

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

R.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Brazil, IN, Employer**

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**Docket No. 10-1626
Issued: March 1, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On June 3, 2010 appellant filed a timely appeal of the February 22, 2010 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated September 22, 2008 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUE

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

¹ For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal with the Board. 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. 20 C.F.R. § 501.3(e).

On appeal, appellant contends that he did not receive a copy of the Office's September 22, 2008 decision denying his claim for a left shoulder condition. He was notified about the denial of his claim when he was contacted about an unpaid bill dated for physical therapy.

FACTUAL HISTORY

On February 12, 2008 appellant, then a 61-year-old rural carrier, filed a traumatic injury claim alleging that he slipped on ice and jammed his left shoulder while delivering a package. He submitted medical records dated February 12 to May 5, 2008 from a hospital, Dr. Jeffery A. Bollenbacher, an attending osteopath, and Dr. Susan A. Koslow, a Board-certified radiologist, which addressed his left shoulder conditions, medical treatment and work capability.

By letter dated August 11, 2008, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It requested additional medical evidence.

In reports dated June 4, 2008, Dr. Bollenbacher advised that appellant had left shoulder impingement syndrome and a partial rotator cuff tear. He released him to return to work with no restrictions. Dr. Bollenbacher advised that appellant had reached maximum medical improvement. He had two percent impairment of the left upper extremity which represented one percent impairment of the whole person based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

By decision dated September 22, 2008, the Office denied appellant's claim. The medical evidence submitted was found insufficient to establish that he sustained an injury causally related to the accepted February 12, 2008 employment incident. The decision was mailed to appellant's address of record.

On January 22, 2010 appellant requested reconsideration of the September 22, 2008 decision.

In a February 22, 2010 decision, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to present clear evidence of error. It found that his request was not timely filed within one year of the most recent merit decision in the case. The Office also found that appellant did not submit any evidence to establish clear evidence of error.²

² Following the issuance of the Office's February 22, 2010 decision, the Office received additional evidence. On appeal, appellant submitted new evidence. The Board may not consider new evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c)(1). Appellant may submit this new evidence with a formal, written request for reconsideration to the Office under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Section 10.607(a) of the Office's implementing regulations provide that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁵

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁶

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁷ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁸ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁰ 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.¹¹

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 *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹² The Board makes an independent determination of whether a claimant has submitted clear evidence

³ 5 U.S.C. § 8128(a).

⁴ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.607(b).

⁷ *Nancy Marcano*, 50 ECAB 110, 114 (1998).

⁸ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

⁹ *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

¹⁰ *Leona N. Travis*, *supra* note 8.

¹¹ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹² *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

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.¹³

ANALYSIS

The Board finds that appellant did not file a timely request for reconsideration. Its procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision.¹⁴ However, a right to reconsideration within one year also accompanies any subsequent merit decision on the issues.¹⁵

The most recent merit decision in this case was the Office's September 22, 2008 decision. As appellant's January 22, 2010 request for reconsideration of the merits of his claim by the Office was made more than one year after the September 22, 2008 merit decision,¹⁶ the Board finds that it was not timely filed.

The Board further finds that appellant's January 22, 2010 request for reconsideration does not raise a substantial question as to whether the decision finding that he did not sustain an injury causally related to the accepted February 12, 2008 employment incident was in error or shift the weight of the evidence in his favor. The Board notes that the underlying issue on which appellant's claim was denied is medical in nature. Appellant did not submit any new medical evidence or explain how the previously submitted evidence was sufficient to shift the weight of the evidence in his favor and establish that the Office erred in denying his claim for a traumatic injury on February 12, 2008. The Board finds that his application for reconsideration did not establish clear evidence of error by the Office. In the absence of clear evidence of error, the Office properly denied merit review of the claim.

Appellant contended on appeal that he did not receive a copy of the Office's September 22, 2008 decision. The record supports that the Office mailed the September 22, 2008 decision to his address of record. Appellant did not establish that his address changed or that the address of record used by the Office was incorrect. In the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have been received at the mailing address in due course. This is known as the mailbox rule.¹⁷ As the decision was properly mailed to appellant's address of record, there is no evidence to substantiate his allegation of nonreceipt.¹⁸

¹³ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁴ 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008).

¹⁵ *D.G.*, 59 ECAB 455 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁶ Appellant had one year to request reconsideration by the Office of its September 22, 2008 decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.6a (January 2004).

¹⁷ *C.T.*, 60 ECAB ____ (Docket No. 08-2160, issued May 7, 2009); *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004).

¹⁸ *Id.*

CONCLUSION

The Board finds that appellant's January 22, 2010 request for reconsideration was untimely filed and failed to show clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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