

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

M.S., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Des Moines, IA, Employer)

**Docket No. 11-878
Issued: December 15, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 22, 2011 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) nonmerit decision dated November 18, 2010 denying his request for reconsideration because it was not timely filed and failed to establish clear evidence of error. Since more than 180 days have elapsed since the most recent merit decision of October 27, 2009 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2 and 501.3.²

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

¹ 5 U.S.C. §§ 8101-8193.

² For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

This case has previously been before the Board.³ By decision dated October 27, 2009, the Board affirmed an October 16, 2008 merit decision in which OWCP denied authorization for a spinal stimulator treatment. The Board found OWCP properly exercised its discretion in denying appellant's request for authorization. The Board also affirmed a December 17, 2008 nonmerit decision denying his request for a review of the written record. The facts of the case as set forth in the Board's prior decision are incorporated herein by reference. The facts and the history relevant to the present appeal are hereafter set forth.

On September 20, 2010 appellant noted his OWCP claim number and requested that his file be reopened and reevaluated for consideration of a spinal cord stimulator. He noted his course of medical treatment and indicated all supporting medical data had been provided. Additional medical evidence was also provided. This included: an April 17, 2008 progress report from Dr. W. David Borchardt, an osteopath specializing in family medicine; a copy of a July 21, 2008 priority screening appointment; and a November 12, 2009 report from Dr. Thomas D. Hansen, a Board-certified pain specialist, which noted appellant's medical treatment and failure of conservative measures and requested that a spinal cord stimulator be approved.

In a September 17, 2010 letter, Dr. Borchardt indicated that appellant's work capacity level remained the same. He stated that appellant's posterior laminectomy and fusion had failed and indicated that other measures such as injections, oral medications and physical therapy had also failed to alleviate his bilateral lower extremity pain. Dr. Borchardt noted that appellant was going to appeal the denial of authorization for a spinal cord stimulator.

In an October 15, 2010 letter, OWCP advised appellant that it was not clear if he was requesting reconsideration of OWCP's October 16, 2008 decision, which the Board had affirmed. It advised no action would be taken on appellant's letter and that, if he wished to request reconsideration, such a request should be made in writing along with the date of the decision he wanted reconsidered.

In an undated appeal request form, postmarked November 5, 2010, appellant requested reconsideration. In a November 1, 2010 letter, he indicated that he was requesting reconsideration of the denial of a spinal cord stimulator. Appellant indicated that he provided all the supporting medical data and course of treatment.

By decision dated November 18, 2010, OWCP denied appellant's November 5, 2010 reconsideration request on the grounds that it was not timely filed and failed to establish clear evidence of error in the last merit decision dated October 16, 2008.

³ Docket No. 09-654 (issued October 27, 2009).

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right.⁴ This section vests OWCP with discretionary authority to determine whether it will review an award for or against payment of compensation.⁵ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority to determine whether it will review an award for or against payment of compensation.⁶ One such limitation is that the application for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁷ In those instances when a request for reconsideration is not timely filed, OWCP will undertake a limited review to determine whether the application presents clear evidence of error on the part of OWCP in its most recent merit decision.⁸

OWCP's 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. OWCP's 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 OWCP should determine through correspondence with the claimant whether the inquiry in effect constitutes a request for exercise of appeal rights.⁹

ANALYSIS

OWCP's November 18, 2010 decision denied appellant's request for further review of the merits of his claim on the grounds that his reconsideration request postmarked November 5, 2010 was untimely and failed to establish clear evidence of error of the October 16, 2008 OWCP decision denying authorization for spinal stimulator treatment. The Board finds, however, that appellant's request for reconsideration was timely filed.

The one-year time limitation for requesting reconsideration begins to run on the date following the date of the original OWCP decision.¹⁰ A right to reconsideration within one year

⁴ 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.607(b). Regarding the clear evidence of error standard, *see Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Review Process*, Chapter 2.1600.3(b) (October 2005).

¹⁰ *Supra* note 7.

also accompanies any subsequent merit decision on the issues.¹¹ This includes merit decisions of the Board.¹² The most recent merit decision in this case was the Board's October 27, 2009 decision affirming OWCP's decisions dated October 16 and December 17, 2008. Thus, appellant had one year from October 27, 2009 in which to timely request reconsideration of the issue involving the denial of authorization for spinal stimulation treatment.

In a September 20, 2010 letter, appellant requested that his file be reopened and reevaluated for consideration of a spinal cord stimulator. He provided his claim number as well as medical evidence. In response to OWCP's October 15, 2010 request for clarification, appellant provided an undated appeal request form, postmarked November 5, 2010, in which he indicated that he was requesting reconsideration. He also submitted a November 1, 2010 letter noting that he was requesting reconsideration of the denial of a spinal cord stimulator.

The Board has held that a request for reconsideration need not be on any particular form but must be in writing, identify the decision and the specific issue or issues for which reconsideration is being requested and be accompanied by relevant and pertinent new evidence or argument not previously considered.¹³

The Board finds that appellant's September 20, 2010 letter constituted a request for reconsideration. In *Gladys Mercado*,¹⁴ the claimant asked OWCP to help her reopen her case, provided her case number and submitted additional medical evidence. The Board found that this letter was a timely request for reconsideration. Here, appellant clearly identified the issue he wanted reopened for further consideration and submitted supporting evidence.¹⁵ Additionally, he responded to OWCP's subsequent request for clarification indicating that he wanted reconsideration. As the contested decision or issue was reasonably determined from appellant's request and the request for reconsideration was also accompanied by new medical evidence, the Board finds that his September 20, 2010 letter constitutes a request for reconsideration.¹⁶ As appellant's September 20, 2010 letter was filed within one year of the Board's October 27, 2009 merit decision, it constitutes a timely request for reconsideration.

As appellant timely requested reconsideration, OWCP improperly denied his reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. The Board will remand the case to OWCP for review of the new evidence and argument under the proper standard of review for a timely reconsideration

¹¹ *Robert F. Stone*, 57 ECAB 292 (2005).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a) (January 2004).

¹³ ¹³ *Vicente P. Taimanglo*, 45 ECAB 504 (1984); *Darrell Stovall*, Docket No. 99-2562 (issued March 14, 2001). See Federal (FECA) Procedure Manual, *supra* note 12.

¹⁴ 52 ECAB 255 (2001).

¹⁵ See *Jeanette Butler*, 47 ECAB 128 (1995) (letter requesting that OWCP reopen the case along with the claim number and additional evidence found sufficient to constitute a request for reconsideration).

¹⁶ Federal (FECA) Procedure Manual, *supra* note 12.

request,¹⁷ to undertake any appropriate additional development it deems necessary and to issue an appropriate decision.

CONCLUSION

The Board finds that appellant's September 20, 2010 letter constituted a request for reconsideration which was timely filed within one year of the last merit decision of record, the Board's October 27, 2009 decision. The Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the November 18, 2010 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: December 15, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁷ 20 C.F.R. § 10.606(b).