

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

_____)
J.S., Appellant)
)
and)
)
U.S. POSTAL SERVICE, POST OFFICE,)
Baltimore, MD, Employer)
_____)

Docket No. 06-1902
Issued: December 18, 2006

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 14, 2006 appellant filed a timely appeal from the Office of Workers’ Compensation Programs’ decision dated May 10, 2006 which denied his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated April 28, 2005 to the filing of this appeal, 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 denied appellant’s request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

On July 27, 2004 appellant, then a 53-year-old clerk, filed a traumatic injury claim alleging that on July 19, 2004¹ he experienced a pain in his left side.² In a decision dated September 9, 2004, the Office denied appellant's claim on the grounds that the evidence was not sufficient to establish that he sustained an injury.

In a letter dated April 12, 2005, appellant³ requested reconsideration accompanied by additional factual and medical information including a letter from Dr. Robert Crosley diagnosing a lumbosacral sprain-strain.

By decision dated April 28, 2005, the Office denied modification of the September 9, 2004 decision.

In a request dated March 30, 2006, appellant sought reconsideration accompanied by additional medical information. The request for reconsideration was scanned by the Office on May 5, 2006. The envelope in which the request for reconsideration was mailed is of record, but the date stamp is not legible. The medical evidence submitted consisted of an unsigned report from Dr. Ronald Harris from the Concentra Medical Center for a January 19, 2006 examination of appellant's right wrist following an alleged January 17, 2006 injury.

In a decision dated May 10, 2006, the Office denied appellant's request for reconsideration. The Office determined that appellant's March 30, 2006 form requesting reconsideration was not received by the Office until May 5, 2006 and, therefore, was not timely filed. The Office further found that appellant had not established clear evidence of error.

¹ The date-of-injury section of the CA-1 contains the date July 21, 2004; however, in the cause of injury section appellant starts with "On July 20, 2004 I experienced a pain."

² The injury listed on the CA-1 is an injury to his left side, however, in the accompanying narrative statement appellant wrote that the pain was on his right side.

³ The April 12, 2005 letter was accompanied by an appeal request form which was dated September 28, 2004 all of which were received by the Office on April 15, 2006.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁴ 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.”⁵

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).⁶ 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.⁷

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.⁸

ANALYSIS

The Office issued a decision on May 10, 2006, denying reconsideration of its prior April 28, 2005 decision on the grounds that appellant's request for reconsideration was received by the Office on May 5, 2006 and was untimely filed. The Office, in denying appellant's request for reconsideration, did not address the fact that the form was not stamped received and the postmark on the accompanying envelopes is illegible.⁹

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8128(a).

⁶ *Diane Matcheum*, 48 ECAB 532, 533 (1997); citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁷ 20 C.F.R. § 10.607(a).

⁸ 20 C.F.R. § 10.607(b).

⁹ The Office received two identical requests for reconsideration mailed separately. Neither of the postmarks are legible.

The one-year time limitation begins to run on the date following the date of the original Office decision.¹⁰ A right to reconsideration within one year accompanies any subsequent merit decision on the issue.¹¹ The Office overlooked the lack of a post mark and erred in finding that the one-year limitation had expired as appellant had from April 29, 2005 through April 28, 2006 in which to timely file a reconsideration request.

The Board finds that March 30, 2006 is the date the Office received the reconsideration request. The Board notes that the Office's procedure manual, Chapter 2.1602.3(b)(1), provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope. The procedure manual states: "Timeliness is thus determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used." The Board notes that the envelopes are illegible and the letter requesting reconsideration was dated March 30, 2006. For this reason the Board finds that the reconsideration request was timely. Appellant, timely filed his request for reconsideration within one year of the April 28, 2005 merit decision and the Office improperly denied his reconsideration by applying the legal standard reserved for cases where reconsideration is requested after more than one year.

CONCLUSION

The Board finds that appellant's March 30, 2006 request for reconsideration was therefore timely filed. The case will be remanded for further adjudication consistent with this decision.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.16602.3(a) (May 1991).

¹¹ *Id.*; *Larry J. Lilton*, 44 ECAB 243 (1992).

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2006 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: December 18, 2006
Washington, DC

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

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

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