

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

M.M., Appellant

and

U.S. POSTAL SERVICE, Tampa, FL, Employer

)
)
)
)
)
)
)

**Docket No. 07-1846
Issued: November 21, 2007**

Appearances:
Capp Taylor, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 6, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 11, 2007 nonmerit decision denying his request for further merit review of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's March 31, 2004 decision. Because more than one year has elapsed between the last merit decision and the filing of this appeal on June 6, 2007, the Board lacks jurisdiction to review the merits of this claim.

ISSUE

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

FACTUAL HISTORY

On December 4, 2002 appellant, then a 44-year-old tractor trailer operator, filed a traumatic injury claim alleging that on the same day a tow motor ran into the upright he was

unloading knocking him into some pallets injuring his back and right arm. On November 13, 2003 the Office denied his claim on the grounds that he did not establish fact of injury or submit sufficient medical evidence to establish his claim. On December 12, 2003 appellant requested a review of the written record. On March 31, 2004 the Branch of Hearings and Review issued a decision affirming the prior decision but modifying the decision finding that appellant had established the factual aspect of his claim, that the incident occurred as alleged, and that he had a diagnosed condition but that appellant had failed to establish the causal relationship between the two. On May 27, 2004 appellant's counsel submitted additional medical records but did not request reconsideration

In a January 4, 2007 letter, appellant, through his counsel, requested reconsideration and stated that enclosures consisting of a December 24, 2006 report from Dr. John Amann and a statement from appellant were included. Appellant's letter was addressed to "William Plunkett, Claims Examiner, ESA/OWCP, P.O. Box 8300, London, KY." In a February 14, 2007 nonmerit decision, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and that the evidence did not establish clear evidence of error. The decision noted that the December 24, 2006 letter from Dr. Amann and appellant's written statement that were referenced in the request letter, were not submitted into the record.

In a February 22, 2007 letter, appellant, through his attorney, requested reconsideration stating that the previous enclosures, Dr. Amann's report and appellant's statement, were enclosed with the letter. Appellant's letter was addressed to "William Plunkett, Claims Examiner, ESA/OWCP, P.O. Box 8300, London, KY." By an April 11, 2007 nonmerit decision, the Office denied appellant's request for reconsideration on the grounds that it was untimely and that there was no clear evidence of error. The Office noted that Dr. Amann's report and appellant's written statement were not enclosed with the request letter.

In appellant's June 6, 2006 appeal to the Board, his attorney stated that he personally enclosed the attachments and mailed them with the February 22, 2007 request for reconsideration to the Office.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.¹ 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.² 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 was in error.³ 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

¹ 5 U.S.C. §§ 8101-8193.

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

³ *Veletta C. Coleman*, 48 ECAB 367 (1997).

evidence of error on the part of the Office.⁴ 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.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinions 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's decision.⁷ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.⁸

ANALYSIS

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁹ In this case, appellant's January 4, 2007 letter requesting reconsideration was submitted more than one year after the last merit decision of record, March 31, 2003, and thus, it was untimely. Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for compensation.¹⁰

The issue of whether appellant established clear evidence of error is not in posture for a decision at this time. Appellant requested reconsideration and submitted enclosures on

⁴ See *Gladys Mercado*, 52 ECAB 255 (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).

⁵ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁶ *Leon J. Modrowski*, 55 ECAB 196 (2004); *Dorletha Coleman*, 55 ECAB 143 (2003).

⁷ *Id.*

⁸ *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

⁹ *Veletta C. Coleman*, 48 ECAB 367 (1997).

¹⁰ 20 C.F.R. § 10.607(b); *Donna M. Campbell*, 55 ECAB 241 (2004).

January 4, 2007. The Office stated that it did not receive the enclosures therefore it did not review the evidence to determine whether it met the clear evidence of error standard. Appellant requested reconsideration again on February 22, 2007 and included the same enclosures. The Office claimed to not receive the enclosures and denied appellant's claim without reviewing the new evidence.

The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of appellant's counsel's practice, is presumed to have arrived at the mailing address in due course.¹¹ The Board has held that the presumption of receipt under the mailbox rule must apply equally to claimants and the Office alike.¹² 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.¹³ Appellant's attorney stated that he mailed the enclosures with his February 22, 2004 letter. Counsel addressed the letters to "OWCP, P.O. Box 8300, London, KY 40742." The identical address used by the Office on its decisions dated March 31, 2003, February 22 and April 11, 2007. The Office received the letters requesting reconsideration as decisions were issued in response. As the mailbox rule applies it is presumed that the Office received the enclosures listed in the letters, Dr. Amann's December 24, 2006 report and appellant's written statement. As the Office has not reviewed the evidence that is presumed to have been received, the case is remanded in order for the Office to review this new evidence.

CONCLUSION

The Board finds this case to not be in posture for a decision and should be remanded for further development consistent with this order.

¹¹ *Dorothy Yonts*, 48 ECAB 549 (1997); *see Jeff Micono*, 39 ECAB 617 (1988).

¹² *Larry L. Hill*, 42 ECAB 596 (1991).

¹³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the April 11, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further proceedings consistent with this opinion.

Issued: November 21, 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