By letter dated May 25, 2004, the employing establishment offered appellant a permanent position as an office automation assistant in Mineral, California. The work schedule was 8:00 am to 4:30 p.m. Monday through Friday, with Saturday and Sunday off. Appellant would be assigned to prepare a variety of correspondence and documents, serve as a personal receptionist, do payroll preparation and recordkeeping. The position did not require overhead lifting or lifting, pulling, pushing or carrying anything greater than 20 pounds. The job was described as primarily sedentary.

By letter dated August 23, 2004, the Office advised appellant that the May 25, 2004 job offer was suitable work and that he had 30 days in which to accept the job offer or provide good cause for refusal. It noted that, under section 8106(c)(2) of the Federal Employees' Compensation Act,[1] a partially disabled employee who refuses an offer of work after suitable work is offered was not entitled to continuing compensation. The Office specified that, if appellant refused the offered position or failed to report for duty when scheduled without reasonable cause, his compensation benefits would be terminated.

By memorandum dated September 19, 2004, appellant refused the August 23, 2004 job offer. He noted that the position offered was in Mineral, California, whereas his former duty station was in Manzanita Lake, California. Appellant stated that the commute from Mineral to Manzanita Lake, was 42 miles. The travel between the two areas was over a park road which is closed to the public much of the time from November to May. An alternate travel route was described as a 60-mile commute. Commute times on the park road were stated to be 1½ hours and up to 2 hours on the longer route. Appellant estimated that he would have to pay an additional $200.00 for gasoline plus additional maintenance for added wear and tear to his car. He also stated that he would not be able to attend his medical appointments and physical therapy sessions due to the estimated 90-mile distance between Mineral Lake and Redding, where his doctor and therapist were located.

The employing establishment controverted appellant's contentions by letter dated September 22, 2004. It stated that the distance from appellant's residence to his duty station was 14.5 miles with a commute time of approximately 25 minutes. The distance from his residence to the new duty station was 25.3 miles with a commuting time of 53 minutes. The distance to the new station was 10.8 miles and 28 minutes longer than the previous commute. Neither commute was through park lands. In support of its assertions, the employing establishment provided internet maps detailing roadways, distances and minutes of travel.

[1] 5 U.S.C. § 8106(c)(2).

By letter dated January 6, 2005, the Office advised appellant that his reasons for refusing to accept the offered position were invalid. It noted that it would not consider any further reasons to justify his refusal of the job offer. The Office reminded appellant of the penalty provision under section 8106(c)(2) of the Act and stated that, if he refused the offer or failed to report for work within 15 days, his benefits would be terminated. He did not respond.

By decision dated February 11, 2005, the Office terminated appellant's wage-loss compensation benefits effective March 19, 2005 on the grounds that he refused an offer of suitable work under section 8106(c)(2) of the Act. It noted that the offered position was suitable to appellant's medical limitations and found that his reply, when rejecting the May 25, 2004 job offer, was insufficient. On February 15, 2005 the Office reissued the February11, 2005 decision.

By letter dated February 12, 2006, appellant requested reconsideration. The envelope was postmarked February 14, 2006. He asserted that the employing establishment misrepresented the commuting issues. Appellant asserted that the proposed route involved using a 21 mile dirt and gravel road that was impassible in the winter and spring causing it to be closed for 5 to 6 months in the winter. Appellant noted that the route used by employing establishment personnel to travel between Manzanita Lake and Mineral was 69 miles in length and required 90 to 120 minutes to drive.

By nonmerit decision dated May 19, 2006, the Office denied reconsideration of its February 11, 2005 decision, finding the request to be untimely. It noted that appellant's letter requesting consideration was postmarked February 14, 2006. Because more than a year had passed since the February 11, 2005 decision and the postmark date, appellant's reconsideration request was not timely. The Office found that he failed to provide evidence to support his arguments and thus, failed to show clear evidence of error.

On appeal to the Board, appellant noted that his copy of the Office's merit decision was dated February 15, 2005.[2]

LEGAL PRECEDENT

The Office has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[3] It will not review a decision on the merits of a claim unless the application for review is filed within one year of the date of that decision.[4] 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.[5] Its procedures state that the Office will reopen a claimant's case for merit review,

[2] Additional documents were received by the Office after the decision on May 19, 2006. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, n.5 (1952); 20 C.F.R. § 501.2(c)(1).

[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

[5] *Veletta C. Coleman*, 48 ECAB 367 (1997).

notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows clear evidence of error on the part of the Office.[6]

ANALYSIS

The Office determined that appellant failed to file a timely application for review. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the Office decision for which review is sought.[7] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[8] In this case, the Office issued two decisions regarding the termination of benefits under section 8106. The record reflects a decision dated February 11, 2005 and a reissuance of the decision dated February 15, 2005. The Office used the February 11, 2005 date in its calculations. Appellant based his request for reconsideration on the February 15, 2005 decision. The Board finds that the February 15, 2005 decision should be used as it is a later decision, which superseded the February 11, 2005 decision. Therefore, appellant's request was timely filed as it was postmarked within one year of February 15, 2005. The Office improperly denied his reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. 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 to the Office for review of this evidence under the proper standard of review for a timely reconsideration request.

CONCLUSION

The Board finds that appellant's February 12, 2006 letter, which was postmarked on February 14, 2006 constituted a request for reconsideration which was timely as it was filed within one year of the Office's February 15, 2005 decision. It will remand the case for review of the evidence under the proper standard of review for a timely reconsideration request.

[6] *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: [The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous. 20 C.F.R. § 10.607(b).

[7] 20 C.F.R. § 10.607(a).

[8] *Robert F. Stone*, 57 ECAB ___ (Docket No. 04-1451, issued December 22, 2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 19, 2006 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: January 8, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board