

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EVERETT L. HUNT and U.S. POSTAL SERVICE, SANTA CLARA  
PROCESSING & DISTRIBUTION CENTER, Santa Clara, CA

*Docket No. 03-1797; Submitted on the Record;  
Issued October 21, 2003*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly found that the request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

This case is on appeal before the Board for the second time. On the first appeal, the Board issued an October 9, 2002 decision, affirming the Office's February 16, 2002 decision, which found the evidence of record insufficient to establish that appellant sustained an injury in the performance of duty. The facts of the case are set forth in this decision and are incorporated by reference.<sup>1</sup>

In an April 18, 2003 letter to the Office, appellant requested reconsideration of the "Decision and Order from U.S. Labor Department, Employees' Compensation Appeals Board Washington, D.C. 20210 dated October 9<sup>th</sup>, 2002." Appellant stated that this request was being made within one year of the decision as required and he submitted medical evidence not previously in the case record.

By decision dated June 20, 2003, the Office denied appellant's request for merit review of its February 16, 2002 decision, on the grounds that it was untimely filed and did not establish clear evidence of error.<sup>2</sup> In finding that appellant's request was untimely filed, the Office noted that the Board had affirmed its February 16, 2002 decision, in an October 9, 2002 decision and stated that it could not reconsider a decision issued by the Board. The Office further stated that appellant's request for reconsideration only applied to the Office's most recent decision dated February 16, 2002. The Office conducted a limited review of the medical evidence submitted by

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<sup>1</sup> Docket No. 02-1287 (issued October 9, 2002).

<sup>2</sup> The Board notes that the Office's June 20, 2003 decision, was mailed to 721 East Olive Avenue, Burbank, CA 91501. The record, however, reveals that appellant advised the Office that his new address is 1850 North Whitley Avenue, Apartment 416, Hollywood, CA 90028-4947 prior to the issuance of the June 20, 2003 decision.

appellant and found that it did not demonstrate clear evidence of error sufficient to warrant review of the prior decision as it did not establish a causal relationship between appellant's right shoulder and neck conditions and factors of his federal employment.

The Board finds that the Office improperly found that the request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.<sup>5</sup> 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 including, *inter alia*, any merit decision by the Board.<sup>6</sup>

In this case, the Office improperly determined that appellant failed to file a timely application for review. The Office based this improper finding on the last merit decision in this case being issued on February 16, 2002. This is incorrect. The Office should have found that the last merit decision in this case is the Board's October 9, 2002 decision, wherein the Board affirmed the Office's February 16, 2002 decision. Therefore, the Board finds that appellant's April 18, 2003 reconsideration request was timely filed well within the one-year time limit and that the Office's denial of appellant's reconsideration request on the basis it was not timely filed was in error.<sup>7</sup>

As appellant's request for reconsideration of the Board's decision was timely, the Office must evaluate the request under the appropriate standard for evaluating timely requests for reconsideration.<sup>8</sup> The "clear evidence of error" standard utilized in this case is appropriate only for untimely reconsideration requests.<sup>9</sup> Accordingly, the case will be remanded for the Office to consider appellant's timely request for reconsideration of the Board's October 9, 2002 decision. After such further development as it deems necessary, the Office should issue an appropriate decision on this issue.

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> Federal (FECA) Procedure Manual, *Reconsiderations*, Chapter 2.1602.3b(1) (June 2002); *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Litton*, 44 ECAB 243 (1992).

<sup>7</sup> *See Gloria J. Catchings*, 43 ECAB 242 (1991); *Douglas McLean*, 42 ECAB 759 (1991).

<sup>8</sup> 20 C.F.R. § 10.606(b).

<sup>9</sup> *See Vicente P. Taimanglo*, 45 ECAB 504 (1994).

The June 20, 2003 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC  
October 21, 2003

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member