

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

C.M., Appellant

and

**U.S. POSTAL SERVICE, EDGEWOOD
STATION, Columbia, SC, Employer**

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**Docket No. 12-1259
Issued: October 10, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On May 24, 2012 appellant filed a timely appeal from the March 12, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied his reconsideration request. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision. Since more than 180 days has elapsed between the last merit decision on February 25, 2011 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.

ISSUE

The issue is whether OWCP properly denied appellant's reconsideration request as untimely filed and failing to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 12, 1996 appellant, a 51-year-old letter carrier, sustained a traumatic injury claim when dirt gave way, causing him to twist his left knee, back and left side. OWCP accepted his claim for lumbar strain and right knee strain. It later accepted status post right knee replacement and status post right shoulder arthroscopy.

In 2004 appellant received a schedule award for a 37 percent impairment of his right leg and a 15 percent impairment of his right arm.

In a 2010 he filed a claim for an increased award.

On February 25, 2011 OWCP issued a decision denying an increased award. It found that the medical evidence did not support an increase in the impairment already compensated. OWCP noted that appellant's physician had not provided an impairment rating. Appeal rights attached to the decision notified appellant that any reconsideration request must be made within one calendar year of the date of the decision.

On March 2, 2012 OWCP received a completed appeal request form from appellant requesting reconsideration of the February 25, 2011 decision. Appellant dated the form August 22, 2011. In a notation, he stated that he signed the papers in August, and it took his physician "until today" to get them finished. Appellant gave no other indication that he was submitting any evidence or argument to support his request for reconsideration.

On March 2, 2012 OWCP also received a January 17, 2011 work capacity evaluation advising that appellant was unable to work.

In a decision dated March 12, 2012, OWCP denied appellant's reconsideration request. It found that the request was untimely and failed to present clear evidence of error in the February 25, 2011 decision denying an increased schedule award.

On appeal, appellant contends that he dated the appeal request form August 22, 2011 and gave it to his physician, who was supposed to send it to OWCP with the impairment worksheet. In the meantime, he went to Thailand. Appellant returned on January 10, 2012. The physician's office called him to pick up the appeal on February 24, 2012. Appellant sent the request to OWCP on February 24, 2012 and the request was postmarked that date.

To support this assertion, appellant submitted to the Board a tracking confirmation inquiry from the U.S. Postal Service for Tracking Label 0311 1660 0002 0285 6630. It indicates that a letter was sent to the proper address for requesting reconsideration and that the letter was sent on February 24, 2012.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”²

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought. If submitted by mail, the application will be deemed timely if postmarked by the U.S. Postal Service within the time period allowed. If there is no such postmark, or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date.³

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁴

The term “clear evidence of error” is intended to represent a difficult standard.⁵ If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.⁶

ANALYSIS

The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP may not be considered by the Board for the first time on appeal.⁷

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a).

⁴ *Id.* § 10.607(b).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

⁶ *Id.* at Chapter 2.1602.3.d(1).

⁷ 20 C.F.R. § 501.2(c)(1).

When OWCP issued its March 12, 2012 decision finding appellant's reconsideration request untimely, it did not have the tracking confirmation evidence that he submitted to the Board. That evidence was not a part of the record when OWCP issued its final decision. The Board is therefore precluded from reviewing this evidence to determine whether it establishes the timeliness of appellant's reconsideration request. Following this appeal, appellant may submit this evidence to OWCP for consideration.

Based on the evidence that was before OWCP at the time of its March 12, 2012 decision, the Board finds that appellant's reconsideration request was untimely. The record contained no postmark, no certified mail receipt, no certificate of service, no affidavit and no other evidence to establish the mailing date of his request. The record showed only that OWCP received appellant's request on March 2, 2012, which is insufficient by itself to establish that he timely sent the request on or before February 25, 2012, one calendar year after the date of the most recent merit decision.

The date appellant signed the appeal request form, August 22, 2011, does not appear to be the date of mailing. Appellant's notation that he signed the form in August and that it took his doctor "until today" to get the papers finished supports that he mailed the form on some date after August 22, 2011.

As appellant's reconsideration must be considered untimely, absent evidence to the contrary, the question for determination is whether his request nonetheless showed clear evidence of error in OWCP's February 25, 2011 decision. Appellant did not support his reconsideration request with evidence or argument. OWCP received a work capacity evaluation dated January 17, 2011, but this did not address the issue adjudicated by the February 25, 2011 decision, which was whether appellant was entitled to an increased schedule award. Appellant's request is thus insufficient on its face to warrant a reopening of his case for a merit review.

The Board finds that appellant's reconsideration request was untimely and failed to show clear evidence of error in OWCP's February 25, 2011 decision. The Board will therefore affirm OWCP's March 12, 2012 decision denying his request.

CONCLUSION

The Board finds that OWCP properly denied appellant's reconsideration request as untimely filed and failing to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 10, 2012
Washington, DC

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

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

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