United States Department of Labor
Employees' Compensation Appeals Board

B.F., Appellant	)	
and	)	**Docket No. 07-1394**
	)	**Issued: May 21, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Berkeley, CA, Employer	)	

Appearances:
Appellant, 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 April 26, 2007 appellant filed a timely appeal from the April 6, 2007 nonmerit decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's denial.

ISSUE

The issue is whether the Office properly denied appellant's January 16, 2007 request for reconsideration.

FACTUAL HISTORY

On February 16, 2005 appellant, then a 45-year-old maintenance manager, filed a claim alleging that the bulging disc in his low back was a result of his federal employment: "Having seen a back specialist, I think my injury was caused by picking up and moving supplies and other material because our procurement was delayed." On February 25, 2005 the Office asked appellant to submit additional information to support his claim. He responded on

March 10, 2005. Appellant submitted a copy of a medical report from a Board-certified spine surgeon and asked whether this information was sufficient. He discussed the nature of his claim and submitted a copy of his current and previous job descriptions. Appellant stated: "Please let me know if you need any additional information or clarification."

On April 8, 2005 appellant wrote to the Office: "About four weeks ago I sent in the information your office requested to evaluate my claim. I like to know if you received this information because I have not received a reply yet."

In a decision dated May 2, 2005, the Office denied appellant's claim. The Office found that the evidence he submitted was insufficient to establish that the events occurred as alleged. The employing establishment had advised that appellant, as a manager, had staff to perform manual labor needs. Appellant was also legally blind and not required to perform physical labor with the exception of scheduling, ordering and handling the telephone. The Office also found that the medical evidence noted the presence of an L4-5 herniated disc and degenerative disc disease, but it provided no history of injury or any opinion on whether the condition reported resulted from any work incident. The Office attached a statement of appeal rights advising that any request for reconsideration must be made within one calendar year from the date of that decision.

On June 1, 2005 appellant wrote a letter to the Office:

> "It has been about two months since I forwarded all the information you requested and I have not gotten a reply. I'm not sure you ever received the additional information.
>
> "Please let me know the status of my claim.
>
> "You can call me anytime at [phone number] and if I'm unable to answer, please leave a message."

On December 11, 2006 appellant telephoned the Office about the status of his claim. The Office noted:

> "CE [claims examiner] called [appellant] back same day and advised that the case had been denied May [20]05. The claimant says he did not receive any thing from the Office. CE advised that a decision was issued and mailed to his address on file with copy [to] the EA [employing agency]. Claimant verified that address was correct. CE advised that she could only make a copy of decision and send it to him. CE curious and asked claimant why he did n[o]t bother to follow-up sooner and he said that he called the Office and could never get a call back. CE advised that there were no calls logged into the voicemail system."

On January 16, 2007 appellant requested reconsideration. He stated that he was never notified of the denial of his claim and was not afforded the opportunity to submit the new and additional information on time: "I had followed up with many phone calls to OWCP office in San Francisco but nobody ever returned my calls until December 11, 2006. I even sent in written request for the status and did not receive any reply." Appellant submitted evidence relating to

his job descriptions, work restrictions and accommodations and his mid-year goals for 2004. He submitted statements from coworkers who supported that he performed manual labor as a manager. Appellant submitted rehabilitation evaluations and treatment notes from May 9 through June 8, 2005. He submitted radiographic reports and part of a January 20, 2006 medical report describing a history of lifting, restocking, reaching and standing. Appellant also submitted information on taking folding bikes aboard BART trains.

Appellant submitted a January 15, 2007 report from Dr. Galicano C. Andal, a specialist in internal medicine, who related the history appellant provided of pushing and lifting supplies at work because his staff could not physically lift the materials. Dr. Andal described his finding on examination and diagnosed, among other things, chronic low back pain, recurrent, "probably work related."

In a decision dated April 6, 2007, the Office denied appellant's request for reconsideration. The Office found that the request was untimely and failed to present clear evidence of error in its May 2, 2005 decision. The Office addressed appellant's contention that he did not receive the May 2, 2005 decision:

> "You also argued that you were not notified of the denial of your case. The records indicate that[,] by correspondence dated June 1, 2005, you asked for the status of your case, however, there was no inquiry follow-up, on your behalf, until December 11, 2006 when you called our office. During that telephonic communication you claimed that you did not receive notice of your denial. A formal decision was mailed to you on May 2, 2005. A letter properly addressed is presumed to have arrived at the mailing address in due course. There is no evidence to the contrary."

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.[1] The Office may send any request for additional evidence to the claimant.[2] In reaching any decision with respect to coverage or entitlement under the Act, the Office considers the claim presented by the claimant, the report by the employer and the results of such investigation as the Office may deem necessary.[3] A copy of the decision shall be mailed to the employee's last known address.[4]

[1] 5 U.S.C. § 8102(a).

[2] 20 C.F.R. § 10.115 (1999).

[3] *Id*. § 10.125(a).

[4] *Id*. § 10.127; *see Tammy J. Kenow*, 44 ECAB 619 (1993) (where the Office did not mail its decision to the claimant's correct address of record, the Board found that the decision was not properly issued).

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.[5] This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.[6] 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.[7]

The Office may review an award for or against payment of compensation at any time on its own motion or on application.[8] An application for reconsideration, however, "must be sent within one year of the date of the [Office] decision for which review is sought." The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[9]

ANALYSIS

The only decision the Board may review on this appeal is the Office's April 6, 2007 nonmerit decision denying appellant's January 16, 2007 request for reconsideration. The first question the Board must decide is whether the request was timely.

The Office denied appellant's claim on May 2, 2005. He had one year, or until May 2, 2006, to request reconsideration. Appellant's January 16, 2007 request for reconsideration is therefore untimely. He argues that the Office never notified him of the denial, but the Office properly addressed its May 2, 2005 decision. It is presumed under the mailbox rule that appellant received the decision in due course, together with the attached notice of appeal rights. He wrote a letter to the Office on June 1, 2005 inquiring about the status of his claim, but the Board finds this alone is not sufficient to rebut the presumption of receipt arising from a properly addressed decision. There is no evidence that the Office's May 2, 2005 decision was returned to sender for any reason, and there is no evidence that the decision was lost by the U.S. Postal Service or irretrievably misdelivered.

Because appellant's January 16, 2007 request for reconsideration is untimely, this appeal turns on whether his request establishes clear evidence of error in the Office's May 2, 2005 decision. Most of the evidence appellant submitted does nothing to show that the denial of his claim was clearly erroneous. Statements from coworkers directly address one of the deficiencies the Office found in appellant's claim. But the medical evidence does not establish on its face

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

[6] *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

[7] *Larry L. Hill*, 42 ECAB 596 (1991) (the presumption of receipt under the mailbox rule must apply equally to claimants and the Office alike). *See generally* Annotation, *Proof of Mailing by Evidence of Business or Office Custom*, 45 A.L.R. 4th 476, 481 (1986).

[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.607 (1999).

that the physical activities he performed in the course of his employment caused or aggravated a diagnosed medical condition. Dr. Andal briefly noted that appellant's chronic low back pain, recurrent, was "probably work related." But this kind of evidence -- equivocal and unsupported by sound and ultimately convincing medical rationale -- would not have discharged appellant's burden of proof even if he had submitted the evidence at the time of his claim.[10] Dr. Andal's report, then, does not show on its face that the Office's denial of compensation was erroneous. Because appellant's untimely request for reconsideration does not show clear evidence of error in the Office's May 2, 2005 decision, the Board will affirm the Office's April 6, 2007 decision to deny a merit review of his case.

CONCLUSION

The Board finds that the Office properly denied appellant's January 16, 2007 request for reconsideration. The request was untimely and failed to show clear evidence of error in the Office's May 2, 2005 decision denying his claim.

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 21, 2008
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

[10] *See Philip J. Deroo*, 39 ECAB 1294 (1988) (although the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute medical certainty, neither can such opinion be speculative or equivocal); *Jennifer Beville*, 33 ECAB 1970 (1982) (statement of a Board-certified internist that the employee's complaints "could have been" related to her work injury was speculative and of limited probative value). *See generally Victor J. Woodhams*, 41 ECAB 345 (1989) (the opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific factors of employment).