

FACTUAL HISTORY

On November 20, 2000 appellant filed a claim alleging a recurrence of disability due to his June 28, 1995 injury. He stated that his pay stopped on September 30, 1998 when he was forced to retire due to the state of his health, consisting of upper respiratory problems and rashes. The employing establishment indicated that appellant voluntarily retired effective September 30, 1998. The Office developed this claim as one for occupational disease; File No. 132041957. By decision dated January 11, 2002, the Office denied appellant's claim as it found that he failed to establish fact of injury.

By letter dated January 23, 2002, appellant requested an oral hearing which was held on February 4, 2003. By decision dated March 31, 2003, an Office hearing representative affirmed the denial of his claim. The Office found that he has not documented incidents of exposure responsible for his diagnosed pulmonary condition. The hearing representative also found that the medical evidence of record did not relate appellant's medical condition to workplace exposure.

Appellant requested reconsideration and indicated that he mailed documents requesting reconsideration on March 29, 2004. In support of his request for reconsideration, appellant faxed a memorandum from the employing establishment dated August 9, 1983, a dispensary permit dated May 18, 1977, a certification of injury/illness dated June 28, 1995 and a department of motor vehicles form containing a statement by his physician regarding his disability dated November 8, 1994. The Office stamped this faxed material as received on April 12, 2004.

The record also indicates that a copy of the same document was stamped as received by the Office on April 5, 2004. There is no postmarked envelope in the record indicating the date that this document was mailed.

By decision dated June 18, 2004, the Office denied appellant's request for reconsideration. The Office found that the application was received by the Office on April 5, 2004 and was, therefore, an untimely request for reconsideration of the March 31, 2003 decision. The Office then evaluated appellant's request and found that he had failed to establish clear evidence of error.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act. The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.¹ While the Office's procedure manual provides that the one-year time limitation for requesting reconsideration begins to run on the date of the original Office decision,² the Board has long held that the date of the event from which the designated period of time begins to run shall not be included when computing the time

¹ 20 C.F.R. § 10.607 (1999); *see also Alan G. Williams*, 52 ECAB 180 (2000).

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(1) (May 1996).

period. However, the last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday.³ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.⁴ The Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitations set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁵

ANALYSIS

In the instant case, the Board finds that the Office improperly determined that appellant's request for reconsideration was untimely filed. The Office indicated that his request for reconsideration was not received until April 5, 2004 and, thus, was not a timely appeal of the March 31, 2003 decision. However, the Board finds that appellant's request was timely filed in two different ways.

Appellant alleged that he mailed the document to the Office on March 29, 2004. The Office stamp indicates that this document was received on April 5, 2004. However, the postmark of appellant's reconsideration request is not in the record. It is established that the timeliness of a reconsideration request is determined by the postmark on the envelope, but if the envelope is not available, the date of the letter itself is used.⁶ In this case, appellant's letter is dated February 21, 2004. He alleged that he mailed the letter on March 29, 2004. Accordingly, appellant's claim was also timely filed when one considers the date he mailed the request for reconsideration.

Therefore, the Board finds that appellant's request for reconsideration was timely filed. On remand the Office should review appellant's claim and new evidence and determine whether he has provided sufficient evidence or argument to warrant merit review of his claim under 20 C.F.R. § 10.608(b).

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

³ *Angel M. Lebron, Jr.*, 51 ECAB 488 (2000); *John B. Montoya*, 43 ECAB 1148, 1151 (1992).

⁴ *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁵ *See Gladys Mercado*, 52 ECAB 255 (2001).

⁶ Federal FECA Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996).

ORDER

IT IS HEREBY ORDERED THAT the June 18, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: March 22, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member