United States Department of Labor
Employees' Compensation Appeals Board

R.L., Appellant	)	
and	)	
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, SOUTH NEVADA HEALTHCARE SYSTEM, North Las Vegas, NV, Employer	)	**Docket No. 09-1459** **Issued: February 5, 2010**

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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 26, 2009 appellant filed a timely appeal from a May 20, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. As over one year has passed since the last merit decision in this case, dated October 30, 2007, and the filing of this appeal, dated May 26, 2009, the Board lacks jurisdiction over the merits of appellant's claim.[1]

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error.

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On March 13, 2006 appellant, a 65-year-old civilian pay technician, filed a traumatic injury claim (Form CA-1) alleging that on January 27, 2006 he sustained a right knee injury during a ground blessing ceremony. On that date, he alleges he was kneeling on his right knee, "receiving the blessed earth" and, after standing up, felt something pop in his right knee. Appellant underwent treatment and submitted evidence supporting his claim.

Appellant sought treatment from Dr. Valerie T. Schram, a Board-certified internist. In a March 1, 2006 note, Dr. Schram noted a popping and snapping in appellant's knee associated with pain and ordered a magnetic resonance imaging (MRI) scan of his knee which, on March 10, 2006, revealed a medial meniscus tear. On April 17, 2006 she diagnosed right wrist tendinitis and right lateral epicondylitis.

On July 23, 2007 appellant alleged recurrence of disability on January 5, 2007.

By decision dated November 30, 2007, the Office denied the claim because the evidence of record did not demonstrate that the established employment incident caused a medically diagnosed condition. It also denied appellant's recurrence claim because no work injury had been accepted.

Appellant's attorney, in a letter dated April 26, 2008, argued that he was reasserting appellant's claim, which should have been accepted based on the medical evidence in the record. He submitted additional copies of Dr. Schram's March 1 and 10, 2006 notes as well as an additional copy of a note signed by a licensed nurse practitioner. Counsel requested the Office "re-see all initial documentation and respond accordingly. [*sic*]"

On July 11, 2008 the Office received a March 16, 2008 note signed by a licensed nurse practitioner indicating that appellant has been seen by a nurse practitioner. In a July 11, 2008 letter, counsel reported that he was still "awaiting for a responsive reply from [the Office]" to his April 26, 2008 letter concerning the status of appellant's claim.

In a September 24, 2008 letter, counsel reported that he was "not pleased" with the way the Office handled appellant's claim and that the Office had not responded to his April 26, 2008 letter. He asserted that any evidentiary deficiencies were due to the Office's failure to respond to his correspondence. During a September 30, 2008 telephone call to the Office, counsel demanded a response to his July 11, 2008 letter and argued that there was enough evidence of record to accept the claim. The claims examiner noted that: "the att[orne]y demanded a response to his [July 11, 2008] letter. I stated I would follow up -- but suggested he file an appeal instead."

On October 1, 2008 the Office received a July 9, 2008 letter from Dr. Schram wherein she stated that appellant had initially called her on March 1, 2006 to complain that his right knee was popping, snapping and that he had severe pain. Dr. Schram also noted that: "although it was not noted in the record, I was aware the injury occurred on January 27, 2006 when he knelt down at the Ground Blessing Ceremony for the new VA hospital." On October 1, 2008 the Office also received a series of progress notes from Dr. Farooq M. Shaikh, a Board-certified

physician specializing in infectious disease. These notes date from December 16, 2007 through July 17, 2008 and detail appellant's medical history, indicating that appellant underwent meniscectomy of the right knee in February 2007, followed by a total knee arthroplasty on June 25, 2007 and prosthetic removal and right knee replacement in December 2007.

By letter dated October 29, 2008, the Office claims examiner responded to counsel's letters and telephone calls noting that appellant's claim was denied on November 30, 2007 because the medical evidence of record did not establish the diagnosed conditions were work related. The claims examiner stated that "you have requested that I reconsider the decision. However, as previously conveyed the appeal process is the only option available to you and your client."

On February 3, 2009 appellant, through his attorney, requested reconsideration.

By decision dated May 20, 2009, the Office denied the request finding that appellant's reconsideration request was untimely and did not demonstrate clear evidence of error.

LEGAL PRECEDENT

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. If the request is untimely and fails to present any clear evidence of error, [the Office] will deny the application…."

The Office's regulations set forth how an employee or representative requests reconsideration. 20 C.F.R. § 10.606 states as follows:

> "(a) An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by [the Office] in the final decision.
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> "(b) The application for reconsideration, including all supporting documents, must:
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> (1) Be submitted in writing;
>
> (2) Set forth arguments and contain evidence that either:
>
> (i) Show that [the Office] erroneously applied or interpreted a specific point of law;
>
> (ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> (iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

The regulations at § 10.608 (b) further provide that, if the request is timely but fails to meet at least one of the standards described in 10.606, the Office will deny the application.

ANALYSIS

The merit decision denying appellant's claim was dated November 30, 2007. As his application for reconsideration was dated February 3, 2009, it was untimely.

The Board finds however that appellant timely requested reconsideration on April 26, 2008. In his letter dated April 26, 2008, appellant's representative stated the reasons he felt the Office's November 30, 2007 was in error. He also requested that the Office "re-see all initial documentation and respond accordingly." Appellant's representative submitted additional evidence with this request and in July and October 2008. Appellant again timely requested the status of his case on July 11, 2008, as well as in September 2008.

It is clear that, by the time of the September 30, 2008 telephone conference between appellant's representative and the Office claims examiner, the claims examiner was well aware that appellant had requested reconsideration as she noted that "the att[orne]y demanded a response to his [July 11, 2008] letter. I stated I would follow up -- but suggested he file an appeal instead." By letter dated October 29, 2008, the claims examiner stated: "you have requested that I reconsider the decision. However, as previously conveyed, the appeal process is the only option available to you and your client." The Board finds however that, as the Office's merit decision was dated November 30, 2007, appellant's appeal options were not limited to an appeal. Appellant timely requested reconsideration and the Office was obligated to issue a timely appropriate decision in response to the request for reconsideration.

The decision of the Office dated May 20, 2009 is set aside. This case is remanded to the Office for a merit review to preserve appellant's appeal rights.[2]

CONCLUSION

The Board finds that appellant's application for reconsideration was timely filed. The decision of the Office dated May 20, 2009 is set aside.

[2] *See Charles E. Varrick*, 33 ECAB 1746 (1982). Delay by the Office effectively thwarted appellant's ability to file a timely appeal on the merits.

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2009 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Issued: February 5, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board