

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

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**RONNIE MONTGOMERY, Appellant**

**and**

**U.S. POSTAL SERVICE, BULK MAIL  
CENTER, Memphis, TN, Employer**

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**Docket No. 04-1871  
Issued: November 19, 2004**

*Appearances:*  
*Ronnie Montgomery, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On July 19, 2004 appellant filed a timely appeal from a June 8, 2004 nonmerit decision of the Office of Workers' Compensation Programs denying his request for merit review on the grounds that his application was not timely filed and failed to establish clear evidence of error. As more than one year has elapsed between the Office's last merit decision dated May 22, 2003 and the filing of appellant's appeal on July 19, 2004, the Board lacks jurisdiction to review the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.<sup>1</sup> The Board's jurisdiction is limited to review of the Office's nonmerit decision dated June 8, 2004. On appeal appellant contends that his request for reconsideration was postmarked within one year of the Office's last merit decision. He also argues that the employing establishment failed to timely provide him with the forms necessary for his claim.

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<sup>1</sup> The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c) and 501.3(d)(2); *see also Algimantas Bumelis*, 48 ECAB 679 (1997).

## ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

## FACTUAL HISTORY

On December 12, 2002 appellant, then a 37-year-old custodian, filed an occupational disease claim alleging that he sustained stress and anxiety due to factors of his federal employment. He stopped work on August 29, 2002 and returned to work on September 5, 2002.

On January 24, 2003 the Office requested additional information from appellant, including a detailed medical report addressing the cause of any diagnosed condition and its relationship to his employment. The Office provided appellant 30 days within which to submit the requested information.

Appellant submitted additional factual information but did not submit any medical evidence in support of his claim.

By decision dated May 22, 2003, the Office denied appellant's claim on the grounds that he had not established fact of injury. The Office noted that appellant had submitted "no medical evidence of any sort...."

In a letter dated May 19, 2004 and marked as received by the Office on May 24, 2004, appellant requested reconsideration of his claim. The letter had a priority mail number on it; however, the envelope is not contained in the record. Appellant also requested reconsideration on the appeal form which accompanied the Office's May 22, 2003 decision. He dated the request for reconsideration May 19, 2003. The Office marked the form received on May 24, 2004. In support of his request for reconsideration, appellant submitted additional factual and medical evidence, including a report dated September 10, 2002 from Dr. Jesse E. McGee, a Board-certified internist, who diagnosed a work-related aggravation of hypertension.

By decision dated June 8, 2004, the Office determined that appellant's request for reconsideration was untimely and did not show clear evidence of error. The Office stated that it had received appellant's request for reconsideration on May 24, 2004 and that therefore the request was made more than one year after the last merit decision on May 22, 2003 and was not timely.

## 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.<sup>2</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of

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<sup>2</sup> 5 U.S.C. § 8128(a); see *Howard Y. Miyashiro*, 51 ECAB 253 (1999); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

compensation.<sup>3</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretion under section 8128(a).<sup>4</sup> The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.<sup>5</sup> The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).<sup>6</sup> 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.<sup>7</sup> The Office will reopen a claimant's case for merit review, 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.<sup>8</sup> In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>9</sup>

With respect to whether a request for reconsideration is timely filed, section 10.607(a) of the regulations provides:

"An application for reconsideration must be sent within one year of the date of the [Office] decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service, and affidavits, may be used to establish the mailing date."<sup>10</sup>

If there is no postmark on the envelope available and no other relevant evidence such as certified mail receipts, certificate of service and affidavits, the date of the letter should be used.<sup>11</sup>

To require the Office to reopen a case for reconsideration under section 8128(a) of the Act,<sup>12</sup> 20 C.F.R. § 10.606 provides, in relevant part, that a claimant may obtain review of the

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<sup>3</sup> 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 her own motion or on application." 5 U.S.C. § 8128(a).

<sup>4</sup> See 20 C.F.R. § 10.607.

<sup>5</sup> 20 C.F.R. § 10.607(a); see also *Shakeer Davis*, 52 ECAB 448 (2001); *Kevin M. Fatzer*, 51 ECAB 407 (2000).

<sup>6</sup> *Angel M. Lebron, Jr.*, 51 ECAB 488 (2000).

<sup>7</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>8</sup> 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 [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

<sup>9</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>10</sup> 20 C.F.R. § 10.607(a).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (January 2004); see also *Willie H. Walker, Jr.*, 45 ECAB 126 (1993).

<sup>12</sup> 5 U.S.C. § 8128(a).

merits of his or her claim by written request to the Office setting forth arguments and presenting 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.<sup>13</sup> 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.<sup>14</sup>

### ANALYSIS

In this 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 and any other evidence such as a certified mail receipt, certificate of service or affidavit, the date of the letter must be used for determining the timeliness of the reconsideration request.<sup>15</sup> As appellant's request for reconsideration is dated May 19, 2004, it was filed within a year of the Office's May 22, 2003 decision and is, therefore, timely. The Office thus erred in denying appellant's request for reconsideration as untimely.

To require the Office to reopen a case for reconsideration under section 8128(a) of the Act,<sup>16</sup> 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 setting forth arguments and presenting 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.<sup>17</sup>

The Office, in its May 22, 2003 merit decision, denied appellant's claim for an employment-related emotional condition after finding that he had not submitted any medical evidence in support of his claim. As appellant did not submit any medical evidence, the Office did not consider whether he had established any compensable employment factors. In support of his May 19, 2004 request for reconsideration, appellant submitted new medical and documentary evidence, including a medical report dated September 10, 2002 from Dr. McGee, who diagnosed an aggravation of hypertension due to employment. Because the Office erroneously applied the clear evidence of error test, it did not analyze the evidence submitted by appellant pursuant to section 10.606(b). The case must therefore be remanded for the Office to review the evidence that appellant submitted and make the proper analysis pursuant to section 10.606(b). The Office shall then issue an appropriate decision.

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<sup>13</sup> 20 C.F.R. § 10.606(b)(2).

<sup>14</sup> 20 C.F.R. § 10.608(a).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (January 2004); *Willie H. Walker, Jr., supra* note 11.

<sup>16</sup> 5 U.S.C. § 8128(a).

<sup>17</sup> 20 C.F.R. § 10.606(b)(2).

**CONCLUSION**

The Board finds that appellant's May 19, 2004 request for reconsideration was timely filed.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 8, 2004 is reversed and the case is remanded for further consideration consistent with this opinion of the Board.

Issued: November 19, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member