

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

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| CLIFFORD G. POLGREEN, Appellant |) | |
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| and |) | Docket No. 06-539 |
| |) | Issued: June 7, 2006 |
| U.S. POSTAL SERVICE, POST OFFICE, Whitestone, NY, Employer |) | |
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Appearances:
C.B. Weiser, Esq., 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 January 9, 2006 appellant filed a timely appeal of the November 1, 2005 decision of the Office of Workers' Compensation Programs, which denied further merit review on the basis that his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the last merit decision dated June 20, 2003 and 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). Accordingly, the only decision properly before the Board is the November 1, 2005 decision denying appellant's request for reconsideration.

ISSUE

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

FACTUAL HISTORY

On February 2, 2002 appellant, then a 49-year-old human resources specialist filed a claim alleging that his stress and anxiety were caused by conditions of his federal employment. Appellant attributed the employing establishment's failure to settle his Equal Employment Opportunity (EEO) case as a cause of his stress and anxiety. He was first aware of his dysthymic disorder and that it was caused or aggravated by his federal employment in January 2001. The record reflects that appellant transferred and relocated several times while employed by the employing establishment and retired on September 17, 2001.

By decision dated August 9, 2002, the Office denied appellant's claim on the basis that he failed to establish any compensable factors of employment.

On August 25, 2002 appellant requested an oral hearing, which was held on March 27, 2003 in Houston, Texas. By decision dated June 20, 2003, the Office hearing representative affirmed as modified the Office's August 9, 2002 decision. The Office hearing representative found that appellant's allegation of disparate treatment by the employing establishment was not substantiated by the evidence of record and that there was no evidence of error or abuse in the employing establishment's handling of administrative actions.

In a January 14, 2004 letter, appellant's attorney notified the Office that he was retained by appellant on August 6, 2003 and provided a copy of appellant's signed authorization. He further requested a copy of appellant's compensation file, which the Office sent on January 29, 2004.

In a letter dated January 29, 2004, the Office advised counsel that appellant's case record was transferred to the Dallas, Texas office but that all correspondence should be addressed to London, Kentucky.

In an August 19, 2005 letter, appellant's attorney notified the Office that appellant had submitted a request for reconsideration on June 11, 2004 and a decision had not been received. A copy of a June 11, 2004 letter from counsel requesting reconsideration and advancing arguments was submitted. A copy of a February 2, 2004 letter from the employing establishment advised that appellant had settled his EEO case on October 4, 1999 and had retired from the employing establishment on September 17, 2001. Appellant's attorney also submitted an August 22, 2005 letter advising the Office of appellant's change of address to Charlotte, North Carolina. All of appellant's attorney's letters, which were addressed to the Office's London, Kentucky address, were received by the Office on August 25, 2005.

In an August 29, 2005 letter, the Office acknowledged receipt of appellant's change of address. The Office further advised that a review of the case file failed to establish that the request for reconsideration dated June 11, 2004 was received prior to August 25, 2005.

By decision dated November 1, 2005, the Office denied appellant's request for reconsideration finding that it was untimely filed and did not 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.¹ This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.² The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³ 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.⁴ 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.⁵

ANALYSIS

The one-year time limitation begins to run on the date following the date of the original Office decision. A right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁶ As noted above, the most recent merit decision is the Office's June 20, 2003 decision. Therefore, appellant had one year from June 20, 2003 to submit a timely request for reconsideration.

The Office received appellant's June 11, 2004 request for reconsideration on August 25, 2005. Because the request was received more than one year after the June 20, 2003 merit decision, the Office found the request to be untimely.

The Board has found that, in the absence of evidence to the contrary, it is presumed that a notice mailed in the ordinary course of business was received in due course by the intended recipient. This presumption is commonly referred to as the mailbox rule. It arises when the record reflects that the notice was properly addressed and duly mailed.⁷ The Board has held that the presumption of receipt under the mailbox rule must apply equally to claimants and to the Office alike. Provided that the conditions which give rise to the presumption remain the same, namely, evidence of a properly addressed letter together with evidence of proper mailing, the mailbox rule may be used to establish receipt by the Office.⁸

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

² 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).

³ 20 C.F.R. § 10.607 (1999).

⁴ 20 C.F.R. § 10.607(a) (1999).

⁵ 20 C.F.R. § 10.607(b) (1999). Regarding clear evidence of error, see *Thankamma Mathews*, 44 ECAB 765 (1993).

⁶ *Donna M. Campbell*, 55 ECAB ____ (Docket No. 03-2223, issued January 9, 2004).

⁷ *Kenneth E. Harris*, 54 ECAB 502, 505 (2003).

⁸ *Id.*; see also *Larry L. Hill*, 42 ECAB 596 (1991).

In this case, appellant, through counsel has submitted sufficient evidence to establish that the June 11, 2004 request for reconsideration was properly addressed to the Office and mailed in the due course of business. His attorney submitted a copy of the June 11, 2004 letter requesting reconsideration and properly addressed to the Office's London, Kentucky address. In appellant's attorney's August 19, 2005 letter, he also addressed the Office's London, Kentucky address, appellant's attorney contended that he mailed the letter requesting reconsideration on June 11, 2004 and the Office had not issued a decision on appellant's request for reconsideration.

In its January 29, 2004 letter acknowledging appellant's legal representative, the Office specifically advised that all correspondence related to appellant's case should be directed to the London, Kentucky address. This is the identical address to which appellant's attorney addressed the June 11, 2004 request for reconsideration. Moreover, there is no evidence to rebut the presumption that a letter properly addressed and mailed in the due course of business, such as in the course of counsel's practice, had arrived at the mailing address in due course.

Thus, the mailbox rule is applicable to the June 11, 2004 correspondence requesting reconsideration, as it is presumed to have been mailed during the ordinary course of business by appellant's attorney. Also there is no evidence that the June 11, 2004 letter was returned as undeliverable.⁹ Consequently, the record establishes that the June 11, 2004 request for reconsideration was correctly addressed to the Office and is presumed to have received the June 11, 2004 request for reconsideration in due course such that the reconsideration request dated June 11, 2004 must be considered timely filed.¹⁰

Since the Office erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard for untimely requests, 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 the Office is presumed to have received appellant's June 11, 2004 request for reconsideration and that such request for reconsideration was timely filed.

⁹ See *John A. Butcher*, 42 ECAB 934 (1991).

¹⁰ Regarding how the timeliness of a reconsideration request is determined, see 20 C.F.R. § 10.607(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

ORDER

IT IS HEREBY ORDERED THAT the November 1, 2005 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development.

Issued: June 7, 2006
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