

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

C.C., Appellant)

and)

**DEPARTMENT OF THE AIR FORCE, OGDEN)
AIR LOGISTICS CENTER, HILL AIR FORCE)
BASE, UT, Employer)**

**Docket No. 11-1173
Issued: April 25, 2012**

Appearances:

*David J. Holdsworth, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

ORDER REMANDING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On April 14, 2011 appellant, through his attorney, filed an application for review of a December 7, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration without further merit review.

In correspondence dated December 1 and 2, 2010, appellant's counsel requested reconsideration from a December 7, 2009 OWCP decision that denied appellant's claim for a schedule award for hearing loss and also denied that he had employment-related tinnitus. In his request, counsel asserted certain arguments and noted that he was submitting additional evidence with the request. He faxed this to OWCP on December 2, 2010 and advised on the fax coversheet that he was separately sending a "hard copy" of his request via U.S. Mail with attachments. The attachments did not accompany the faxed copy of his reconsideration request. On December 3, 2010 OWCP scanned as received the faxed copy of the reconsideration request and on December 7, 2010 it denied the reconsideration request without a review of the merits of the claim. OWCP advised that, while attachments were referenced, no additional evidence was received with the reconsideration request.

On December 8, 2010 it scanned as received the mailed December 1 and 2, 2010 reconsideration requests, which included the evidence not sent with the faxed version of the request. The postmark on the envelope was December 2, 2010.

By decision dated December 7, 2010 OWCP denied the faxed reconsideration request noting that no new evidence had been submitted. The denial of appellant's faxed request for reconsideration by OWCP was proper and that decision is hereby affirmed. The Board has held that, to obtain a merit review, a request for reconsideration must set forth arguments or contain evidence that either shows that OWCP erroneously applied or interpreted a specific point of law, advances a relevant legal argument not previously considered by OWCP, or constitutes relevant and pertinent new evidence not previously considered by OWCP.¹ As appellant's request failed to include this evidence or argument, it properly did not review the case on the merits.

The Board finds, however, that this case must be remanded for further development. The mailed reconsideration request with new evidence, scanned into the record as received on December 8, 2010, was neither considered nor decided by OWCP.² The date of the postmark, December 2, 2010, reflected that it was timely filed. As OWCP has not considered the mailed reconsideration request, along with the new evidence, the Board may not consider the new evidence for the first time on appeal.³

The case will be remanded to OWCP to enable it to properly consider appellant's timely filed reconsideration request, received December 8, 2010, and all evidence submitted with the request. Following this and any further development deemed necessary, OWCP shall issue an appropriate decision on appellant's request for reconsideration.

¹ 20 C.F.R. §10.606(b)(2)(i), (ii) and (iii).

² Generally, the timeliness of a request for reconsideration is determined on the basis of the postmark of the envelope containing the request. 20 C.F.R. § 10.607(a). If the case record does not contain this envelope or the postmark is illegible and other evidence cannot establish the mailing date, the date of the letter itself should be used. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (January 2004).

³ See 20 C.F.R. § 501.2(c).

IT IS HEREBY ORDERED THAT the December 7, 2010 decision of the Office of Workers' Compensation Programs is affirmed and the case is remanded for further proceedings consistent with this order of the Board.

Issued: April 25, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board