

**United States Department of Labor
Employees' Compensation Appeals Board**

M.D., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Honolulu, HI, Employer**

)
)
)
)
)
)
)
)
)
)

**Docket No. 12-1973
Issued: February 12, 2013**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

ORDER REMANDING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

On September 27, 2012 appellant, through her attorney, filed a timely appeal from a September 5, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).

This case has been before the Board on a prior appeal. In a decision dated August 6, 2012 the Board found, in part, that OWCP had erroneously applied the clear evidence of error standard of review to appellant's June 27, 2011 timely request for reconsideration and remanded that aspect of the case for an appropriate decision.¹

On September 5, 2012 OWCP again denied appellant's June 27, 2011 decision as untimely and insufficient to establish clear evidence of error of its May 6, 2010 decision. It noted the Board had "inadvertently referenced a separate reconsideration request that was decided [by OWCP] on June 21, 2011."

The requests for reconsideration in this case are premised on appellant's wage loss claim for disability from February 10 to March 6, 2010. Appellant's claim was first denied in OWCP's

¹ Docket No. 12-338 (issued August 6, 2012).

decision of May 6, 2010. Thereafter, on December 13, 2010, the Branch of Hearings and Review remanded the case to OWCP for acceptance of additional conditions. The district OWCP was directed to review the medical evidence in light of the newly accepted conditions and issue a merit decision on appellant's claim of disability from February 10 to March 6, 2010.

After further review, OWCP issued a May 12, 2011 decision again denying appellant's claim.

On July 5, 2011 appellant submitted a form requesting further reconsideration, but he did not utilize the appeal rights form attached to the May 12, 2011 decision. Rather, the record reflects he utilized a copy of the appeal rights form attached to the May 6, 2010 decision, as that is the preprinted date on the form. Appellant signed his request form on June 27, 2011.

In the August 6, 2012 decision, the Board found that appellant's June 27, 2011 request was for reconsideration of the May 12, 2011 merit decision, despite his use of the form attached to the prior May 6, 2010 decision. As his request was timely, the case was remanded to OWCP for application of proper legal standard.

By decision dated September 5, 2012, OWCP again denied appellant's June 27, 2011 request as untimely and insufficient to establish clear evidence of error. It is apparent that OWCP considered appellant's request in relation to the May 6, 2010 decision rather than the May 12, 2011 merit decision. OWCP's procedure manual states that when reviewing requests for reconsideration, it "should review the file to determine whether the application for reconsideration was received within one year of a merit decision."² As the May 12, 2011 merit decision adjudicated the same issue as that of the May 6, 2010 decision, the May 6, 2010 decision was not the last merit decision on that issue. As a one year period of review is attached to the last merit decision of May 12, 2011,³ appellant's June 27, 2011 request is not untimely, as the Board previously found.

The case is again remanded to OWCP to issue a decision under the proper standard of review for timely requests for reconsideration.

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(4)(b) (June 1997).

³ *Id.* at Chapter 2.1602(4)(a) (June 1997).

IT IS HEREBY ORDERED THAT the September 5, 2012 Office of Workers' Compensation Programs' decision is set aside. The case is remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: February 12, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board