

The issue on appeal is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error. On appeal, appellant through her representative alleges that there is sufficient medical evidence of record to establish a claim for appellant's neck and elbow conditions and that the April 25, 2003 decision should either be reversed in its entirety or remanded for review of additional medical evidence.

### **FACTUAL HISTORY**

On October 5, 1999 appellant, then a 38-year-old electrical equipment repairer, filed an occupational disease claim alleging that she developed pain in her right elbow, shoulder and neck in the performance of duty.<sup>1</sup> The claim was denied on November 20, 1999 on the grounds that the medical documentation submitted with the claim failed to establish fact of injury. Appellant through a representative subsequently requested reconsideration of the decision. By decision dated November 3, 2000, the Office modified the prior decision to reflect that fact of injury was established but the medical evidence failed to establish a causal relationship between the diagnosed condition and work duties.

Appellant's representative again requested reconsideration on March 6, 2001. By "Notice of Decision" dated June 8, 2001, the Office reversed the prior decision and accepted the claim for impingement syndrome of the right shoulder with surgery. The Office, however, also denied a claim for neck or elbow conditions indicating that a causal relationship was not established in that regard. The case was combined with the previous case under one master case file.

On May 3, 2002 appellant's representative requested reconsideration of the June 8, 2001 decision and submitted additional medical evidence. By decision dated May 22, 2002, the Office found that the prior June 8, 2001 decision, which reversed an earlier decision and accepted appellant's case did not have appeal rights thus, the latest decision with appeal rights was dated November 3, 2000. The Office further found that because the reconsideration request was not received within one year of the November 3, 2000 decision, it was untimely filed and the only issue determinable was whether appellant had presented clear evidence of error of the November 3, 2000 decision. The Office concluded that the November 3, 2000 decision was reversed by decision dated June 8, 2001 and that the evidence submitted by appellant was insufficient to warrant further change.

In a letter dated May 28, 2002, appellant through her representative requested reconsideration. The Office reissued the May 22, 2002 decision on April 25, 2003 and afforded appellant new appeal rights. The Office determined that appellant's request for reconsideration of the November 3, 2000 decision was untimely and did not present clear evidence of error.

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<sup>1</sup> Appellant previously submitted an occupational disease claim for a bilateral wrist condition, which was accepted for bilateral wrist tendinitis. The claim was upgraded on June 11, 1999 to include right carpal tunnel syndrome with release and surgery was performed on June 22, 1999. On August 8, 2000 the Office issued appellant a schedule award for 20 percent permanent impairment of the right upper extremity from April 26, 2000 to July 6, 2001. Also on August 8, 2000 the Office issued a decision determining that the secretary position, which appellant accepted with the employing establishment and worked in for more than 60 days fairly and reasonably represented her wage-earning capacity.

## **LEGAL PRECEDENT**

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative), who receives an adverse decision.<sup>2</sup> The decision is accompanied by information about the claimant's appeal rights, which may include the right to a hearing, a reconsideration and/or a review by the Board.<sup>3</sup> The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."<sup>4</sup>

Section 8128(a) of the Act<sup>5</sup> does not entitle an employee to a review of an Office decision as a matter of right.<sup>6</sup> This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

"The Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. The Secretary, in accordance with the facts found on review may –

- (1) end, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>7</sup> As one such limitation, the Office has stated that it 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.<sup>8</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).<sup>9</sup>

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<sup>2</sup> 20 C.F.R. § 10.605 (2003).

<sup>3</sup> 20 C.F.R. § 10.126 (2003)

<sup>4</sup> 20 C.F.R. § 10.605 (2003).

<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>7</sup> Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office. See 20 C.F.R. § 10.606(b).

<sup>8</sup> 20 C.F.R. § 10.607(b).

<sup>9</sup> See cases cited *supra* note 3.

### **ANALYSIS**

In this case, appellant requested reconsideration of the June 8, 2001 decision on May 3, 2002 and submitted additional medical evidence. By decision dated May 22, 2002, the Office found that the prior Office decision dated June 8, 2001 did not constitute a final decision because appeal rights were not attached. The Office, therefore, determined that the latest decision with appeal rights was dated November 3, 2000 and, therefore, appellant's reconsideration request dated May 3, 2002 was untimely as it was outside of the one-year time limit. The Office reissued the May 22, 2002 decision on April 25, 2003 following a subsequent request for reconsideration.

Although appeal rights were apparently not included with the June 8, 2001 Office's "Notice of Decision," which accepted a right shoulder condition, the Board finds that it constitutes an adverse decision in denying neck and elbow conditions related to the employment injury. Since the June 8, 2001 letter does in fact constitute a final adverse decision, the Board finds that appellant's May 3, 2002 request for reconsideration was timely as it was within a year of the June 8, 2001 decision.

Therefore, the case should be remanded to the Office for proper consideration of the medical evidence submitted since the June 8, 2001 decision and evaluation under the standards for a timely request for reconsideration to be followed by an appropriate decision.

### **CONCLUSION**

The Board finds that this case is not in posture for a decision regarding the refusal of the Office to reopen appellant's case for merit review.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 25, 2003 is set aside and case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: February 5, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member