

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

DONALD G. SCOTT, Appellant)

and)

**HOMELAND SECURITY, EMERGENCY
PREPAREDNESS & RESPONSE,
Edmond, OK, Employer**)

**Docket No. 05-957
Issued: August 8, 2005**

Appearances:
Donald G. Scott, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 18, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated November 17, 2004 which denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the last merit decision dated September 16, 2003 and the filing of this appeal on March 18, 2005, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue on appeal is whether the Office properly determined that appellant's request for reconsideration received on September 20, 2004 was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On July 1, 2003 appellant, then an 83-year-old member of the Emergency Preparedness and Response Team, filed a claim alleging that on May 19, 2003 he had a heart attack which was

caused by breathing polluted air while assisting disaster victims at the World Trade Center on September 11, 2001. Appellant stopped work on May 19, 2003.

In a letter dated August 6, 2003, the Office advised appellant of the medical evidence needed to establish his claim and requested that he submit such evidence within 30 days. The Office requested that he submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors as well as the feasibility of appellant returning to regular duty.

In letters dated June 25 and August 26, 2003, appellant advised that he developed breathing problems and fluid in his lungs which he attributed to inhaling toxic air after the World Trade Center disaster. He indicated that he was unable to work since his heart attack on May 19, 2003. Also submitted was a hospital admission from May 19 to June 2, 2003. The admitting physician, Dr. Stephen M. Spielman, a Board-certified internist, noted in a discharge summary that appellant experienced chest pressure, chest pain and coughing and was admitted for observation. He diagnosed atrial fibrillation, chest pain, coronary artery disease, acute myocardial infarction and renal disease. Appellant came under the treatment of Dr. Alanna M. Silverstein, a Board-certified internist, who noted on June 9, 2003 that appellant presented with atrial fibrillation and ventricular response and was admitted to the hospital on May 19, 2003. Appellant underwent a catheterization and found to have a subtotal occlusion of the diagonal which was stented. Dr. Silverstein diagnosed coronary artery disease, history of atrial fibrillation, mild congestive heart failure secondary to a rapid ventricular response, renal insufficiency, hypercholesterolemia, relative hypotension, anemia and osteoarthritis of the left knee.

In a decision dated September 16, 2003, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that his heart condition was caused by the factors of employment.

By form dated September 12, 2004 and a letter dated September 13, 2004, appellant requested reconsideration and submitted additional evidence. The appeal request form and letter were stamped as received by the Office on September 20, 2004. The envelope retaining the request was not retained in the record. Appellant noted that since September 11, 2001 he underwent numerous cardiac and respiratory tests and therapies. He further noted that he had not been able to return to work since his heart attack on May 19, 2003. Appellant advised that others who worked in the recovery effort have experienced similar problems. He submitted an American Lung Association article which advised that particle pollution could contribute to heart attacks. Also submitted was an article addressing conditions developed since the September 11, 2001 attack on the World Trade Center including lung damage and post-traumatic stress disorder. Appellant submitted a report from Dr. Timothy Betz, a Board-certified internist, dated September 11, 2003, who treated appellant on July 17, 2003 for dyspnea. He reported a history of exposure to a significant amount of dust while working at the World Trade Center disaster on September 11, 2001 and experienced shortness of breath. Appellant related that he moved out of the area and his health improved until his heart attack on May 19, 2003. Dr. Betz indicated that x-rays and a computerized tomography (CT) scan revealed bilateral effusions. He noted that the pulmonary function test revealed moderate impairment with no structural abnormalities and symptoms consistent with a cardiac etiology.

By decision dated November 17, 2004, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office 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.”¹

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).² This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.³

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁴

ANALYSIS

The Office issued a decision on November 17, 2004, denying reconsideration of its September 16, 2003 decision on the grounds that appellant's request for reconsideration date stamped as received September 20, 2004 was untimely filed. The Board finds that September 20, 2004 is the date the Office received the reconsideration request. The one-year time limitation begins to run on the date following the date of the original Office decision.⁵ A

¹ 5 U.S.C. § 8128(a).

² *Diane Matchem*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

³ 20 C.F.R. § 10.607(a).

⁴ 20 C.F.R. § 10.607(b).

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

right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁶ The Board notes that, the Office's procedure manual, Chapter 2.1602.3(b)(1), provides that timeliness for a reconsideration request is determined by the postmark on the envelope. The procedure manual provides that timeliness is determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used.⁷ The Board notes that the envelope containing the request was not retained in the record and the appeal request form was dated September 12, 2004 and the letter requesting reconsideration was dated September 13, 2004. For this reason, the Board finds that the reconsideration request was timely. Appellant timely filed his request for reconsideration within one year of the September 16, 2003 merit decision. The Office improperly denied his reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since the Office erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case to the Office for review of this evidence under the proper standard of review for a timely reconsideration request.⁸

CONCLUSION

The Board finds that appellant's September 12, 2004 request for reconsideration was timely filed.

⁶ *Id.*; *Larry J. Lilton*, 44 ECAB 243 (1992).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (January 2004).

⁸ *See Donna M. Campbell*, 55 ECAB __ (Docket No. 03-2223, issued January 9, 2004).

ORDER

IT IS HEREBY ORDERED THAT the November 17, 2004 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded to the Office for further proceedings consistent with this opinion.

Issued: August 8, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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