United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 07-2222**
	)	**Issued: February 6, 2008**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Jersey City, NJ, Employer	)	

Appearances:
James Muirhead, 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 August 31, 2007 appellant filed a timely appeal of a June 27, 2007 decision of the Office of Workers' Compensation Programs, denying merit review of his claim. The record also contains an August 17, 2007 decision denying a request for reconsideration as untimely. Since more than one year has elapsed between the last merit decision on May 22, 2006 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2) and 501.6(c) and (d).

ISSUES

The issues are: (1) whether the Office properly denied appellant's May 2, 2007 application for reconsideration pursuant to 5 U.S.C. § 8128(a) and the implementing regulations; and (2) whether the Office properly denied appellant's July 2, 2007 application for reconsideration on the grounds that it was untimely filed.

FACTUAL HISTORY

Appellant filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury when he fell in the performance of duty on November 28, 2005. The Office accepted the claim for bilateral hip contusions. Appellant returned to work in a light-duty position. He filed a notice of recurrence of disability commencing March 9, 2006, indicating that he was scheduled for hip surgery.

An Office medical adviser reviewed the medical evidence and in a March 22, 2006 report stated that, if appellant was completely asymptomatic prior to the November 28, 2005 incident, the fall would be an aggravation of degenerative joint disease. The medical adviser also indicated that the degenerative joint disease would eventually have caused the need for surgery regardless of the work injury.

The Office referred appellant for a second opinion examination by Dr. I. Ahmad, an orthopedic surgeon. In a report dated April 24, 2006, Dr. Ahmad opined that appellant sustained a sprain of his left hip in the November 28, 2005 incident, but the sprain had resolved. He noted that x-rays showed evidence of preexisting arthritis and degenerative changes and appellant's current symptoms were due to the preexisting conditions. Dr. Ahmad opined that appellant could return to his regular work as a tractor-trailer operator. He also opined that appellant's condition did not require hip surgery.

In a report dated May 18, 2006, an Office medical adviser stated that without seeing the x-rays he would have to accept Dr. Ahmad's opinion. He also stated that he agreed with the prior medical adviser that the degenerative joint disease would progress and eventually require surgery.

By decision dated May 22, 2006, the Office denied the claim for compensation. The Office found the medical evidence was insufficient to establish a recurrence of disability.

In a letter dated May 2, 2007, appellant requested reconsideration. He stated that Dr. Ahmad did not provide any medical rationale, and then argued that there was a conflict between Dr. Ahmad and the March 22, 2007 report from the Office medical adviser.

By decision dated June 27, 2007, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim. He again requested reconsideration by letter dated July 2, 2007, submitting a May 28, 2007 report from Dr. Richard Boiardo, an orthopedic surgeon.

In a decision dated August 17, 2007, the Office denied the July 2, 2007 application for reconsideration. The Office stated: "the July 2, 2007 request for reconsideration is hereby denied because it was not postmarked or dated within the one-year time limit."

LEGAL PRECEDENT -- ISSUE 1

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.[1] 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]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent evidence not previously considered by the Office.[3]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[4]

ANALYSIS -- ISSUE 1

The claim for compensation commencing March 9, 2006 was denied on the grounds that the medical evidence did not establish an employment-related disability. To require the Office to reopen his claim for merit review, appellant must meet one of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that the Office erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument. To the extent that appellant raised a legal argument that a conflict under 5 U.S.C. § 8123(a) existed, he did not provide a valid argument. A conflict cannot be created between an Office medical adviser and a second opinion physician.[5] Where the legal argument presented has no reasonable color of validity, the Office is not required to reopen the case for merit review.[6]

The claim for compensation was denied based on the weight of the medical evidence, and appellant did not submit any new and relevant medical evidence with respect to disability commencing March 9, 2007. Appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). He did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or

[1] 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.605 (1999).

[3] *Id*. at § 10.606(b)(2).

[4] *Id*. at § 10.608.

[5] A conflict under 5 U.S.C. § 8123(a) exists only when there is a disagreement between a physician making the examination for the United States and a physician of the employee. *See Leanne E. Maynard*, 43 ECAB 482, 490 (1992).

[6] *See Norman W. Hanson*, 40 ECAB 1160 (1989).

submit relevant and pertinent evidence not previously considered by the Office. Accordingly, the Office properly declined to review the merits of the case.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) does not entitle a claimant to a review of an Office decision as a matter of right.[7] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[8] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.[9] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[10]

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[11] In accordance with this holding the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[12]

ANALYSIS -- ISSUE 2

The August 17, 2007 decision finds that the July 2, 2007 application for reconsideration was untimely as it was filed more than one year after the May 22, 2006 merit decision. It is well established, however, that an untimely application for reconsideration must be reviewed under the "clear evidence of error" standard to determine whether the case should be reopened for merit review. The Office failed to properly determine whether the application for review showed "clear evidence of error." The August 17, 2007 decision stated that the application for reconsideration was denied because it was untimely, without further discussion. The case will be remanded to the Office for proper consideration of the untimely application for reconsideration. After such further development as the Office deems necessary, it should issue an appropriate decision.

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[7] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[8] 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."

[9] 20 C.F.R. § 10.607(a).

[10] *See Leon D. Faidley, Jr.*, *supra* note 7.

[11] *Leonard E. Redway*, 28 ECAB 242 (1977).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

CONCLUSION

The Office properly denied appellant's May 2, 2007 application for reconsideration on the grounds that it was not sufficient to warrant merit review of the claim. With respect to the July 2, 2007 application for reconsideration, while the application was untimely the Office failed to consider whether it established clear evidence of error. The case is remanded for proper consideration of the July 2, 2007 application for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 17, 2007 is set aside and the case remanded for further action consistent with this decision of the Board. The June 27, 2007 Office decision is affirmed.

Issued: February 6, 2008
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