United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 13-450**
	)	**Issued: April 26, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Alhambra, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 18, 2012 appellant filed a timely appeal from a June 22, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration as untimely filed and failing to demonstrate clear evidence of error. Because more than 180 days has elapsed from the last merit decision dated February 17, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 15, 2009 appellant, then a 54-year-old custodian laborer, filed an occupational disease claim alleging that he developed grade 2 spondylolisthesis of L5 as well as arthritis and degeneration of his hips due to lifting, carrying and pushing heavy containers. He noted that his position required him to bend, lift, twist, pull and push as well as use a heavy machine to clean floors. Appellant stated that he first became aware of his condition in December 1989 and first attributed his condition to his employment in April 1991. He also submitted a statement describing his work duties as a part-time flexible carrier beginning in 1988. Appellant noted that his back condition was first diagnosed in April 1991. He returned to work at the employing establishment on June 25, 1994 as a custodian laborer. Appellant stated that his condition worsened and that he currently required a hip replacement.

In a note dated December 15, 2009, Dr. Scott Goldman, a Board-certified orthopedic surgeon, diagnosed osteoarthritis and spondylolisthesis of the lumbar spine and osteoarthritis of the bilateral hips as a result of repetitive bending, stooping and lifting in the performance of his job duties.

OWCP requested additional factual and medical information in support of appellant's claim in a letter dated January 25, 2010. Dr. Goldman completed a report dated February 8, 2010 and noted appellant's employment duties. He diagnosed osteoarthritis and spondylolisthesis of the lumbar spine as well as osteoarthritis of both hips. Dr. Goldman opined that appellant would have had some arthritis and spondylolisthesis without working at the employing establishment. He stated, "However, the severity of arthritis in the lower back and hips is not consistent with his age had he not worked for the [employing establishment]. It is my opinion that his severe conditions, including arthritis of the lower back and both hips, are the result of the repetitive bending, stooping and lifting activities he has performed with working at the [employing establishment] since 1988."

By decision dated April 28, 2010, OWCP denied appellant's claim on the grounds that Dr. Goldman's reports were not based on a complete factual background. Dr. Goldman completed an additional report on May 24, 2010 and opined that appellant's conditions were due to repetitive trauma that occurred while working at the employing establishment.

Appellant requested a review of the written record by an OWCP hearing representative on May 26, 2010. By decision dated February 17, 2011, the hearing representative found that Dr. Goldman did not provide the necessary factual background to support his opinion that appellant's current conditions were due to his employment. The hearing representative stated, "Dr. Goldman provided a conclusion without sufficient explanation of the nature of the repetitive motions required by the claimant's duties in 2010, when the claim was filed, or why, over a period of time, the identified work activities caused the diagnosed conditions."

In a letter dated July 14, 2011 and including his claim number, appellant stated that he disagreed with the denial of his claim. He stated that he was submitting more information and stated, "I'm hoping that the doctors' reports will help with your final decision concerning the claim I have submitted. Truly the reports show that the work I have performed with the [employing establishment] has been the contributor to my conditions of grade 2

spondylolisthesis, lumbar disc disease and hip degenerative joint disease which resulted in total left hip replacement and future right hip replacement." With his letter, appellant included a copy of the first page of the February 17, 2011 decision, circled the appeal rights paragraph and noted, "I do disagree."

Appellant submitted notes from a chiropractor, Dr. Gary Spunt, dated April 11, 2011 diagnosing degenerative joint disease in the lower back and hip region. On December 6, 1993 he had undergone a fitness-for-duty examination due to intermittent lower back pain resulting in a diagnosis of spondylosis. Dr. Thomas W. Jackson, a Board-certified orthopedic surgeon, stated that appellant had preexisting spondylolisthesis at L5-S1 which was being aggravated by his work activities. He found that appellant's spondylolisthesis was stable and would likely result in a spontaneous fusion. Dr. Jackson stated that appellant was capable of work. Dr. Randy Jones, a physician Board-certified in emergency medicine, examined appellant on April 18, 1993 and diagnosed severe spondylosis at L5-S1. He opined that appellant was totally disabled and that his condition was not due to his employment. Dr. Steven M. Ma, a Board-certified orthopedic surgeon, examined appellant on April 23, 1993 and diagnosed grade 2 spondylolisthesis of L5 on S1 with significant sclerosis and loss of L5-S1 disc space. He recommended work restrictions including lifting no more than 25 pounds. Appellant also submitted a July 14, 2010 medical note indicating that he had undergone a posterior left hip replacement.

In response to a telephone call, OWCP advised appellant to select the type of appeal he wished to pursue. Appellant requested reconsideration on March 26, 2012. He stated that the July 14, 2011 letter was a request for reconsideration.

By decision dated June 22, 2012, OWCP declined to review the merits of appellant's claim on the grounds that his request for reconsideration was not timely filed and did not demonstrated clear evidence of error. It performed a limited review of the evidence received after the hearing representative's February 17, 2011 decision and determined that there was no evidence of error on the part of OWCP.

LEGAL PRECEDENT

Under section 8128(a) of FECA[2] OWCP has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. It must exercise this discretion in accordance with section 10.607 of the implementing federal regulations. Section 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."[3] In *Leon D. Faidley, Jr.*,[4] the Board held that the imposition of the one-year time limitation for filing an application for review was not an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA. The one-year time limitation period set forth in 20 C.F.R. § 10.607 does not restrict OWCP from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.

[2] *Id.* at § 8128(a).

[3] 20 C.F.R. § 10.607.

[4] 41 ECAB 104, 111 (1989).

OWCP is required to perform a limited review of the evidence submitted with an untimely application for review to determine whether a claimant has submitted clear evidence of error on the part of OWCP thereby requiring merit review of the claimant's case.

Thus, if the request for reconsideration is made after more than one year has elapsed from the issuance of the decision, the claimant may only obtain a merit review if the application for review demonstrates "clear evidence of error" on the part of OWCP.[5]

ANALYSIS

The only decision before the Board on this appeal is that of OWCP dated November 1, 2012 in which it declined to reopen appellant's case on the merits because the request for reconsideration was not timely filed and did not show clear evidence of error.

The one-year time limitation begins to run on the date following the date of the original OWCP decision. A right to reconsideration within one year accompanies any subsequent merit decision on the issues.[6] Therefore appellant had one year from February 17, 2011 to submit a timely request for reconsideration. OWCP received appellant's March 26, 2012 request for reconsideration on that date. Because the request was received more than one year after the February 17, 2011 merit decision, OWCP found the request to be untimely.

However, the Board notes that OWCP also received a letter from appellant dated July 14, 2011 which pertained to the status of his claim. For the reasons notes below, the Board finds that appellant's July 14, 2011 letter constituted a timely request for reconsideration.

Although the July 14, 2011 letter did not mention the word reconsideration, the Board has held that there may be a request for reconsideration in situations where a letter does not contain the word reconsideration. In *Vicente P. Taimanglo*,[7] *Gladys Mercado*[8] and *Jack D. Johnson*[9] the Board found that letters written by the employees constituted timely requests for reconsideration even though they did not mention the word reconsideration. In *Taimanglo*, the Board stated that, while no special form is required, the request must be made in writing, identify the decision and the specific issue(s), for which reconsideration is being requested and be accompanied by relevant and pertinent new evidence or argument not considered previously.[10] In *Taimanglo*, the claimant had identified OWCP's decision in his letter, indicated that additional medical evidence had been submitted and stated that he was waiting for a response. The Board found that the letter constituted a timely request for reconsideration. In *Mercado*, the claimant asked OWCP to

[5] 20 C.F.R. § 10.607; *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[6] *Jack D. Jackson*, 57 ECAB 593 (2006).

[7] 45 ECAB 504 (1994).

[8] 52 ECAB 255 (2001).

[9] *Supra* note 6.

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (January 2004); *supra* note 7.

help her reopen her case, provided her case number and submitted additional medical evidence. The Board found that the claimant's letter constituted a timely request for reconsideration. In *Johnson,* appellant advised that he was enclosing pertinent information related to his claim and provided his file number as well as submitting medical evidence.

In its February 17, 2011 decision, OWCP advised appellant that, if he disagreed with the attached decision, he had the right to submit new evidence to OWCP and request reconsideration of the case or, if he had no additional evidence, he could appeal the decision to the Board. In the letter of July 14, 2011, appellant included his claim number and stated that he disagreed with the denial of his claim. He also included the front page of the February 17, 2011 decision and wrote on it; "I do disagree." Appellant also stated that he was submitting more medical information. With this letter, he submitted a series of medical reports. Considering these factors, the Board finds that appellant's July 14, 2011 letter constituted a request for reconsideration and that new medical evidence was submitted in support of the request.

As appellant timely requested reconsideration, OWCP improperly denied his reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. The Board will remand the case to OWCP for review of the new medical evidence under the proper standard of review for a timely reconsideration request and to undertake any appropriate additional development it deems necessary, to be followed by the issuance of an appropriate decision.

CONCLUSION

The Board finds that appellant's July 14, 2011 letter constituted a request for reconsideration which was timely filed within one year of the February 17, 2011 merit decision. The Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2012 decision of the Office of Workers' Compensation Programs be set aside and the case remanded to OWCP for further proceedings consistent with this opinion of the Board.

Issued: April 26, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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