United States Department of Labor
Employees' Compensation Appeals Board

R.P., Appellant	)	
and	)	**Docket No. 06-1903**
DEPARTMENT OF THE NAVY, NAVAL WEAPONS STATION, Seal Beach, CA, Employer	)	**Issued: August 10, 2007**

Appearances:
Thomas George Key, Esq., for the appellant[1]
Office of Solicitor, for the Director

Oral Argument July 18, 2007

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 14, 2006 appellant, through his attorney, filed a timely appeal from the June 16, 2006 nonmerit decision of the Office of Workers' Compensation Programs which denied his application for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit denial. The Board has no jurisdiction to review the Office's December 21, 2004 decision which is the most recent merit decision on appellant's wage-earning capacity, as he filed his appeal to the Board more than one year after the date of that decision.

[1] Appellant's attorney presented the Board with a June 21, 2007 authorization of representation from appellant, showing that the attorney was authorized to appear on his behalf at the July 18, 2007 oral argument. Counsel also presented the Board with a June 27, 2007 medical report showing that appellant was medically unable to travel to Washington, DC.

ISSUE

The issue is whether the Office properly denied appellant's March 30, 2006 application for reconsideration.

FACTUAL HISTORY

On May 20, 1997 appellant, then a 45-year-old pipefitter, sustained an injury in the performance of duty while installing an overhead gas line. The Office accepted his claim for lumbar sprain. On or about July 30, 1999 appellant sustained another injury in the performance of duty while closing a 10-inch valve, showing a boiler man how to pack a 10-inch lead joint and pushing dirt into a hole. The Office also accepted this claim for lumbar strain. Following the report of an impartial medical specialist selected to resolve a conflict in medical opinion, the Office expanded the accepted conditions to include multilevel lumbar degenerative disc disease, degenerative spondylosis and spinal stenosis with right leg radiculopathy.

On July 30, 2002 the Office issued two final decisions. The first denied compensation for certain periods of wage loss. The second determined that appellant's actual wages in the position of work input control clerk from July 19 through September 21, 2000, fairly and reasonably represented his wage-earning capacity such that he was no longer entitled to compensation for wage loss.

In a decision dated September 17, 2003, the Office granted appellant's July 11, 2003 application for reconsideration and reopened his case for a review on the merits. The Office found that the evidence submitted was insufficient to warrant modification of either July 30, 2002 decision.

In a decision dated December 21, 2004, the Office granted appellant's September 16, 2004 application for reconsideration and again reopened his case for a review on the merits. The Office found that the evidence submitted was insufficient to warrant modification of the September 17, 2003 decision. In an attached statement of appeal rights, the Office notified appellant that, if he had any additional evidence or legal argument that he believed would establish his claim, he could request in writing that the Office reconsider its decision. The Office advised that any such request must be made within one calendar year of the date of the decision and must be accompanied by relevant evidence not previously submitted. The Office attached an appeal request form which instructed appellant how to make an application for reconsideration and where to send it.

Appellant corresponded with his U.S. Senator and Congressman. He sent them a number of documents with his comments. In appellant's correspondence, he referred to a "December 21 appeal." The Office received a copy of this material on December 22, 2005. On January 4, 2006 the Office wrote to appellant to advise that it could find no request for reconsideration, no request for a response. The Office stated that, if he wanted to request reconsideration of the most recent merit decision on December 21, 2004, he should complete and return the appeal request form. The Office noted that reconsideration was an avenue of relief if filed within one year of December 21, 2004. On March 1, 2006 the Office advised appellant's U.S. Senator that it had

yet to receive a completed appeal request form or any other correspondence from appellant requesting reconsideration.

In a letter postmarked March 30, 2006, appellant requested reconsideration. He submitted an appeal request form stating: "I have included two letters, one from [the supervisory claims examiner] to Senator Boxer and one from me to [the supervisory claims examiner]. Sorry for the mix up. If there is anything else you need please let me know. Thank you." Appellant submitted a copy of the Office's March 1, 2006 letter to his U.S. Senator and a copy of his March 14, 2006 letter to the Office:

> "Thank you for the information that you sent me. I was under the impression that Senator Boxer's people were acting as a liaison between me and [w]orkers' [co]mp[ensation]. I am getting the paper to ask for reconsideration. Do I send this in order to have my appeal evaluated again or should I send it with a complete copy of my appeal? Would also like copies of all the decisions from 2000 to the ones you last sent starting in July 2002. Would also ask if there is a time limit on how long your employer can keep you working in a field (your job) when a doctor says that you should [not] do this kind of work anymore. I have heard that they have one year to retrain you and put you into a different field. Can you tell me what the time limit is[?]"

On April 18, 2006 the Office acknowledged receipt of appellant's request for reconsideration but informed him that it was untimely because it was received more than one year after the last merit decision on December 21, 2004. The Office stated that it would determine whether this request presented clear evidence that the December 21, 2004 decision was in error.

In a decision dated June 16, 2006, the Office denied appellant's March 30, 2006 application for reconsideration. The Office found that the application was untimely, as appellant did not file it within one year of the last merit decision. The Office denied a reopening of his case for a merit review on the grounds that his untimely application failed to show clear evidence that the December 21, 2004 decision was in error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[2] All applications for reconsideration should be accompanied

[2] 20 C.F.R. § 10.605 (1999); *see* 5 U.S.C. § 8128(a).

by evidence or argument.[3] An application not supported by evidence or argument is *prima facie* insufficient to warrant a merit review of the case.[4]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision.[5] An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed.[6] The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[7] The term "clear evidence of error" is intended to represent a difficult standard.[8] If clear evidence of error has not been presented, the Office should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.[9]

ANALYSIS

The last decision on the merits of appellant's case was the Office's December 21, 2004 decision denying modification. Appellant had one year from the date of that decision to request reconsideration from the Office. The attached statement of appeal rights properly notified him of this time limitation and, together with the attached appeal request form, instructed appellant how to prepare an application for reconsideration and where to send it. Appellant did not follow these instructions. These were the same instructions he successfully followed when he made his July 11, 2003 and September 16, 2004 applications for reconsideration. The Office granted those applications and reopened his case for a review on the merits, but in the calendar year following the Office's December 21, 2004 merit decision, appellant did not complete the appeal request form, did not send it to the Office at the address given on that form, did not write "Reconsideration Request" on the outside of the envelope and did not submit relevant evidence not previously submitted. He corresponded instead with his U.S. Senator and Congressman. It was not until March 30, 2006 that appellant sent the Office an application for reconsideration. As he made this application more than 15 months after the Office's December 21, 2004 merit decision, the Office properly found that the application was untimely.

The Office may still grant an untimely application for reconsideration, but the claimant must meet a high legal standard. The application must show on its face that the Office's decision

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[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (May 1996).

[4] *Id*. at Chapter. 2.1602.6 (January 2004).

[5] 20 C.F.R. § 10.606(a) (1999).

[6] *Id*. § 10.607(a).

[7] *Id*. § 10.607 (b).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

[9] *Id*. at Chapter 2.1602.3.d(1).

was erroneous. There can be no question. Appellant's March 30, 2006 application does not meet this standard. Two letters accompanied the application, one from appellant to the Office, one from the Office to appellant's U.S. Senator. Neither showed clear evidence of error in the Office's December 21, 2004 merit decision. Neither, in fact, made the attempt. The Board will, therefore, affirm the Office decision denying appellant's untimely application for reconsideration. Appellant is not entitled to a reopening of his case.

CONCLUSION

The Board finds that the Office properly denied appellant's March 30, 2006 application for reconsideration. The application was untimely and failed to establish on its face that the Office's most recent merit decision was erroneous.

ORDER

IT IS HEREBY ORDERED THAT the June 16, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 10, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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