

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

G.B., Appellant)

and)

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Santa Clarita, CA,
Employer**)

**Docket No. 09-1624
Issued: February 26, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 10, 2009 appellant filed a timely appeal from a May 11, 2009 nonmerit decision of the Office of Workers' Compensation Programs, denying her request for reconsideration as untimely and finding that it failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated January 8, 2008 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.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

On appeal, appellant contends that her request for reconsideration was timely filed.

FACTUAL HISTORY

This case has been before the Board on a prior appeal. By decision dated April 20, 2007, the Board affirmed a March 26, 2006 decision of the Office denying appellant's claim for compensation for partial disability from August 27 to November 3, 2005 and leave buyback for the period August 24 to 25, 2005.¹ The Board found that the reports of Dr. John T. Harbaugh, Board-certified in family practice and occupational health, were of diminished probative value as the physician failed to support his opinion with objective evidence. The facts contained in that decision are incorporated herein by reference.²

Appellant filed claims for wage-loss compensation for the period April 2 to June 9, 2006. She submitted reports from Dr. Harbaugh and a report from Dr. Andrea Nachenberg, a treating Board-certified psychiatrist.

On June 14, 2006 the Office issued a decision denying appellant's claim for wage-loss compensation beginning April 2, 2006. It found the evidence insufficient to establish her claim of wage-loss compensation for the period in question.

Subsequent to the June 14, 2006 decision, the Office received additional reports from Dr. Harbaugh.

On June 22, 2006 appellant's requested a telephonic hearing before an Office hearing representative, which was held on October 6, 2006.

By decision dated December 14, 2006, the Office hearing representative affirmed the June 14, 2006 decision denying appellant's claim for wage-loss compensation for the period April 2 through June 9, 2006.

In a letter dated November 19, 2007, appellant requested reconsideration of the December 16, 2006 decision and submitted additional medical evidence in support of her request.

By decision dated January 8, 2008, the Office denied modification of its prior decision denying her claim.

On a form dated January 8, 2009 appellant requested reconsideration and submitted medical evidence with her request.

¹ Docket No. 06-1532 (issued April 20, 2007).

² On June 12, 2001 appellant, then a 46-year-old clerk, filed an occupational disease claim alleging that on March 31, 1999 she first realized that her cervical degenerative disc disease had been permanently aggravated by her employment. She noted that on May 15, 1998 she first became aware of this condition. On the back of the form, the employing establishment noted that appellant had been on limited duty since April 13, 1999 due to her accepted carpal tunnel syndrome under claim file number xxxxxx901. The Office accepted the claim for cervical radiculopathy and authorized cervical surgery, which was performed on June 29, 2004.

In a May 11, 2008 decision, the Office found that appellant's January 8, 2009 reconsideration request, which was received on January 13, 2009, was dated more than one year after the January 8, 2008 decision and was untimely. It further found that she did not submit any evidence establishing clear evidence of error in the Office's denial of her wage-loss claim.

LEGAL PRECEDENT

The Federal Employees' Compensation Act³ 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 may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁵ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁶

Title 20 of the Code of Federal Regulations, section 10.607(b) provides that the Office will consider an untimely application only if it demonstrates clear evidence of error by the Office in its most recent merit decision. 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.⁷ The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.⁸ 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.⁹

³ 5 U.S.C. §§ 8101 *et seq.*

⁴ 20 C.F.R. § 10.605.

⁵ *Id.* at § 10.607(a).

⁶ 5 U.S.C. § 8128(a); *E.R.*, 60 ECAB ____ (Docket No. 09-599, issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁷ *D.O.*, 60 ECAB ____ (Docket No. 08-1057, issued June 23, 2009); *Robert F. Stone*, 57 ECAB 292 (2005); *Leon D. Modrowski*, 55 ECAB 196 (2004); *Darletha Coleman*, 55 ECAB 143 (2003).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991). *See E.R.*, *supra* note 6.

⁹ *See W.G.*, 60 ECAB ____ (Docket No. 08-2340, issued June 22, 2009); *S.D.*, 58 ECAB 713 (2007); *Alberta Dukes*, 56 ECAB 247 (2005).

ANALYSIS

The Office issued a decision on May 11, 2009, which denied appellant's request for reconsideration of its January 8, 2008 decision on the grounds that the request was untimely filed and failed to establish clear evidence of error. The Board finds that the Office erroneously found appellant's request to be untimely within the one-year time limitation period set forth at 20 C.F.R. § 10.607.

Appellant's request for reconsideration was dated January 8, 2009. The one-year time limitation begins the day the Office issued its original decision, which was dated January 8, 2008.¹⁰ Therefore, the Board finds that appellant had until January 8, 2009 to file her request. A right to reconsideration within one-year accompanies any merit decision on the issues, including a decision issued by the Board.¹¹ The Board notes that the Office's procedure manual, Chapter 2.1602.3(b)(1), 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.¹² The procedure manual provides that timeliness is determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used.¹³

The January 8, 2009 reconsideration request was received by the Office on January 13, 2009; however, the envelope containing the reconsideration request was not retained in the record. The Board finds that the reconsideration request was timely and that the Office improperly denied appellant's request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since it erroneously reviewed the evidence submitted in support of her reconsideration request under the clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.¹⁴

CONCLUSION

The Board finds that appellant's request for reconsideration was timely filed.

¹⁰ Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1602.3(a) (January 2004). See *A.F.*, 59 ECAB ____ (Docket No. 08-977, issued September 12, 2008); *V.B.*, 58 ECAB 725 (2007); *Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

¹¹ Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1602.3(b)(1); *Larry J. Lilton*, 44 ECAB 243 (1992).

¹² Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1602.3(b)(1) (January 2004). See 20 C.F.R. § 10.607(a)

¹³ Federal (FECA) Procedure Manual, *supra* note 12 at Chapter 2.1602.3(b)(1) (January 2004).

¹⁴ See *Donna M. Campbell*, 55 ECAB 241 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 11, 2009 is set aside. The case is remanded for further consideration consistent with this decision of the Board.

Issued: February 26, 2010
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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