

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

ANGELA B. FARRAR, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Huntsville, AL, Employer**

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**Docket No. 05-752
Issued: June 8, 2005**

Appearances:

*Leslie J. Horton, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On February 10, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated February 1, 2005 denying her 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 January 16, 2004 to 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).

ISSUE

The issue on appeal is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

On August 1, 2003 appellant, then a 39-year-old clerk, filed an occupational disease claim alleging that she suffered an emotional condition due to conditions of her federal employment.

By letter dated August 28, 2003, the Office advised appellant that the information submitted was insufficient to substantiate her claim.

By decision dated January 16, 2004, the Office denied appellant's claim on the grounds that the evidence failed to establish that her alleged emotional condition was due to an injury sustained in the performance of duty.

By memorandum and accompanying affidavit dated January 15, 2005, appellant, through her representative, requested reconsideration and submitted additional evidence. The request was received by the Office on January 19, 2005.

By letter dated January 21, 2005, appellant's attorney informed the Office that the previously submitted affidavit and request for reconsideration dated January 15, 2005 had actually been signed and mailed on January 14, 2005, as evidenced by the accompanying express mail receipt and tracking documents.

By decision dated February 1, 2005, the Office denied appellant's request for reconsideration. Having determined that appellant's January 15, 2005 letter requesting reconsideration was not received in the Office until January 19, 2005 and, therefore, was not dated within the one-year limit, the Office applied the standard for an untimely request for reconsideration and found that appellant had failed to establish clear evidence of error on the part of the Office.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.¹ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.²

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act.³ The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁴ 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

¹ 20 C.F.R. § 10.606(b)(2).

² 20 C.F.R. § 10.608(b). *See Annette Louise*, 54 ECAB ____ (Docket No. 03-445, issued August 26, 2003).

³ 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180, 186 (2000).

was in error.⁵ The Office procedures state that 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.⁶ 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.⁷

ANALYSIS

The Board finds that appellant's request for reconsideration was timely filed. The Office issued a decision on February 1, 2005, denying reconsideration of its prior January 16, 2004 decision on the grounds that appellant's request for reconsideration, date stamped as received January 19, 2005, was untimely filed. However, in denying appellant's request for reconsideration, the Office did not address the fact that the request, which was dated January 15, 2005, was accompanied by an express mail receipt and tracking documents reflecting that the request was actually mailed on January 14, 2005, nor did the Office address appellant's letter of January 21, 2005 advising the Office that the original request for reconsideration had actually been signed on January 14, 2005, the date it was mailed.

The one-year time limitation begins to run on the day following the date of the original Office decision.⁸ Therefore, appellant had until January 16, 2005 to submit a timely request for reconsideration. The Board notes that Chapter 2.1602.3(b)(1) of the Office's procedure manual 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 Board notes that, although the envelope containing the request was not retained in the record, appellant provided evidence of the date of mailing, January 14, 2005, in the form of the express mail receipt and the tracking documents. Therefore, the timeliness of appellant's reconsideration request shall be determined by the date of posting.⁹ The Board finds that appellant timely filed her request for reconsideration within one year of the January 16, 2004 merit decision, and the Office improperly denied her 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

⁵ *Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

⁶ See *Gladys Mercado*, 52 ECAB 255, 256 (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 [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

⁷ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

⁸ *Donna M. Campbell*, 55 ECAB ____ (Docket No. 03-2223, issued January 9, 2004).

⁹ 20 C.F.R. § 10.607(a) provides that, if a request for reconsideration is submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. An imaged copy of the envelope that enclosed the reconsideration request should be in the case record. If there is no such postmark, other evidence such as (but not limited to) certified mail receipts, certificates of service and affidavits may be used to establish the mailing date.

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.

CONCLUSION

The Board finds that appellant's January 14, 2005 request for reconsideration was timely filed.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2005 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded to the Office for further proceedings consistent with this opinion.

Issued: June 8, 2005
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member