United States Department of Labor
Employees' Compensation Appeals Board

R.W., Appellant	)	
and	)	**Docket No. 08-2430**
	)	**Issued: July 2, 2009**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Pocatello, ID, Employer	)	

Appearances:
David E. Alexander, 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 September 10, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated June 13, 2008, which denied her reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated September 21, 2006 and the filing of this appeal on September 10, 2008, 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 determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

Appellant, a 45-year-old archive technician, filed a claim for benefits on August 4, 2004, alleging that she developed a chronic cough and lung condition as a result of reviewing

50-year-old malodorous case files on July 19, 2004. She stated that another employee noticed the smell emitted by the files and told her she had burst a blood vessel in her right eye.

In a memorandum dated September 22, 2005, the employing establishment stated that the U.S. Public Health Service had conducted testing on the files in question, the results of which were negative. It stated that, "since initial testing did not substantiate significant microbial or bacterial growth coupled with the fact that the file in question is indistinguishable from other files, it is difficult to form a medically plausible hypothesis which would explain the file as the cause for your continuing medical problems." The employing establishment stated, however, that chemical residues were not part of the testing protocol.

In a letter to the Office dated June 22, 2006, received by the Office on July 3, 2007, appellant stated that she had obtained numerous statements from witnesses who would attest that the files to which she was exposed on July 19, 2004 bore an odor unlike any to which she had ever been exposed in her office. She stated that she was told by management that these files were sprayed with an insecticide to treat for a termite infestation shortly before the suspect file was shipped to her office for review in July 2004. In addition, appellant stated that she would submit medical evidence which would establish the causal connection between her claimed condition and her July 2004 exposure to toxic chemicals. She stated:

> "In an effort to force the FBI to make this information available, to have this file tested for volatile chemicals as requested previously or to provide the file to us so we can have it tested, I have retained an attorney, David Alexander, 201 East Center Street, Pocatello, Idaho 83204, telephone number (208) 232-6101, who has begun taking legal action."

By decision dated September 21, 2006, the Office denied the claim. It stated that the employing establishment's September 22, 2005 memorandum indicated that the files to which appellant was exposed on July 2004 had been subjected to testing which did not substantiate the presence of any significant toxic elements.

In a request dated September 21, 2007, received by the Office on September 26, 2006, appellant's attorney requested reconsideration. In support of this request, appellant submitted numerous medical reports and affidavits, which indicated that her claimed condition was causally related to her exposure to toxic elements at the workplace on July 19, 2004.

By letter dated January 31, 2008, the Office informed appellant that, although her attorney Mr. Alexander had submitted a request for reconsideration, signed by him on September 21, 2007 (which was within one year of the September 21, 2006 decision), the Office had advised her on October 23, 2007 that Mr. Alexander was not an authorized representative, as there was no record on file of a signed statement authorizing him to represent her in this specific claim. It stated that her June 22, 2006 letter, which identified Mr. Alexander by name and address as her attorney did not constitute sufficient authorization for his representation under 20 C.F.R. § 501.11(a); therefore, since Mr. Alexander was not authorized to represent her in her claim before the Office, the request for reconsideration dated September 21, 2007 was not valid.

By decision dated June 13, 2008, the Office denied appellant's request for reconsideration without a merit review, finding that she had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. It stated that she was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle an employee to a review of an Office decision as a matter of right.[2] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[3] As one such limitation, it has stated that it 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.[4] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office granted under 5 U.S.C. § 8128(a).[5]

The Office's regulations provide that "the appointment [of a representative] must be in writing.[6]

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[1] 5 U.S.C. § 8128(a).

[2] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

[3] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

[4] 20 C.F.R. § 10.607(b).

[5] *See* cases cited *supra* note 2.

[6] 20 C.F.R. § 10.700(a).

ANALYSIS

The Office improperly found that appellant failed to file a timely application for review. It issued its last merit decision in this case on September 21, 2006. Appellant, through her attorney, requested reconsideration on September 21, 2007. The Office advised appellant by letter dated January 31, 2008 that the request for reconsideration dated September 21, 2007 was not valid because Mr. Alexander was not an authorized representative at the time he made the request. It noted that, under 20 C.F.R. § 501.11, "no person shall be recognized as representing an appellant ... unless there shall be filed with the Board a statement in writing, signed by the party to be represented, authorizing such representation."[7] The Office found that appellant's June 22, 2006 letter stating that she had retained Mr. Alexander as her attorney was not sufficient to constitute valid proof of authorization of his representation under section 501.11.

The Board notes, however, that section 501.11(a) applies to proceedings before the Board; it does not address the proper procedures for attorney authorization in proceedings before the Office. In addition, the appeal form checked and signed by Mr. Alexander on September 21, 2007 was complete and accompanied by affidavits from him and appellant, which argued the merits of her claim. The Board finds that appellant's June 22, 2006 letter, in conjunction with the documents she and Mr. Alexander submitted on September 21, 2007, constitute sufficient indicia of Mr. Alexander's authorization to represent appellant pursuant to 20 C.F.R. § 10.700(a). In addition, these documents, taken together, manifest the requisite intent on appellant's part to request reconsideration as of September 21, 2007. As this was within one year of the date of the Office's most recent merit decision, September 21, 2006, the Board finds that appellant's request cannot be found untimely pursuant to section 10.607 of the Office's regulations.[8] The case will be remanded for the Office to further review appellant's September 21, 2007 reconsideration request in accordance with its regulations and procedures.[9]

Accordingly, the Office erred in finding that appellant's request for reconsideration was untimely filed. The Board will set aside the June 13, 2008 decision and the case is remanded for a review of the merits of her claim and any other proceedings deemed necessary by the Office, to be followed by an appropriate decision.

CONCLUSION

The Board finds that the Office erred by finding that appellant's request for reconsideration was untimely filed.

[7] 20 C.F.R. § 501.11(a).

[8] The record does not contain a postmark for the September 21, 2007 reconsideration request.

[9] *See* 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2008 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for a review of the merits of appellant's claim and any other proceedings deemed necessary by the Office, to be followed by an appropriate decision.

Issued: July 2, 2009
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