

FACTUAL HISTORY

This is the fourth appeal in the present case. In the first appeal,³ the Board issued a decision on December 11, 1995 affirming the Office's determination that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after February 19, 1992 due to her accepted right hand and wrist injury.⁴ The Board determined that the reports of appellant's attending Board-certified orthopedic surgeons, Dr. Rida N. Azer and Dr. William E. Gentry, did not show that she sustained such an employment-related recurrence of disability. In the second appeal,⁵ the Board issued a decision on March 17, 2003 affirming the Office's refusal to reopen appellant's case for merit review because her applications for review were not timely filed and failed to present clear evidence of error.⁶ In the third appeal,⁷ the Board issued a decision on July 13, 2004 affirming the Office's refusal to reopen appellant's case for merit review because her application for review was not timely filed and failed to present clear evidence of error. The facts and the circumstances of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

On May 9, 2005 appellant requested reconsideration of her claim that she sustained a recurrence of disability due to her accepted right hand and wrist injury. She argued that her September 4, 2003 reconsideration request was timely because it was filed within one year of the Board's March 17, 2003 decision and asserted that her claim should have been reviewed on the merits. Appellant alleged that the reports of Dr. Azer showed that she had disability after February 19, 1992 due to her accepted right hand and wrist injury. She submitted an April 27, 2005 report of Dr. Azer.

In a January 26, 2006 decision, the Office discussed precedent regarding the finality of Board decisions and stated:

“Please be advised that the July 13, 2004 decision from the [Board], was not a merit decision, therefore, this [O]ffice has no jurisdiction to review a nonmerit decision.”

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³ Docket No. 95-802 (issued December 11, 1995).

⁴ The Office accepted that appellant sustained tendinitis and de Quervain's complex of the right hand and wrist and she returned to limited-duty work on December 29, 1990. The case number for this injury is A25-297044. Appellant also claimed that she had disability after March 10, 1993 due to an accepted left thumb and wrist injury, but this injury (case number A25-398729) is not the subject of the present appeal.

⁵ Docket No. 01-2038 (issued March 17, 2003).

⁶ On August 13, 2004 appellant filed a petition for reconsideration of the Board's July 13, 2004 decision and, in a January 11, 2005 order, the Board dismissed appellant's petition for reconsideration as untimely.

⁷ Docket No. 04-545 (issued July 13, 2004).

“In conclusion, no further action will be taken on this request to reconsider the [Board] decision, as the Board has issued a final nonmerit decision on the timeliness issue; therefore, there is no appealable right to this Office.”⁸

In a December 4, 2006 letter, appellant again requested reconsideration of her claim that she sustained an employment-related recurrence of disability. She characterized the Office’s January 26, 2006 letter as a “decision” and argued that it should have been accompanied by appeal rights. Appellant claimed that her May 9, 2005 request for reconsideration was timely filed and required that the Office perform a review of the merits of her claim. She discussed Office regulations regarding the filing of reconsideration requests and argued that a proper interpretation of these regulations showed that all of her prior reconsideration requests were timely. Appellant claimed that the reports of Dr. Azer showed that she had disability after February 19, 1992 due to her December 2, 1986 injury. She alleged that the Office had confused her claim for a recurrence of disability due to her accepted right hand and wrist injury with her claim for a recurrence of disability due to her accepted left thumb and wrist injury.

In a March 5, 2007 decision, the Office denied appellant’s request for reconsideration. In justification of this determination, the Office stated, “We have declined your request for reconsideration dated December 4, 2006 as this Office shows no decision dated January 26, 2006 as indicated in your letter. We have not reviewed the merits of your case.”

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁹ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees’ Compensation Act.¹⁰

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes “clear evidence of error.”¹¹ Office regulations and procedure provide that the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set

⁸ The Board notes that although the Office did not provide appeal rights the January 26, 2006 document constitutes a final decision of the Office concerning appellant’s May 9, 2005 request for merit review of her claim.

⁹ 20 C.F.R. § 10.607(a).

¹⁰ 5 U.S.C. § 2128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

¹¹ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹²

In determining whether a claimant has discharged his or her burden of proof and is entitled to compensation benefits, the Office is required by statute and regulation to make findings of fact.¹³ Office procedure further specifies that a final decision of the Office must include findings of fact and provide clear reasoning which allows the claimant to "understand the precise defect of the claim and the kind of evidence which would tend to overcome it."¹⁴ These requirements are supported by Board precedent.¹⁵

ANALYSIS

The Office accepted that appellant sustained tendinitis and de Quervain's complex of the right wrist and hand and paid compensation for periods of disability until December 29, 1990, when she returned to limited-duty work. Appellant claimed that she sustained a recurrence of total disability on February 19, 1992 due to her accepted right hand and wrist injury. The Office denied her claim finding that she did not submit sufficient medical evidence to establish such a recurrence of disability.

In a December 4, 2006 letter, appellant requested reconsideration of her claim that she sustained a recurrence of disability due to her accepted right hand and wrist injury. She argued that she had submitted sufficient medical evidence to establish her claim, including reports of Dr. Azer, an attending Board-certified orthopedic surgeon. Appellant also discussed her prior reconsideration requests and argued that they should have been considered to be timely reconsideration requests.

In a March 5, 2007 decision, the Office denied appellant's request for reconsideration. In justification of this determination, the Office stated, "We have declined your request for reconsideration dated December 4, 2006 as this Office shows no decision dated January 26, 2006 as indicated in your letter. We have not reviewed the merits of your case."

The Board finds that the Office did not provide sufficient findings of fact and reasoning to explain its determination that appellant was not entitled to a review of the merits of her claim. The Office did not adequately explain why it did not evaluate appellant's reconsideration request

¹² 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id.* at Chapter 2.1602.3c.

¹³ 5 U.S.C. § 8124(a) provides: "The [Office] shall determine and make a finding of facts and make an award for or against payment of compensation." 20 C.F.R. § 10.126 provides in pertinent part that the final decision of the Office "shall contain findings of fact and a statement of reasons."

¹⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (July 1997).

¹⁵ See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

under the standards of 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.607 discussed above.¹⁶ In her December 4, 2006 letter, appellant addressed the merits of her claim that she sustained a recurrence of disability due to her accepted right hand and wrist injury. The Office did not discuss whether appellant's December 2006 reconsideration request was timely or apply the appropriate standard for evaluating her reconsideration request after making such a determination.

For these reasons, the case should be remanded to the Office for a proper evaluation of appellant's December 2006 reconsideration request in accordance with the above-described standards. After such development it deems necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether the Office properly denied appellant's request for further review of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: December 12, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹⁶ See *supra* notes 9 through 12 and accompanying text.