United States Department of Labor
Employees' Compensation Appeals Board

JACK D. JOHNSON, Appellant	)	
and	)	**Docket No. 06-433**
	)	**Issued: May 17, 2006**
DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICES, Decatur, IN, Employer	)	

Appearances:
Jack D. Johnson, pro se
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 19, 2005 appellant filed a timely appeal of the October 6, 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 most recent merit decision dated February 20, 2004 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).

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 December 24, 2002 appellant, then a 50-year-old soil conservation technician, filed an occupational disease claim alleging that he contracted West Nile virus as a result of mosquito exposure in the performance of his job duties. He first realized his condition was caused or aggravated by his employment on September 21, 2002. Appellant stopped work on September 23, 2002 and returned to work for approximately six or seven hours a day on November 14, 2002.

After performing the necessary development of the record, by decision dated April 1, 2003, the Office denied the claim on the grounds that the medical evidence of record did not establish that the claimed medical condition was causally related to work factors.

In an April 22, 2003 letter, appellant requested "an oral hearing or review of the written record" in his claim. The Office treated this as a request for a review of the written record and appellant submitted additional evidence.

By decision dated February 20, 2004, an Office hearing representative affirmed the April 1, 2003 decision. The Office hearing representative found that the medical evidence of record was not sufficient to establish that the claimed medical condition was causally related to appellant's employment. In a cover letter of February 20, 2004, the Office advised appellant that, if he disagreed with the decision, he had the right to submit new evidence to the Office and request reconsideration of the case or, if he had no additional evidence, he could appeal the decision to the Board.

In a letter dated February 15, 2005, which the Office received March 10, 2005, appellant advised that he was enclosing pertinent information related to his claim, which had not been accepted, and provided his file number. The envelope bearing this letter is not of record. Appellant stated that he tried to contact the Office hearing representative on December 22, 2003 regarding the date of his oral hearing and was informed, on January 14, 2004, that there was no need for an oral hearing. On March 1, 2004 he found out his case had not been accepted. Appellant noted that he had contacted attorneys and various groups who supported his receipt of workers' compensation. He verified the fact that he was exposed to mosquitoes while out on the job, and stated that his doctors did not understand how he could be turned down for workers' compensation. Appellant also discussed the high level of exposure to mosquitoes he has in his job as well as flooding by his office location. In a December 16, 2004 report, received March 10, 2005, Dr. Hyung S. Lee, a general surgeon, stated that appellant's job exposed him to situations where the West Nile virus might be found.

Appellant submitted a February 20, 2005 letter, which was addressed to the Board, which the Office received on March 10, 2005. Appellant asked for some of the information in his file to be reviewed to see how he has been treated unfairly. He noted that several of his doctors also felt that he had been unfairly treated and that he was going to contact his congressional representatives. Appellant discussed his frustration with sending correspondence to the Office and not receiving a response until his claim denial.

The Office also received several undated statements, some of which contained photographs, from appellant which described the locations, job performed and the mosquito conditions he worked in from June 25 to September 10, 2002. He also provided statements which discussed the location of his office building, the general geographical area and the work environment, which made for breeding grounds for mosquitoes. In a November 10, 2003 statement from John Fried, a County Conservationist, verified that appellant's position puts him at risk for mosquito bites.

Appellant also submitted medical documentation. In an undated report, which the Office initially received March 16, 2004, Dr. Robert H. Larmore, a Board-certified ophthalmologist, advised that he did not think that appellant's diagnosis of West Nile virus was related to his decreased visual acuity. He stated that he reviewed all the correspondence and medical records which appellant had concerning his diagnosis of West Nile virus and opined that appellant's loss of work was directly due to his infection with the West Nile virus as a result of his exposure from his occupation.

The Office also received duplicate copies of various evidence.

In a June 8, 2005 telephone call report, the Office noted that appellant had called to check on the status of his claim and was advised that no reconsideration request had been filed. In a July 21, 2005 letter, appellant stated that he was requesting reconsideration of his claim. He stated that he had called to check on the status of his claim and was told that the file had been sent to the district Office and set aside as he did not clearly state whether he wanted reconsideration or an appeal.

By decision dated October 6, 2005, the Office denied appellant's request for reconsideration finding 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

[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).

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] Therefore, appellant had one year from February 20, 2004 to submit a timely request for reconsideration. The Office received appellant's July 21, 2005 request for reconsideration on July 28, 2005. Because the request was received more than one year after the February 20, 2004 merit decision, the Office found the request to be untimely.

However, the Board notes that the Office also received a letter from appellant dated February 15, 2005, which pertained to the status of his claim. For the reason noted below, the Board finds that appellant's February 15, 2005 letter constituted a request for reconsideration. While the letter was not received by the Office until March 10, 2005, the envelope bearing the letter was not retained by the Office. 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.[7] As the Office did not retain the envelope for appellant's February 15, 2005 letter, Office procedures state that, when there is no evidence to establish the mailing date, the date of the letter itself should be used.[8] For this reason, the Board finds that appellant's letter dated February 15, 2005 is considered timely filed.

Although the February 15, 2005 letter did not mention the word "reconsideration," the Board has held that there may be a request for reconsideration in situations where a letter does

[5] 20 C.F.R. § 10.607(b) (1999). 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 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).

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

[7] The Office's procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be 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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

[8] *Id*.; *see also Donna M. Campbell*, *supra* note 6.

not contain the word "reconsideration." In *Vicente P. Taimanglo*,[9] and *Gladys Mercado*[10] the Board found that letters written by the employees constituted timely requests for reconsideration even though they did not mention the word reconsideration. In *Taimanglo*, the Board stated that, while no special form is required, the request must be made in writing, identify the decision and the specific issue(s), for which reconsideration is being requested and be accompanied by relevant and pertinent new evidence or argument not considered previously.[11] In *Taimanglo*, the claimant had identified the Office decision in his letter, indicated that additional medical evidence had been submitted and stated that he was waiting for a response. The Board found that the letter constituted a timely request for reconsideration. In *Mercado*, the claimant asked the Office to help her reopen her case, provided her case number and submitted additional medical evidence. The Board found that the claimant's letter constituted a timely request for reconsideration.

In its February 20, 2004 decision, the Office advised appellant that, if he disagreed with the attached decision, he had the right to submit new evidence to the Office and request reconsideration of the case or, if he had no additional evidence, he could appeal the decision to the Board. In the letter of February 15, 2005, appellant advised that he was enclosing pertinent information related to his claim and provided his file number. With this letter, appellant submitted Dr. Lee's December 16, 2004 report. Also, following the hearing representative's February 20, 2004 decision, appellant submitted Dr. Larmore's report which was received by the Office on March 16, 2004. Considering these factors, the Board finds that appellant's February 15, 2005 letter constituted a request for reconsideration and that new medical evidence was submitted in support of the request.[12]

As appellant timely requested reconsideration, the Office improperly denied his reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. The Board will remand the case to the Office for review of the new medical evidence under the proper standard of review for a timely reconsideration request and to undertake any appropriate additional development it deems necessary.

CONCLUSION

The Board finds that appellant's February 15, 2005 letter constituted a request for reconsideration which was timely filed within one year of the February 20, 2004 decision. The Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.

[9] *Vicente P. Taimanglo*, 45 ECAB 504 (1994).

[10] *Gladys Mercado*, 52 ECAB 255 (2001).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (January 2004); *Vicente P. Taimanglo, supra* note 9.

[12] *See Gladys Mercado, supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2005 decision of the Office of Workers' Compensation Programs be vacated and the case remanded to the Office for further proceedings consistent with this opinion of the Board.

Issued: May 17, 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