

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

R.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dallas, TX, Employer**

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**Docket No. 06-1825
Issued: December 26, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 7, 2006 appellant filed a timely appeal of the May 1, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. Because more than one year elapsed between the last merit decision dated April 19, 2004 and the filing of this appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). The only decision before the Board is the May 1, 2006 nonmerit decision.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On July 20, 1998 appellant, then a 43-year-old clerk, sustained a low back injury while lifting mail from a cart. The Office accepted the claim for lumbar strain and left shoulder strain.¹

This is the second time this case has been before the Board. By order dated February 14, 2006, the Board set aside and remanded the Office's August 10, 2005 decision denying appellant's claim for lost wages. It instructed the Office to obtain a copy of a certified mail receipt in order to ascertain the date of her request for reconsideration.²

On January 28, 2004 appellant filed a claim for lost wages for the period May 28, 2003 to January 23, 2004. On April 19, 2004 the Office denied her wage-loss claim on the grounds that the evidence failed to establish that she experienced a recurrence of disability or was temporarily disabled during the period in question.

The record contains a letter from appellant dated December 7, 2004 requesting reconsideration of the Office's April 19, 2004 decision. The record also contains an appeal request form dated May 23, 2005, requesting reconsideration. The record does not contain a copy of the envelope accompanying appellant's December 7, 2004 letter or appeal request form. However, the upper right-hand corner of the December 7, 2004 letter contained the following hand-written notation: "cert. # 7004 2890 0001 6117 8031."

In support of her request, appellant submitted medical evidence, including reports of magnetic resonance imaging (MRI) scans dated July 9, 1999 and October 18, 2003 and a report of an April 5, 2005 arthrogram of the left shoulder. Appellant submitted unsigned chart notes from Dr. Benjamin Cunningham, a Board-certified orthopedic surgeon. Notes dated January 4, 2005 reflected diagnoses of chronic left shoulder supraspinatus tendinitis; possible mild acromioclavicular (AC) joint tenderness; and left shoulder impingement. Dr. Cunningham stated that it was "possible that many of [appellant's] symptoms may be coming from some process in her neck." Notes dated May 17, 2005 reflected an additional diagnosis of Slap lesion Type II. On March 29, 2005 Dr. Cunningham noted that appellant was essentially unchanged. In a May 23, 2005 progress note, Dr. Daniel N. Metzger, a Board-certified family practitioner, provided a diagnosis of shoulder tendinitis.

In a decision dated August 10, 2005, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and that she failed to present clear evidence of error. Appellant filed a request for review of the Office's August 10, 2005 decision with the Board. By decision dated February 14, 2006, the Board remanded the case to the Office

¹ The Office noted in its August 10, 2005 decision that appellant's claim was initially accepted for a lumbar strain and later upgraded to include left shoulder strain. The Board notes that the evidence of record does not include any documents relating to the acceptance of left shoulder strain or any documents received by the Office between November 17, 2000 and March 26, 2002. The Office also stated that on March 21, 2001 appellant sustained an injury to her lower back, which was accepted for an aggravation of a low back strain. (case No. 162018995) However, the evidence of record does not contain documentation of such claim.

² Docket No. 05-1857 (issued February 14, 2006).

with instructions to obtain the certified mail receipt from appellant, in order to ascertain the date of her request for reconsideration.³

By letter dated March 31, 2006, the Office asked appellant to provide a copy of the certified mail receipt referenced on her December 7, 2004 letter. The record contains a document from the U.S. Postal Service entitled “Track and Confirm” referencing receipt #7004 2890 0001 6117 8031. The document contains the following notation: “Your item was delivered at 8:58 a.m. on June 1, 2005 in London, KY 40742. The item was signed for by J. Neil.”

On April 19, 2006 appellant contended that the evidence showed that the Office received her December 7, 2004 letter. Further contending that the Office should have retained the envelope bearing the postmark, she requested that the Office honor the date of the letter.

By decision dated May 1, 2006, the Office denied appellant’s request for reconsideration as untimely and failing to establish clear evidence of error.

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.⁴ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.⁵ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁶ 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.⁷ In those instances when a request for reconsideration is not timely filed, the Office 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.⁸

³ *Id.*

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

⁵ 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).

⁶ 20 C.F.R. § 10.607 (2003).

⁷ 20 C.F.R. § 10.607(a) (2003).

⁸ 20 C.F.R. § 10.607(b) (2003). 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).

Office procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be retained 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.⁹

ANALYSIS

On February 14, 2005 the Board instructed the Office to obtain a certified mail receipt for appellant's letter dated December 7, 2004 in order to ascertain the correct date of her request for reconsideration. The Office obtained a "track and confirm" receipt from the U.S. Postal Service reflecting that item #7004 2890 0001 6117 8031, was delivered to the Office in London, KY at 8:58 a.m. on June 1, 2005. Based on this information, the Office denied appellant's request for reconsideration, finding that it was not timely filed and failed to present clear evidence of error. The Board, however, finds that it was timely and that the Office evaluated the request under an improper standard of review.

Appellant had until April 19, 2005 to file a timely request for reconsideration. She submitted both a letter dated December 7, 2004 and an appeal request form dated May 23, 2005, requesting reconsideration of the Office's April 19, 2004 merit decision. The record does not contain a copy of the envelope accompanying appellant's December 7, 2004 letter or the appeal request form. The Office initially determined that the date of receipt of these documents, June 1, 2005, rendered appellant's request untimely. In accordance with the Board's February 14, 2006 order, the Office attempted to obtain the certified mail receipt for the December 7, 2004 letter from appellant, but was unable to do so. Instead, it obtained a "track and confirm" receipt, which indicated that an unidentified document was delivered to the Office on June 1, 2005. On the grounds that it was received more than a year after the April 19, 2004 decision, the Office denied appellant's request for reconsideration on May 1, 2006. The Board finds that it failed to cure the error committed in its August 10, 2005 decision by using the date of receipt to establish the mailing date. The Office failed to retain an envelope with a postmark and was unable to obtain other evidence to establish the mailing date. Therefore, according to its own procedures, the Office was obligated to use the date of the letter itself.¹⁰ Moreover, the evidence of record does not establish with certainty that appellant's December 7, 2004 letter was the certified mail document received by the Office on June 1, 2005. It is possible that the hand-written notation made by the Office in the upper left-hand corner of the December 7, 2004 letter, was mistakenly placed on the December 7, 2004 letter, rather than the May 23, 2005 appeal request form.

Appellant's request for reconsideration was dated December 7, 2004, clearly within the one-year time limitation. The Board finds that she timely filed her request for reconsideration within one year of the most recent merit decision that was issued on April 19, 2004. The Board further finds that 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

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004). See *Donna M. Campbell*, 55 ECAB 241 (2004).

¹⁰ *Id.*

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.

CONCLUSION

The Board finds that appellant's December 7, 2004 request for reconsideration was timely filed.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 1, 2006 is set aside and the case is remanded for further proceedings consistent with this decision.

Issued: December 26, 2006
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board