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<b>M.E., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 06-1886</b>
	)	<b>Issued: January 30, 2007</b>
<b>DEPARTMENT OF THE ARMY, 25th</b>	)	
<b>DIVISION OFFICERS' MESS, TRANG BANG,</b>	)	
<b>REPUBLIC OF VIET NAM, Employer</b>	)	
	)	

### Case Submitted on the Record

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

On January 10, 2006 appellant filed an appeal of a September 28, 2005 decision of the Office of Workers' Compensation Programs which denied his request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the last merit decision dated September 18, 1983 to the filing of this appeal, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board lacks jurisdiction to review the merits of appellant's claim.

The issue is whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

### **FACTUAL HISTORY**

On December 18, 1969 appellant, then a 22-year-old Philippine citizen, who was the club manager at an army base in Viet Nam, sustained multiple fragment wounds to the face, neck, right arm and left eye as the result of a hostile rocket propelled grenade attack. He was hospitalized and returned to the Philippines on December 30, 1969.<sup>1</sup> Appellant's medical expenses were paid. By decision dated September 15, 1983, his claim was accepted under the War Hazards' Compensation Act.<sup>2</sup> By that decision, appellant was granted a schedule award for a 35 percent loss of use of his left eye. On November 28, 1983 he filed an appeal with the Board. On May 9, 1984 the Director filed a motion to dismiss the appeal. By order dated June 28, 1984, the appeal was dismissed.<sup>3</sup> On September 2, 1985 appellant requested reconsideration before the Office. In a decision dated September 27, 1985, the Office denied his reconsideration request, noting that the medical evidence submitted was a duplicate of a report previously reviewed.

On September 13, 2005 appellant again requested reconsideration, stating that his head injury caused dizziness and headaches. He submitted a July 29, 2005 radiographic/ultrasound report that demonstrated a density in the left frontal region. An August 18, 2005 computerized tomography (CT) scan of the head demonstrated age-related cerebral volume loss, a bony defect of the left frontal bone which was a possible postsurgical change, and bilateral maxillary, ethmoid and sphenoid sinus disease. In a September 12, 2005 report, Dr. Miguel Delmer F. Calayag, a neurologist, noted the history of injury and appellant's complaints of vertigo and headaches. He provided examination findings of depressed skull and diminished vision in the left eye with no motor or neurological defect. Dr. Calayag diagnosed post-traumatic stress syndrome, status post craniotomy with dural repair and removal of a foreign object from appellant's left eye. He recommended further testing. Appellant also submitted duplicates of factual and medical evidence previously of record.

By decision dated September 28, 2005, the Office denied his reconsideration request on the grounds that his request was untimely and he failed to present clear evidence that the Office erred in its last merit decision.

### **LEGAL PRECEDENT**

The War Hazards' Compensation Act provides that employees who had injuries resulting from a war risk hazard are entitled to compensation "to the same extent as if the person so employed were a civil employee of the United States and were injured in the performance of duty."<sup>4</sup> Office procedures provide that the administrative procedures of the Federal Employees'

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<sup>1</sup> Appellant's employment was terminated on December 25, 1969.

<sup>2</sup> 42 U.S.C. §§ 1701-1793.

<sup>3</sup> Docket No. 84-448 (issued June 28, 1984).

<sup>4</sup> 42 U.S.C. § 1701.

Compensation Act are generally applicable to claims filed under the War Hazards' Compensation Act.<sup>5</sup>

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.<sup>6</sup> Section 10.607 provides that an application for reconsideration must be sent within one year of the date of the decision for which review is sought.<sup>7</sup> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.<sup>8</sup>

Effective June 1, 1987, regulations were promulgated, including a change in the time period within which a claimant may be entitled to reconsideration. The regulations provided that, in addition to the requirements of section 10.138(b)(1),<sup>9</sup> the Office would not "review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."<sup>10</sup> The Office, in Federal Employees' Compensation Act (FECA) Bulletin No. 87-40 and its procedures, has specified the type of notice to be provided a claimant where a decision issued before June 1, 1987 is followed by a nonmerit decision issued after that date. FECA Bulletin No. 87-40, in relevant part, states:

"It has been determined that where an application for review is denied based on the grounds that the claimant has not met the requirements of section 10.138(b)(1)(i)-(iii) and the decision being disputed was issued prior to June 1, 1987, the claimant should be notified of the one-year time limitation for requesting further review. It is not necessary to deny the application and wait for the claimant to submit sufficient evidence for a merit review before implementing the new one-year time limitation."<sup>11</sup>

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"1. The attachment to this bulletin reflects the text to be used where the decision in dispute was issued prior to June 1, 1987, and the claimant's application for review is being denied based on insufficiency of evidence (*i.e.*, the claimant has not met the requirements of section 10.138(b)(1)(i)-(iii)). This text advises the

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<sup>5</sup> Federal (FECA) Procedural Manual, Part 4 -- Special Case Procedures, *War Hazards*, Chapter 4.300.6(c) (September 1994).

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> 20 C.F.R. § 10.607; *see Gladys Mercado*, 52 ECAB 255 (2001).

<sup>8</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>9</sup> 20 C.F.R. § 10.138(b)(1) (1998).

<sup>10</sup> 20 C.F.R. § 10.138(b)(2) (1998).

<sup>11</sup> Effective January 4, 1999, Office regulations were revised. Section 10.606(b)(2) of the 1999 regulations contains essentially the same requirements for a reconsideration application as those found in former section 10.138(b)(1). *Compare* 20 C.F.R. § 10.138(b)(1) (1998) and 20 C.F.R. § 10.606(b)(2) (1999).

claimant of his or her rights to appeal the denial of application to the [Board] and of the new one year time limit for obtaining merit review. This is the only situation which this notice is to be used.

“2. A copy of the notice of the one-year time limitation must be placed in the case file along with the decision denying application. If a copy of the notice is not in the case file, the time limitation cannot be applied to a subsequent request for reconsideration.”<sup>12</sup>

Office procedures provided that no time limit applied to requests for reconsideration of decisions issued before June 1, 1987 because there was no regulatory time limit for requesting reconsideration prior to that date. A request for reconsideration may not be denied as untimely unless the claimant was advised of the one-year filing requirement in a later decision denying an application for reconsideration or denying modification of the contested decision. In those cases, the one-year time limit begins on the date of the decision that includes notice of the time limitations.<sup>13</sup> The procedures further provide that, if the original denial was issued before June 1, 1987, the cover letter or appeal rights attached to the decision should include a notice of the one-year time limitation for requesting reconsideration. Thereafter, the claimant would have one year from the decision denying the application to again request reconsideration of the contested decision.<sup>14</sup>

### ANALYSIS

The only decision before the Board is the September 28, 2005 decision in which the Office denied appellant’s request for reconsideration on the grounds that the request was untimely filed and failed to demonstrate clear evidence of error. The Board finds that the Office improperly refused to reopen appellant’s claim for further consideration of the merits under section 8128 on the grounds that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.

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<sup>12</sup> FECA Bulletin No. 87-40 (issued June 26, 1987).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(2) (January 2002).

<sup>14</sup> *Id.* at Chapter 2.1602.6(b) (January 2004). The notice advises the claimant of his or her right to an appeal before the Board and further provides:

#### “NOTICE:

“Section 10.607(a) of Title 20 of the Code of Federal Regulations, which concerns the reconsideration of a decision by the Office of Workers’ Compensation Programs (OWCP), provides that OWCP will not review a decision denying or terminating a benefit unless the claimant’s request for review is filed within one year of that decision. This provision of the regulations became effective June 1, 1987. Therefore, even though the decision in your case was issued prior to June 1, 1987 and included the right to reconsideration, without specifying a time limit, a request for reconsideration of that decision will be denied if it is not made within one year from the date of this notice.”

The most recent merit decision of record is the Office's September 15, 1983 decision. The appeal rights accompanying that decision advised appellant that he could request reconsideration "at any time" or file an appeal with the Board within 90 days. On September 2, 1985 he requested reconsideration and, in a September 27, 1985 decision, the Office denied his request. The same appeal rights accompanied the latter decision. Thus, both decisions that were issued prior to the June 1, 1987, the effective date of regulations that changed the time period in which a claimant could seek reconsideration. No time limit applied to requests for reconsideration of decisions issued before June 1, 1987.<sup>15</sup> A request for reconsideration may not be denied as untimely unless the claimant was notified of the one-year filing requirement in a later decision denying an application for reconsideration or denying modification of the contested decision. The case record does not establish that appellant was ever notified of the regulatory change. The Office has specified the type of notice to be provided where a decision issued before June 1, 1987 is followed by a nonmerit decision issued after that date and, in those cases, the one-year time limit begins on the date of the decision that includes notice of the time limitations.<sup>16</sup> The Board therefore finds that the one-year time limitation for requesting reconsideration of a claim does not apply in this case. Appellant's September 13, 2005 request cannot be found untimely pursuant to section 10.607 of the Office's regulations.<sup>17</sup> The case will be remanded for the Office to further review appellant's September 13, 2005 reconsideration request in accordance with its regulations and procedures.

### **CONCLUSION**

The Board finds that the Office erred in finding appellant's September 13, 2005 reconsideration request untimely.

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<sup>15</sup> See 20 C.F.R. § 10.136 (1986).

<sup>16</sup> FECA Bulletin No. 87-40, *supra* note 12; FECA Procedure Manual, *supra* notes 13 and 14. See John W. O'Connor, 42 ECAB 797 (1991).

<sup>17</sup> See Charles E. Puff, 48 ECAB 429 (1997); Mary Joan Coppolino, 42 ECAB 489 (1991).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 28, 2005 be set aside. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: January 30, 2007  
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