

placed him on the periodic rolls. By decision dated September 10, 1981, the Office terminated appellant's compensation. By decisions dated November 6, 1981, November 19, 1982, May 14 and August 14, 1985, the Office denied modification of the September 10, 1981 decision.

By letter dated August 16, 2007, appellant's representative, Hank Royal, requested reconsideration. He contended that the Office committed an error of law in its September 10, 1981 termination decision by finding a conflict between two of appellant's treating physicians and then improperly referring the case to a referee medical examiner.

By decision dated October 5, 2007, the Office denied appellant's request for reconsideration without a merit review, finding that appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error, and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle a claimant to a review of an Office decision as a matter of right.² This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.³ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority.

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),⁴ 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."⁵ The Office, in 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

¹ 5 U.S.C. § 8128(a).

² *Thankamma Mathews*, 44 ECAB 765 (1993).

³ *Id.* at 768.

⁴ 20 C.F.R. § 10.138(b)(1) (1998).

⁵ 20 C.F.R. § 10.138(b)(2) (1998).

the claimant to submit sufficient evidence for a merit review before implementing the new one-year time limitation.”⁶

* * *

“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 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.”⁷

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.⁸ 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.⁹

⁶ Effective January 4, 1999, the 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).

⁷ FECA Bulletin No. 87-40 (issued June 26, 1987).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(2) (January 2002).

⁹ *Id.* at Chapter 2.1602.6(b) (January 2004). This 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, provides that [the Office] 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.”

ANALYSIS

The Office improperly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on August 14, 1985. Appellant requested reconsideration on August 16, 2007.

By decision dated August 14, 1985, the Office, in a merit decision, affirmed the termination of appellant's compensation benefits. 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. No time limit applied to requests for reconsideration of decisions issued before June 1, 1987.¹⁰ 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. The Board therefore finds that the one-year time limitation for requesting reconsideration of a claim does not apply in this case. Appellant's request cannot be found untimely pursuant to section 10.607 of the Office's regulations.¹¹ The case will be remanded for the Office to further review appellant's August 16, 2007 reconsideration request in accordance with its regulations and procedures.

CONCLUSION

The Board finds that the Office erred in finding appellant's August 16, 2007 reconsideration request untimely.

¹⁰ See 20 C.F.R. § 10.136 (1986).

¹¹ See *Charles E. Puff*, 48 ECAB 429 (1997).

ORDER

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

Issued: May 14, 2008
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