

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

DANIEL J. O'NEIL, Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Springfield, MA, Employer**

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**Docket No. 04-2295
Issued: February 24, 2005**

Appearances:
Jason N. Sheffield, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 21, 2004 appellant's representative filed a timely appeal from a June 18, 2004 nonmerit decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated March 19, 2003 to the filing of this appeal on September 21, 2004, the Board lacks jurisdiction to review the merits of the claim and has jurisdiction over the nonmerit decision, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits of his claim on the grounds that it was untimely filed and failed to establish clear evidence of error. On appeal appellant's representative contends that appellant

timely filed his request for reconsideration as the postmark on the request was dated March 19, 2004.¹

FACTUAL HISTORY

On May 30, 1998 appellant, a 37-year-old clerk filed a traumatic injury claim alleging that he pulled a groin muscle that day while lifting a sack of mail. He did not stop work. Appellant filed a recurrence claim on October 23, 1998.

By decision dated January 26, 1999, the Office denied appellant's claim on the grounds that he failed to establish that his condition was causally related to the May 30, 1998 employment incident and thus, fact of injury was not established. The Office also denied his recurrence claim on the grounds that the original claim had not been accepted.

In a letter dated February 22, 1999, appellant requested reconsideration and submitted evidence in support of his claim.

In a merit decision dated May 25, 1999, the Office denied appellant's request for modification.

In a letter dated July 14, 1999, appellant requested reconsideration and submitted additional evidence.

By merit decision dated October 5, 1999, the Office denied appellant's modification request.

In a letter dated September 7, 2000, appellant again requested reconsideration and submitted evidence in support of his request.

In a merit decision dated November 28, 2000, the Office denied appellant's request for modification.

In a letter dated November 18, 2001, appellant again requested reconsideration and submitted evidence in support of his request.

In a merit decision dated January 10, 2002, the Office denied appellant's request for modification.

In a letter dated January 6, 2003, appellant, through counsel, requested reconsideration and submitted medical evidence in support of his request.

¹ With his appeal appellant submitted copies of the certified mail receipt and return receipt, which were not contained in the record transmitted to the Board from the Office for this appeal. The Board is limited to review of evidence which was before the Office at the time of its final decision. The Board is, therefore, precluded from reviewing the new evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

By “amended decision” dated March 19, 2003,² the Office denied appellant’s request for modification.

In a letter dated March 19, 2004, received by the Office on March 25, 2004, appellant’s representative requested reconsideration and submitted evidence in support of his request.³

By decision dated June 18, 2004, the Office denied appellant’s request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

The imposition of a one-year time limitation, within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).⁴ This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulation, 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 merit decision, for which review is sought.⁵ Under this section, the proper procedure is to determine if the request was submitted by mail and then determine the mailing date. The postmark date is the best evidence of the mailing date and the Office is clearly in the best position to retain evidence of the postmark date in the record. When the Office does not retain the envelope or other evidence of the mailing date and the date of the reconsideration request cannot be ascertained,⁶ then “other evidence such as (but not limited to) certified mail receipts, certificate of service and affidavits” pursuant to section 10.607(a), may be used to establish the mailing date.

Section 10.607(c) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office’s decision was, on its face, erroneous.

To establish clear evidence of error a claimant must submit evidence relevant to the issue that was decided by the Office.⁷ The evidence must be positive, precise and explicit and must

² The Office earlier issued a merit decision dated March 11, 2003, denying appellant’s modification request.

³ On July 14, 2003 the Office received medical and factual evidence from appellant’s congressional representative.

⁴ *Diane Matchem*, 48 ECAB 532 (1997), citing *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ Current Office procedures indicate that, if the postmark is not available, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (January 2004).

⁷ *Nancy Marcano*, 50 ECAB 110 (1998).

manifest on its face that the Office committed an error. Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸

It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office's denial would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.⁹

ANALYSIS

The most recent merit decision of the Office was issued on March 19, 2003. Accordingly, appellant had until March 19, 2004 to file his reconsideration request. The record shows that the Office received appellant's request on March 25, 2004. However, there is no envelope or other indication in the record as to what date appellant's request was mailed. The date on the letter requesting reconsideration is March 19, 2004. The Board notes that, the Office's procedure manual, Chapter 2.1602.3(b)(1), provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope. The procedure manual states: "Timeliness is thus, determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used." The Board notes that the envelope containing the request was not retained in the record and the letter requesting reconsideration was dated March 19, 2004. For this reason the Board finds that appellant timely filed his request for reconsideration within one year of the March 19, 2003 merit decision and the Office improperly denied his reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since the Office erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case to the Office for review of this evidence under the proper standard of review for a timely reconsideration request, pursuant to section 10.606(b)(2) of the Office's procedures.¹⁰ Following the application of the proper standard of review and any further development, the Office will issue an appropriate decision.

CONCLUSION

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

⁸ *Richard L. Rhodes*, 50 ECAB 259 (1999).

⁹ *Annie Billingsley*, 50 ECAB 210 (1998).

¹⁰ See 20 C.F.R. § 10.606(b)(2), which provides that, a claimant may obtain review of the merits of the claim if the application for reconsideration and supporting documents: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (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.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 7, 2003 is set aside and this case is remanded for further proceedings consistent with this decision.

Issued: February 24, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member