

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

B.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Rahway, NJ, Employer**

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**Docket No. 14-464
Issued: June 4, 2014**

Appearances:
Robert D. Campbell, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 23, 2013 appellant, through his representative, filed a timely appeal from the June 24, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

ISSUE

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

¹ An appeal is considered filed upon receipt by the Clerk of the Board. 20 C.F.R. § 501.3(f). The notice of appeal must be filed within 180 days from the date of issuance of an OWCP decision. *Id.* at § 501.3(e). In this instance, 180th day fell on a weekend; Saturday, December 21, 2013. Under the circumstances, the period for filing is extended to the close of next business day, which is Monday, December 23, 2013. *Id.* at § 501.3(f)(2). The notice of appeal was received by the Clerk of the Board on December 23, 2013, which renders the appeal timely. *Id.*

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On the prior appeal of this case,³ the Board found on June 15, 2012 that appellant did not meet his burden of proof to establish an occupational disease in the performance of duty. Although the Board found that he had sufficiently identified the implicated work factors, the medical evidence did not present a physician's well-reasoned opinion on whether the accepted work factors caused or aggravated his bilateral knee condition. The Board modified OWCP's June 8, 2011 decision accordingly and affirmed the denial of appellant's occupational disease claim. The facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.⁴

On June 13, 2013 appellant, through his representative, requested reconsideration. OWCP received this request on June 17, 2013. Appellant submitted an April 23, 2012 treatment note; a February 15, 2013 procedure note; a March 28, 2012 examination and x-ray report; an April 9, 2012 imaging study; and a September 10, 2012 impairment evaluation from Dr. Arthur Becan, an orthopedic surgeon, stating that appellant's injuries in 2007 and 2008, compounded by cumulative and repetitive occupational trauma, were the competent producing factors for his current subjective and objective findings. Appellant also submitted copies of impairment evaluations conducted in 2009 and 2010.

Appellant's representative argued that reconsideration should be granted to an employee who provides pertinent new evidence and argument not previously considered by OWCP. He contended that the submitted evidence established the element of causal relationship between appellant's work activities, ending August 13, 2009 and the aggravation of his bilateral knee arthropathy.

In a decision dated June 24, 2013, OWCP denied appellant's reconsideration request. It found the request untimely. OWCP further found that it did not present clear evidence of error.

Appellant's representative argues on appeal that the regulation pertaining to untimely reconsideration requests does not apply in this case because the one-year limitation applies only to OWCP decisions and appellant was appealing from the Board's June 15, 2012 decision. He argues that the request, postmarked on June 13, 2013, was timely under the mailbox rule.

³ Docket No. 12-327 (issued June 15, 2012).

⁴ On September 2, 2009 appellant, then a 46-year-old letter carrier, alleged that his knees would swell and get sore to the point that he could hardly walk. He advised that, while delivering mail, walking and climbing stairs, both knees would swell and become sore and stiff.

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.”⁵

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 received by OWCP within one year of the date of the OWCP decision for which review is sought. The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board and any merit decision following action by the Board, but does not include precoupment hearing decisions.⁶

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.⁷

The term “clear evidence of error” is intended to represent a difficult standard.⁸ 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.⁹

ANALYSIS

The most recent merit decision in this case was the Board’s June 15, 2012 merit decision finding that appellant did not meet his burden of proof to establish that he sustained an occupational disease in the performance of duty. Appellant had one calendar year from the date of that decision or until June 15, 2013, to ensure that OWCP received any reconsideration

⁵ 5 U.S.C. § 8128(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b(1) (January 2004).

⁷ 20 C.F.R. § 10.607.

⁸ *See supra* note 6 at Chapter 2.1602.5.a (October 2011).

⁹ *Id.* at Chapter 2.1602.5.b.

request. The date of the request or the date of the postmark is immaterial. The regulation makes clear that the period of limitation is satisfied only by receipt.

The record shows that OWCP received appellant's reconsideration request on June 17, 2013. This was two days after the expiration of the period of limitation. The Board therefore finds that appellant's reconsideration request was untimely.

The question for determination is whether the untimely request 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.

The medical evidence appellant submitted to support his reconsideration request does not establish error by OWCP in denying appellant's claim. The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made a mistake. For example, a claimant provides proof that a schedule award miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate. Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁰

None of the evidence submitted with the untimely request for reconsideration establishes any error in OWCP's most recent merit decision.

The Board finds that appellant's reconsideration request does not demonstrate clear evidence of error on the part of OWCP in its most recent merit decision, as modified by the Board's prior decision. The Board will therefore affirm OWCP's June 24, 2013 decision denying that request.

Appellant's representative contends that appellant was appealing the Board's June 15, 2012 decision. OWCP has no jurisdiction to review a Board decision. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board.¹¹ The Board's June 15, 2012 decision modified OWCP's grounds for denial and provided appellant another one-year period within which to request reconsideration of his case from OWCP. Appellant's request was untimely.

It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.¹² This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.¹³

¹⁰ *Dean D. Beets*, 43 ECAB 1153 (1992); *Leona N. Travis*, 43 ECAB 227 (1991). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.5(a) (March 2011)

¹¹ 20 C.F.R. § 501.6(d). Appellant had 30 days from the date of the Board's June 15, 2012 decision to file a petition for reconsideration with this Board of its decision. *Id.* at § 501.7.

¹² *George F. Gidicsin*, 36 ECAB 175 (1984) (when OWCP sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice).

¹³ *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the sender, will raise a presumption that the original was received by the addressee. This is known as the mailbox rule.¹⁴

Although the mailbox rule raises a presumption of receipt, it does not raise a presumption of timeliness. Receipt by OWCP is established. Timely receipt is not.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 24, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁴ *Larry L. Hill*, 42 ECAB 596 (1991) (the presumption of receipt under the mailbox rule must apply equally to claimants and OWCP alike).