

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

JIMMIE D. JOHNSON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kingsport, TN, Employer**

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**Docket No. 04-1661
Issued: November 26, 2004**

Appearances:
George Todd East, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 21, 2004 appellant filed a timely appeal of the April 8, 2004 decision of the Office of Workers' Compensation Programs, which denied further merit review on the basis that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. The Office issued its most recent merit decision on March 25, 2003. Because more than one year has elapsed between the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). Accordingly, the only decision properly before the Board is the Office's April 8, 2004 decision denying appellant's request for reconsideration.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits.

FACTUAL HISTORY

On July 23, 2001 appellant, then a 53-year-old mail carrier, filed a traumatic injury claim alleging that he sustained a herniated disc at L4-5 and injured his sciatic nerve while in the performance of duty on May 31, 2001. Appellant stated that it was raining and he fell on a slick fig leaf. He pulled his lower back in winter while unloading mail from a hamper to his vehicle. Appellant underwent a left L4-5 laminotomy and microdiscectomy on June 25, 2001, and he returned to work on July 23, 2001.

By decision dated February 11, 2002, the Office denied appellant's claim. The Office found that appellant failed to establish that he was injured as alleged on May 31, 2001.

On November 26, 2002 appellant requested reconsideration. He claimed that he fell at work on June 5, 2001 rather than May 31, 2001 as originally reported. In a decision dated March 25, 2003, the Office denied modification of the February 11, 2002 decision. The Office changed the date of the alleged injury from May 31 to June 5, 2001.

By letter dated March 17, 2004, appellant's counsel requested reconsideration.¹ In a decision dated April 8, 2004, the Office denied appellant's request as untimely. The Office further found that appellant failed to demonstrate clear evidence of error on the part of the Office in issuing the March 25, 2003 decision.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.³ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴ One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁵ In those instances when a request for reconsideration is not timely filed, the Office

¹ The request was date-stamped as received by the Office on March 30, 2004.

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

³ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁴ *Supra*, note 2; 20 C.F.R. § 10.607 (1999).

⁵ *Supra*, note 2; 20 C.F.R. § 10.607(a) (1999).

will undertake a limited review to determine whether the application presents “clear evidence of error” on the part of the Office in its “most recent merit decision.”⁶

ANALYSIS

The one-year time limitation begins to run on the day the Office issued its March 25, 2003 decision, as this was the last merit decision in the case.⁷ Appellant’s request for reconsideration was dated March 17, 2004 and it was stamped as received by the Office on March 30, 2004. Section 10.607(a) provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁸ The regulation further provides that if the request is “submitted by mail, the application will be deemed timely if postmarked ... within the time period allowed.”⁹ As previously stated, appellant’s request was dated March 17, 2004, which is within a year of the date of the Office’s last merit decision. The Office, however, did not receive the request until March 30, 2004, which was more than a year after the issuance of the March 25, 2003 merit decision. The Office considered the request untimely based on the March 30, 2004 date of receipt.

The Office neglected to retain a copy of the envelope in which appellant’s March 17, 2004 request was submitted.¹⁰ Thus, the Board is unable to determine from the record whether appellant’s March 17, 2004 request for reconsideration would have been timely under section 10.607(a) based on the postmark. In light of the Office’s failure to preserve the evidence of mailing, the Board finds that the request was timely filed.¹¹ Appellant is afforded the benefit of the March 17, 2004 date of his request, which is within one year of the Office’s March 25, 2003

⁶ *Supra*, note 2; 20 C.F.R. § 10.607(b) (1999). To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. *See Dean D. Beets*, 43 ECAB 1153 (1992). The evidence must be positive, precise and explicit, and it must be apparent on its face that the Office committed an error. *See Leona N. Travis*, 43 ECAB 227 (1991). It is not enough to merely show that the evidence could be construed to produce a contrary conclusion. *Id.* Evidence that does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error. *See Jesus D. Sanchez*, 41 ECAB 964 (1990). The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision. *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

⁷ *See Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

⁸ 20 C.F.R. § 10.607(a) (1999).

⁹ *Id.*

¹⁰ The Board further notes that the March 17, 2004 request for reconsideration indicated that additional evidence was enclosed. However, no such evidence was included in the record on appeal before the Board.

¹¹ In determining the timeliness of a reconsideration request, the date of the request should be used if the envelope bearing the postmark is unavailable. *Algimantas Bumelis*, 48 ECAB 679, 680 (1997). Additionally, the Office’s procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark, or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.16023(b)(1) (January 2004).

decision. Accordingly, the April 8, 2004 decision is set aside and the case is remanded to the Office to consider appellant's timely request for reconsideration pursuant to 20 C.F.R. §§ 10.606 and 10.608.¹²

CONCLUSION

The Board finds that the request for reconsideration dated March 17, 2004 was timely filed.

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further consideration consistent with this decision.

Issued: November 26, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹² Section 10.606(b)(2) provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office. 20 C.F.R. § 10.606(b)(2)(1999). Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits. 20 C.F.R. § 10.608(b) (1999).