

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated April 2, 2012, the Board set aside a June 6, 2011 decision denying appellant's request to expand her claim to include sacroiliac (SI) joint instability and left pelvis joint pain.³ The Board determined that a conflict existed between an OWCP medical adviser and appellant's attending physicians, Dr. Gary S. Gruen, a Board-certified orthopedic surgeon, and Dr. Philip J. Chua, an osteopath, regarding whether her claim should be expanded to include SI joint disease. The Board remanded the case for OWCP to resolve the conflict in medical opinion. The facts and circumstances as set forth in the prior decision are hereby incorporated by reference.

On remand OWCP referred appellant to Dr. Peter K. Thrush, a Board-certified orthopedic surgeon, for an impartial medical examination.⁴ Based on his report, in a decision dated July 13, 2012, it denied her request to expand her claim to include SI joint instability and joint pain of the left pelvis.

On July 24, 2012 appellant, through counsel, requested a telephone hearing. Following the November 16, 2012 telephone hearing, by decision dated January 31, 2013, an OWCP hearing representative affirmed the July 13, 2012 decision. OWCP properly addressed the January 31, 2013 decision to appellant.

On February 8, 2013 the January 31, 2013 decision was returned to OWCP as undeliverable. The envelope indicated that the letter was "not deliverable as addressed."

On May 22, 2013 appellant telephoned OWCP and advised that she had not received a decision following the November 2012 telephone hearing. She informed OWCP that some mail in her area had been vandalized.

On May 22, 2013 OWCP resent appellant a copy of the January 31, 2013 decision. It noted that it had correctly addressed the original decision, but that it had been returned to sender.

In a letter dated January 31, 2014, received by OWCP on February 5, 2014, appellant requested reconsideration.

³ Docket No. 11-1617 (issued April 2, 2012). OWCP accepted that on January 27, 2006 appellant sustained left hip strain, thoracic strain, and lumbar strain when she fell down a slope. Appellant underwent a left hip arthroscopy on August 3, 2007.

⁴ In a report dated June 22, 2012, Dr. Thrush found no objective evidence of an injury to the SI joint, noting that there were no bone scans or magnetic resonance imaging studies of the SI joint. He indicated that the accepted condition of left hip strain "turned out to be a diagnosis of a labral tear on the left..." Dr. Thrush opined that appellant's accepted conditions had resolved and she could resume work. He also advised that her symptoms might be the result of "early arthritis in the left hip based on the labral tear."

By decision dated July 3, 2014, OWCP denied appellant's request for reconsideration, finding that it was not timely and failed to show clear evidence of error.

On appeal appellant contends that her request for reconsideration only had to be postmarked within one year of the last decision because she did not know about a change in the applicable regulation. She notes that she did not receive OWCP's January 31, 2013 decision until four months after it was issued. Appellant asserts that OWCP did not assign a claims examiner to her request for reconsideration until June 11, 2014, 91 working days after the request. She also raises arguments regarding OWCP's weighing of the medical evidence.

LEGAL PRECEDENT

OWCP may review an award for or against payment of compensation at any time on its own motion or on application.⁵ An application for reconsideration, however, must be sent within one year of the date of OWCP's decision for which review is sought.⁶ An application for reconsideration must now be received within one year of the date of OWCP's decision for which review is sought.⁷ OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁸

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.⁹ This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.¹⁰ 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.¹¹

ANALYSIS

The only decision before the Board on appeal is OWCP's July 3, 2014 nonmerit decision denying appellant's January 31, 2014 request for reconsideration as untimely and insufficient to

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of the OWCP's decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

⁸ *Id.* at § 10.607(b).

⁹ See *George F. Gidicsin*, 36 ECAB 175 (1984) (where OWCP sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice).

¹⁰ See *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

¹¹ See *Kenneth E. Harris*, 54 ECAB 502 (2003); *Larry L. Hill*, 42 ECAB 596 (1991).

show clear evidence of error. The initial issue before the Board is whether she timely requested reconsideration.

In a decision dated January 31, 2013, an OWCP hearing representative affirmed a denial of appellant's request to expand her claim to include SI joint instability and joint pain of the left pelvis. OWCP properly addressed and mailed the decision to her in accordance with its regulations, which provide that a copy of its decision shall be mailed to the employee's last known address.¹²

Under the mailbox rule, 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. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.¹³ As a rebuttable presumption, however, receipt will not be assumed when there is evidence of nondelivery.¹⁴ OWCP's January 31, 2013 decision, while properly addressed, was returned to sender as undeliverable on May 22, 2013. The presumption of delivery under the mailbox rule is thus rebutted as the return envelope constitutes evidence of nondelivery.¹⁵ OWCP resent a copy of the January 31, 2013 decision to appellant on May 22, 2013. Appellant thus had one year from this date, or until May 22, 2014, to submit a reconsideration request to OWCP. She requested reconsideration by letter received by OWCP on February 5, 2014. Consequently, appellant timely requested reconsideration. In its July 3, 2014 decision, OWCP applied the clear evidence of error legal standard to her reconsideration request. This standard is appropriate only in cases in which a reconsideration request is untimely filed.¹⁶ On remand, OWCP should consider appellant's request for reconsideration under the standards that apply to timely reconsideration requests as set forth at 20 C.F.R. § 10.606(b).

CONCLUSION

The Board finds that the case is not in posture for decision.

¹² 20 C.F.R. § 10.127.

¹³ See *Michelle Lagana*, 52 ECAB 187 (2000).

¹⁴ See *C.O.*, Docket No. 10-1796 (issued March 23, 2011); *M.U.*, Docket No. 09-526 (issued September 14, 2009).

¹⁵ See *C.O.*, *id.*

¹⁶ See *Donna M. Campbell*, 55 ECAB 241 (2004).

ORDER

IT IS HEREBY ORDERED THAT the July 3, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 21, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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