

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SANTOS B. RIVERA and DEPARTMENT OF THE AIR FORCE,
AIR FORCE LOGISTICS COMMAND, KELLY AIR FORCE BASE, TX

*Docket No. 99-1943; Submitted on the Record;
Issued November 14, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and appellant failed to present clear evidence of error.

The Office accepted appellant's claim for a lumbar strain and a herniated disc. In a decision dated June 13, 1996, the Office terminated appellant's compensation benefits effective June 22, 1996 on the grounds that appellant's work-related back condition ceased and his current disability was due to his underlying spondylosis. On November 24, 1997 the Office denied modification of the decision.

By letter dated November 19, 1998, which was date-stamped as received on December 15, 1998, appellant requested reconsideration of the Office's decision and submitted a medical report from Dr. James W. Simmons, a Board-certified orthopedic surgeon, dated September 10, 1998.

By decision dated March 15, 1999, the Office denied appellant's request for reconsideration because it was not made within one year of the Office's November 24, 1997 merit decision and it did not show clear evidence of error. The Office stated that it received appellant's request for reconsideration on December 15, 1998, and therefore the request was made more than one year after the last merit decision and was not timely.

The Board finds that appellant's November 19, 1998 request for reconsideration was timely filed and that the case is not in posture for decision.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹ The Office will not review a decision denying or

¹ 5 U.S.C. § 8128(a).

terminating benefits unless the application for review is filed within one year of the date of that decision.² The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.³ Timeliness of the request for reconsideration is determined by the postmark on the envelope in which it was mailed, if it is available, but if it is not available and there is no other relevant evidence such as certified mail receipts, certificate of service and affidavits, the date of the letter should be used.⁴

In the present case, the envelope in which appellant mailed his request for reconsideration is not in the record and the postmark date of the mailing cannot be determined. Absent the postmark date, the date of the letter must be used for determining the timeliness of the reconsideration request. Since appellant's request for reconsideration is dated November 19, 1998, it was filed within a year of the Office's November 24, 1997 decision, and it therefore is timely. The Office's denial of appellant's reconsideration request as untimely was in error.

To require the Office to reopen a case for reconsideration, 20 C.F.R. § 10.606 provides, in relevant part, that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and set forth arguments and present 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 Section 10.608(a) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.⁶

In support of his November 19, 1998 request for reconsideration, appellant submitted Dr. Simmons' September 10, 1998 medical report. Because the Office erroneously applied the clear evidence of error test, it did not analyze the evidence appellant submitted pursuant to section 10.606(b). The case must therefore be remanded for the Office to review the evidence appellant submitted and make the proper analysis pursuant to section 10.606(b). The Office shall then issue an appropriate decision.

² 20 C.F.R. § 10.607(a). See also *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

³ 20 C.F.R. § 10.607(b); see *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a) (August 1994); see 20 C.F.R. § 10.607(a).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ 20 C.F.R. § 10.608(a).

The decision of the Office of Workers' Compensation Programs dated March 15, 1999 is hereby reversed regarding the untimely filing of the reconsideration request and remanded for further consideration consistent with this opinion.

Dated, Washington, DC
November 14, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member