

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

JUNE P. HIRONAKA, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
North Las Vegas, NV, Employer**

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**Docket No. 04-538
Issued: December 30, 2005**

Appearances:
Kim Shugars, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 22, 2003 appellant filed a timely appeal from the August 13, 2003 nonmerit decision of the Office of Workers' Compensation Programs, which denied her December 6, 2002 request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the denial of this request. The Board does not have jurisdiction to review the merits of appellant's claim because she did not file the appeal within one year of an Office merit decision.¹

ISSUE

The issue is whether the Office properly denied appellant's December 6, 2002 request for reconsideration on the grounds that it was untimely and failed to demonstrate clear evidence of error.

¹ An oral argument before the Board was scheduled on September 15, 2005, but appellant's representative notified the Clerk of the Board that it would be impossible for him to appear. The oral argument was cancelled and appellant was given until October 21, 2005 to file a brief.

FACTUAL HISTORY

On October 14, 1994 appellant, then a 54-year-old city carrier, filed a claim alleging that management's interference, retaliation, harassment and numerous confrontations regarding her representational functions as a union steward caused her mental anguish and physical symptoms.

In a decision dated April 6, 1995, the Office denied appellant's claim on the grounds that the evidence failed to establish that her diagnosed condition arose out of and in the course of the performance of duty. The Office accepted that certain incidents occurred as a matter of fact and were compensable under the Act. However, the Office found that the medical evidence was not sufficient to establish a causal relationship between these accepted incidents and appellant's diagnosed condition.

On February 18, 1998 an Office hearing representative affirmed the denial of appellant's claim. The hearing representative also found that appellant had established certain compensable factors of employment,² but noted that there was no medical report by a physician who supported that appellant's condition was work related and who identified as responsible one of the established compensable factors of employment.

In a decision dated August 14, 2001, the Office denied appellant's April 9, 2001 request for reconsideration. The Office found that the request was untimely and did not present clear evidence of error in the denial of her claim.

On May 19, 2003 appellant faxed 12 pages to the District Office in San Francisco: (1) a cover page indicating that she was faxing 12 pages; (2) an undated letter from appellant to the District Director in San Francisco regarding her October 21, 2002 request for a copy of her case record;³ (3) a May 14, 2003 letter from the District Director in San Francisco to appellant acknowledging receipt of her request for a copy of her case record; (4) a copy of a December 6, 2002 letter from appellant to the Office's central mailroom in London, Kentucky, requesting reconsideration of the merits of her claim based on a March 29, 2002 decision of the Equal Employment Opportunity (EEO) Commission, which the letter indicated was attached; (5) a delivery status report from the U.S. Postal Service indicating that item number 7001 1940 0001 7669 2935 was delivered at 8:47 a.m. on January 30, 2003 in London, Kentucky, 40742;⁴ (6) a certified mail receipt dated January 30, 2003 indicating that the Office's central mailroom in London, Kentucky received an item identified as "Request for Reconsideration & Merit Review"; (7) a U.S. Postal Service track/confirm inquiry showing that the item number above was mailed from Las Vegas on January 27, 2003 and was delivered to an R. Gumm in London, Kentucky, on January 30, 2003; (8) a U.S. Postal Service track/confirm inquiry showing the signature of Roger Gumm, P.O. Box 140, for delivery of the item numbered above; (9) a receipt

² The established compensable factors were negative comments made to appellant by coworkers Bernat and Myskowski prior to March 1994, management's response to her request for Family Medical Leave after she stopped working in September 1994, and her being required to undergo a fitness-for-duty examination in December 1994.

³ This letter indicated that she had made a request for reconsideration on January 27, 2003 and that this request was received on January 30, 2003 at 8:47 a.m.

⁴ This same item number appears on the copy of appellant's December 6, 2002 letter requesting reconsideration.

showing that appellant had sent something by first-class mail; (10) a copy of appellant's October 21, 2002 request for a complete copy of her case record; (11) a certified mail receipt dated October 24, 2002 indicating that the Office's central mailroom in London, Kentucky, received an unspecified item; and a facsimile transmission verification report indicating that appellant faxed an unspecified page on October 21, 2002.

In a decision dated August 13, 2003, the Office denied appellant's December 6, 2002 request for reconsideration. The Office found that the request was untimely and did not present clear evidence of error. The Office noted that the March 29, 2003 decision of the EEO Commission, which appellant's December 6, 2002 letter indicated was attached, was not in the case record.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”⁵

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application 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.⁶

The term “clear evidence of error” is intended to represent a difficult standard.⁷

ANALYSIS

The only issue before the Board is whether the Office properly denied appellant's December 6, 2002 request for reconsideration. The Board finds that this request was untimely. The last decision on the merits of appellant's claim was the hearing representative's decision on February 18, 1998, which denied compensation on the grounds that she failed to submit medical opinion evidence sufficient to establish a causal relationship between her diagnosed condition

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607 (1999).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

and the established compensable factors of employment. In the statement of review rights attached to that decision, the hearing representative notified appellant that any request for reconsideration “must be made within one year.” Appellant therefore had until February 18, 1999 to make a timely request. So regardless of whether she mailed her letter on December 6, 2002 or January 27, 2003, her request for reconsideration was untimely, as both dates fall well outside the one-year period following the hearing representative’s 1998 decision.

The question for determination, then, is whether appellant’s untimely request for reconsideration demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The Board finds that it does not. Appellant stated that she was basing her request on an attached March 29, 2002 decision of the EEO Commission, but no such decision appears in the case record. The Board has reviewed the case record and finds there is no copy of this decision. There is no evidence to confirm that appellant attached it to her December 6, 2002 request as alleged or that the Office otherwise received it. Appellant stated that the decision found a violation of Title VII of the Civil Rights Act of 1964 as the employing establishment retaliated against her for engaging in protected activity. But with no copy of this decision in the record, the Board finds that appellant’s unsupported allegation does not establish clear evidence of error in the hearing representative’s February 18, 1998 decision.

The Board further finds that none of the other items that appellant faxed to the Office on May 19, 2003 shows clear evidence of error in the Office’s denial of her claim. The Board will affirm the Office’s August 13, 2003 decision denying her December 6, 2002 request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant’s December 6, 2002 request for reconsideration. The request was untimely filed and failed to demonstrate clear evidence of error in the hearing representative’s February 18, 1998 merit decision.

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 30, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board