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

| | | |
|---|---|---|
| **B.C., Appellant** | ) | |
| **and** | ) | **Docket No. 10-1120** |
| | ) | **Issued: January 14, 2011** |
| **U.S. POSTAL SERVICE, POST OFFICE, Brooklyn, NY, Employer** | ) | |

*Appearances:*
*Thomas S. Harkins, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On August 28, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 18, 2009 nonmerit decision, denying his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year elapsed between the last merit decision dated August 22, 2007 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

### ***ISSUE***

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

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3. 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 April 6, 2003 appellant, a 50-year-old clerk, filed an occupational disease claim for back, leg, neck, shoulder and arm injuries due to his employment activities. The Office accepted his claim for lumbar strain. Appellant returned to limited duty four hours a day.

Appellant filed a claim for a recurrence of disability as of May 1, 2005, alleging that his condition had worsened because he had been required to box mail. By decision dated December 13, 2005, the Office denied his claim, finding that the evidence did not establish a worsening of his condition or a change in the nature and extent of his duties.

Appellant filed a claim for a recurrence of disability as of May 23, 2006, alleging that his condition had worsened because the employing establishment had not provided him with an ergonomically designed chair. By decision dated November 9, 2006, the Office denied his claim, finding that the evidence did not establish a worsening of his condition or a change in the nature and extent of his duties.

On February 7, 2007 appellant requested reconsideration. By decision dated May 14, 2007, the Office denied modification of the November 9, 2006 decision.

On May 22, 2007 appellant again requested reconsideration. He submitted a copy of his April 14, 2006 limited-duty job offer for modified manual clerk, which contained the notation "need ergonomic chair."

By decision dated August 22, 2007, the Office denied modification of its previous decisions.

Appellant submitted a January 31, 2008 report from Dr. Perry Stein, a Board-certified physiatrist, who stated that appellant had spinal stenosis on top of congenitally narrow canal with cervical and lumbar radiculopathy and myofascial pain syndrome. He had painfully restricted range of motion of his lumbar and cervical spine, as well as tenderness to palpation of the scapulothoracic girdle. Dr. Stein recommended that appellant refrain from working.

In a letter dated February 20, 2008, Alan Podhaizer informed the Office that he had been retained by appellant to represent him in his workers' compensation claim. Noting that there were two active cases, he stated that appellant wanted to file motions to reconsider both cases.[2] Mr. Podhaizer also requested that the cases be merged.

On March 17, 2008 the Office informed appellant that it had received Mr. Podhaizer's February 20, 2008 letter, but that it would be disregarded without proper notification of representation.

In a notification received by the Office on March 17, 2008, appellant authorized Alan Podhaizer, Esquire, to represent him in File Nos. xxxxxxx989 and xxxxxx695. On March 21, 2008 the Office acknowledged receipt of appellant's attorney authorization.

[2] Mr. Podhaizer referenced the instant claim number, as well as File No. xxxxxx695.

In a letter dated June 11, 2008, the Office addressed its June 10, 2008 telephone call from appellant, in which he followed up on his attorney's February 20, 2008 letter requesting reconsideration. It stated "it is unclear as to why the request for a reconsideration of the claims was not addressed previously." The Office informed appellant that he should submit a specific request for each decision he wished to appeal, together with new and relevant evidence or legal contentions.

In a June 26, 2008 Office memorandum, Manfred Kurtz noted that he had received a telephone call from appellant on that date requesting assistance, noting that he was being thrown out on the street and was financially desperate. Mr. Kurtz advised him to file a "new recon" if he wanted the decision overturned. When appellant stated that his doctor had sent in records, Mr. Kurtz told him that "it does not matter if we get new medical records if he has not filed a reconsideration."

In a letter dated August 22, 2008, appellant's representative informed the Office that he was sending a cover letter in reference to a request for reconsideration. His letter, which referenced both of appellant's file numbers, indicated that he was including several documents in support of the application and would provide additional information as it became available. The record does not contain a copy of the envelope in which the August 22, 2008 letter arrived.

Appellant submitted a December 27, 2007 report from Dr. Stein, who stated that he had been treating appellant since April 22, 2004 for symptoms related to injuries that he sustained on the job superimposed on congenital spinal stenosis. His symptoms included pain on the right side of his neck, shoulder and arm, which generalized to the upper, middle and low back and were precipitated by prolonged static activities that require trunk control. Dr. Stein diagnosed cervical and lumbar radiculopathy and spinal stenosis with bilateral neural foraminal narrowing. He opined that these symptoms were permanently disabling. In an undated report, Dr. Stein opined that appellant was unable to perform the duties of his job. In a note bearing an illegible date in 2006, appellant informed the employing establishment that he did not have an ergonomic chair.

On January 15, 2009 appellant stated that he "would like to apply for reconsideration." Noting that he was attaching a doctor's note dated November 20, 2008, he asked the Office to advise him if it needed anything further.

In a report dated November 20, 2008, Dr. Stein stated that appellant had to stop working because of specific work activities that aggravated his condition, included boxing, verifying and stamping mail. While he had neck, shoulder and back pain prior to May 1, 2005, it was on this date that the symptoms became intolerable from the repetitive activities that he was performing on the job. On examination, appellant had painfully restricted range of motion of the cervical spine; signs of bilateral lumbar nerve root compression with absent right knee jerk and atrophy of the left calf. Previous diagnostic imaging studies confirmed the presence of herniated nucleus pulposus in the cervical and lumbar spine with right C6 radiculopathy and multilevel lumbar radiculopathy. Dr. Stein diagnosed cervical radiculopathy, cervical spondylosis, and spinal stenosis on a congenital basis with superimposed degenerative changes resulting multilevel

lumbar radiculopathy, which he opined were exacerbated by his work-related activity, specifically maintaining prolonged static postures of the trunk in order to support the upper extremity for repetitive activity such as boxing, verifying and stamping mail. He stated that appellant remained totally permanently disabled.

The record contains numerous physical therapy reports, prescription forms, diagnostic test results, requests for authorization and notes and reports from appellant's treating physician through September 15, 2009.

By decision dated September 18, 2009, the Office denied appellant's January 15, 2009 request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error.

## ***LEGAL PRECEDENT***

An application for reconsideration 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 new evidence not previously considered by the Office.[3] With regard to the contents of a request for reconsideration, the Office's procedure manual states that, while no special form is required, the request must be in writing, identify the decision and the specific issues for which reconsideration is being requested and be accompanied by relevant new evidence or argument not considered previously.[4]

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[5] In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[6]

Title 20 Code of Federal Regulations, section 10.607(b) provide 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. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the

[3] 20 C.F.R. § 10.606.

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2a (October 2005).

[5] 20 C.F.R. § 10.607(a).

[6] *Veletta C. Coleman*, 48 ECAB 367 (1997); *Larry L. Lilton*, 44 ECAB 243 (1992).

[7] *See Alberta Dukes*, 56 ECAB 247 (2005); *see also Leon J. Modrowski*, 55 ECAB 196 (2004).

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 opinion or establish a clear procedural error, but must be of sufficient probative value to raise a substantial question as to the correctness of the Office's decision. 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]

Office procedures provide that an application for review includes any written communication from a claimant or representative which requests a hearing, reconsideration or appeal of a formal decision; no special form is necessary. A claimant who expresses or implies disagreement with a formal decision, without requesting a specific action, should be advised of the basis of the decision and reminded to exercise rights of appeal if further action is desired. Office procedures also provide that any file in which a complaint about a formal decision is received should be reviewed informally to assess whether the action leading to the complaint was correct and the Office should determine through correspondence with the claimant whether the inquiry in effect constitutes a request for exercise of appeal rights.[9]

## ***ANALYSIS***

The Office found that appellant's January 15, 2009 request for reconsideration was untimely and failed to demonstrate clear evidence of error. The Board finds, however, that appellant submitted a timely request for reconsideration on August 22, 2008. Therefore, this case is not in posture for a decision, as the Office applied an incorrect standard in making its determination.

On August 22, 2008 appellant's duly authorized representative submitted a timely request for reconsideration, which was in writing and identified his claim number. This record reflects a receipt date of August 27, 2008. The Office, however, failed to retain a copy of the envelope, as required by its procedures. Accordingly, the date of the letter itself should be used to determine whether the reconsideration request was timely filed.[10] As the letter was dated within one year of the last merit decision dated August 22, 2007, it was timely.

The Board notes that counsel did not specify the decision he wanted reconsidered. The Office's procedure manual provides that, if the contested decision or issue cannot be reasonably determined from a claimant's request, the claims examiner should return a copy of the

[8] *See Alberta Dukes, supra* note 7.

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Review Process*, Chapter 2.1600.3(b) (October 2005).

[10] 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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

application to the claimant for clarification and inform him that the Office will take no further action on the request unless clarification is submitted.[11] In this case, as there was only one decision in the record, no additional clarification from appellant was necessary.[12] The request for reconsideration was also accompanied by new medical evidence not previously considered by the Office. Appellant's August 22, 2008 request for reconsideration met the standards as detailed in the Office's regulations and procedure manual.

The Office evaluated appellant's reconsideration request using the standard for untimely requests, namely the clear evidence of error standard. The Board finds that the Office should have addressed appellant's August 22, 2008 request for reconsideration and evaluated the evidence submitted in accordance with section 10.606 of the Office's regulations.[13]

## ***CONCLUSION***

The Board finds that the Office improperly denied appellant's request for reconsideration of the merits on the grounds that his request was untimely and failed to demonstrate clear evidence of error, and the case must be remanded for a review of the evidence submitted with his timely request and an appropriate decision.

[11] *Id*. at Chapter 2.1602.3

[12] The Board notes that appellant's attempt to request reconsideration of the August 22, 2007 decision commenced on February 20, 2008 with a letter from appellant's then unauthorized representative. Following proper attorney authorization and numerous discussions between appellant and the Office, counsel ultimately submitted the August 22, 2008 reconsideration request.

[13] 20 C.F.R. § 10.606(b).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 18, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this decision of the Board.

Issued: January 14, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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