

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

L.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Herman, NE, Employer**

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**Docket No. 09-2128
Issued: June 7, 2010**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 18, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated June 8, 2009 denying her reconsideration request on the grounds that it was not timely filed and failed to establish clear evidence of error. As the most recent merit decision was issued on April 30, 2008, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

¹ For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

On December 6, 1995 appellant, then a 42-year-old rural mail carrier, filed a traumatic injury claim alleging she injured her right knee when she slipped and fell while working. The Office accepted the claim for right medial meniscus tear, arthroscopic surgeries, and right knee extensor reconstruction and paid appropriate benefits. Appellant's claim was later expanded for the condition of aggravation of right knee degenerative joint disease. She returned to limited duty September 2002 and full-time regular duty on April 3, 2003. The Office accepted that appellant sustained a recurrence of disability beginning August 14, 2003 and she was placed back on limited-duty work.

On February 25, 2005 the Office reduced appellant's compensation to zero finding that her actual earnings as a modified general clerk fairly and reasonably represented her wage-earning capacity.

On September 18, 2007 appellant filed a notice of recurrence for a right ankle fracture which occurred on August 25, 2007. She also alleged her left knee had broken cartilage due to the excess stress she placed on it because of the injured right knee.

By decision dated April 30, 2008, the Office denied appellant's claim for a consequential right ankle fracture and left knee condition.

In a March 26, 2009 letter, which the Office received on May 4, 2009, appellant requested reconsideration of the Office's April 30, 2008 decision concerning her right ankle fracture. The envelope containing the request was not retained in the record. In support of her claim, appellant submitted treatment notes from August 27, 2007 to March 26, 2009 from Christina Prauner, a nurse practitioner; treatment notes dated August 27, 2007, September 2 and 4, 2008 reports from Dr. Steven G. Kumagai, a Board-certified orthopedic surgeon; an August 15, 2008 report from Dr. Lori K. Reed, a Board-certified orthopedic surgeon; diagnostic studies dated March 18, 2008 to March 26, 2009 and lab testing of September 4, 2008.

By decision dated June 8, 2009, 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 evidence sufficient to establish clear evidence of error.

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.² 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.³ When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the

² 5 U.S.C. §§ 8101-8193.

³ 20 C.F.R. § 10.607(b); *Gladys Mercado*, 52 ECAB 255 (2001).

application establishes “clear evidence of error.”⁴ Office regulations and procedure provide 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(a), if the claimant’s application for review shows “clear evidence of error” on the part of the Office.⁵

ANALYSIS

The June 8, 2009 Office decision denied appellant’s request for further review of the merits of her claim on the grounds that her March 26, 2009 reconsideration request was untimely filed and failed to establish clear evidence of error of the April 30, 2008 decision denying her claim for right ankle fracture. The Board finds, however, that appellant’s reconsideration was timely filed.

The one-year time limitation for requesting reconsideration begins to run on the date following the date of the original Office decision.⁶ A right to reconsideration within one year accompanies any merit decision on the issues.⁷ Office regulations and procedures provide that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope.⁸ The Office’s procedures require that an imaged copy of the envelope that enclosed the request for reconsideration should be in the case record. If there is no postmark, or it is not legible, other evidence such as a certified mail receipt, a certificate of service and affidavits may be used to establish the mailing date. In the absence of such evidence, the date of the letter itself should be used.⁹

The Board notes that the envelope containing the reconsideration request was not retained in the record and the letter requesting reconsideration was dated March 26, 2009. For this reason the Board finds that the reconsideration request dated March 26, 2009 was timely filed within one year of the April 30, 2008 merit decision. The Office improperly denied her reconsideration 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 appellant’s 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.¹⁰

⁴ See 20 C.F.R. § 10.607(b); *D.D.*, 58 ECAB 206 (2006); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁵ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004).

⁶ Federal (FECA) Procedure Manual, *id.* at Chapter 2.1602.3(a) (January 2004).

⁷ *Id.*; *Larry J. Lilton*, 44 ECAB 243 (1992).

⁸ See 20 C.F.R. § 10.607(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

⁹ *Id.*; see *Jack D. Johnson*, 57 ECAB 593 (2006).

¹⁰ See *Donna M. Campbell*, 55 ECAB 241 (2004).

CONCLUSION

The Board finds that appellant's March 26, 2009 request for reconsideration was timely filed.

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2009 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: June 7, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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