

CASIE JACKSON)
)
 Claimant)
)
 v.)
)
 GREAT LAKES DREDGE & DOCK)
 COMPANY)
)
 and)
)
 SIGNAL MUTUAL INDEMNITY) DATE ISSUED: 11/24/2010
 ASSOCIATION, LIMITED)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) ORDER on MOTION
) FOR RECONSIDERATION

Employer has filed a motion for reconsideration of the Board's Decision and Order outside the 30-day time frame specified for such a filing. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a).¹ Nonetheless, as the 30-day time limit for filing a motion for reconsideration is not jurisdictional, *see Dailey v. Director, OWCP*, 936 F.2d 241, 242, 15 BLR-2-129, 2-130 (6th Cir. 1991); *Director, OWCP v. Hileman*, 897 F.2d 1277, 13 BLR 2-382 (4th Cir. 1990), the Board has the discretion to address such a motion for reconsideration *Id.*; 20 C.F.R. §§802.217(a), (e), 802.221(c). Thus, we will entertain employer's motion, but we nonetheless deny employer's request that the Board reissue its prior Decision and Order.

¹ Employer's motion for reconsideration of the Board's Decision and Order dated July 22, 2010, was filed on September 24, 2010.

The facts surrounding employer's motion are not in dispute. The Certificate of Service accompanying the Board's decision indicates that it was sent to employer's attorney, via certified mail, on July 22, 2010. However, employer's attorney did not receive a copy of the decision as evidenced by the fact that the envelope was returned to the Board due to the lack of postage.² Employer therefore contends that since it did not become aware of the Board's decision until September 21, 2010, the Board should reissue its decision such that it may pursue an appeal to the United States Court of Appeals for the Eleventh Circuit.

At issue in this case is the interpretation of 20 C.F.R. §802.403(b). Section 802.403(b), in relevant part, states: "The original of the decision shall be filed with the Clerk of the Board. A copy of the Board's decision shall be sent by certified mail or otherwise presented to all parties to the appeal and the Director." 20 C.F.R. §802.403(b) (emphasis added). In *Pifer v. Florence Mining Co.*, 8 BLR 1-498 (1986), the Board dismissed a claimant's motion for reconsideration as it was not filed within the time frame required by Section 802.407(a).³ The Board noted that since its Decision and Order was filed with the Clerk of the Board on June 28, 1985, and claimant's Motion for Reconsideration was not filed until fifteen days later, the motion was filed outside the time allowed by 20 C.F.R. §802.407(a). Similarly, in *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-11 (2003), the Board, citing Sections 802.403(b) and 802.407(a), held that its decision became final "on the date it was filed with the Clerk of the Board." The Board added that "[a] Board decision is filed on the date it is issued." *Id.* While neither of these cases involved issues, as in this case, relating to improper mailing of the Board's decision, they nonetheless stand for the proposition that the "filing" date, as used in Sections 802.407(a) and 802.403(b), refers to the date a Decision and Order is filed with the Clerk of the Board.

² This occurrence was verified by the Clerk of the Board.

³ Section 802.407(a) (1986) then required requests for Board reconsideration to be filed within 10 days. Shortly afterward, Section 802.407(a) was changed to allow parties 30 days to file a motion for reconsideration with the Board. *See* 52 Fed.Reg. 27290 (July 20, 1987).

Improper service/mailing of a decision of the Board has been addressed in terms of Section 21(c) of the Act, 33 U.S.C. §921(c),⁴ with regard to an appeal of a decision of the Board to the relevant United States Court of Appeals. In *Stevedoring Services of America v. Director, OWCP*, 29 F.3d 513, 28 BRBS 65(CRT) (9th Cir. 1994), the United States Court of Appeals for the Ninth Circuit held that “issuance” in Section 21(c) of the Act means the filing of the Board’s decision with the Clerk of the Board and nothing more. Therefore, notwithstanding the lack of service of the Board’s decision on employer, the court held that the 60-day time frame for filing an appeal ran from the date that decision was filed with the Clerk of the Board. See 33 U.S.C. §921(c); 20 C.F.R. §802.410(a).

Similarly, the United States Court of Appeals for the Fourth Circuit held, in *Mining Energy, Inc. v. Director, OWCP*, 391 F.3d 571, 23 BLR 2-202 (4th Cir. 2004), that a decision of the Board is “issued” within the meaning of Section 21(c) of the Act and 20 C.F.R. §802.410(a) when it is filed with the Clerk of the Board. In its decision, the court stated that:

Section 802.403(b) does oblige the Clerk of the Board to serve Board decisions by certified mail. However, the mere fact that the DOL directs the Board’s Clerk to serve Board decisions does not mean that the DOL has interpreted the term “issuance” in Section 921(c) to mean that an opinion has not been issued until it has been both filed *and* served.

⁴ Section 21(c) (emphasis added) provides that:

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside.

20 C.F.R. §802.410(a) (emphasis added) states:

Within 60 days after a decision by the Board has been filed pursuant to 802.403(b), any party adversely affected or aggrieved by such decision may file a petition for review with the appropriate U.S. Court of Appeals pursuant to section 21(c) of the LHWCA.

To the contrary, §802.410(a) provides otherwise: it specifies that an aggrieved party may file a petition for review with the court of appeals within “60 days after” the decision by the Board has been “*filed* pursuant to 20 C.F.R. §802.403(b).” §802.410(a) (emphasis added). Because §802.403(b) addresses how the Clerk of the Board is to handle both “filing” and “service,” §802.410(a)’s selection of one of those terms (filing), and not the other (service), makes it plain that the sixty-day filing period begins to run with the *filing* of a Board opinion with the Clerk of the Board.

Mining Energy, Inc., 391 F.3d at 575, 23 BLR at 2-208, 2-209. *See also Butcher v. Big Mountain Coal, Inc.*, 802 F.2d 1506, 1507-08, 9 BLR 2-121, 2-122-24 (4th Cir. 1986) (ministerial failures by the clerk of the Board in connection with service of the Board’s decision do not relieve a petitioner of his obligation to file within the statutory period); *Clay v. Director, OWCP*, 748 F.2d 501, 502-03 (8th Cir. 1984) (petition for review of Board decision filed 63 days after Board’s order was not timely, even though petitioner did not personally receive a copy of that order from the Board; attorney received copy); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 43-44, 4 BRBS 156, 167 (2^d Cir. 1976) (holding that petition for review of Benefits Review Board ruling must be dismissed as untimely, even if clerk made error in mailing notice to incorrect party); *but see Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 1392 n. 10, 18 BLR 2-215, 2-219 n. 10 (7th Cir. 1994) (finding petition for review timely when received by court within sixty days of actual notice); *White Ash Min. Co. v. Burchett*, 916 F.2d 714 (6th Cir. 1990) (table) (where the Board, through its own neglect, fails to notify a party of an adverse decision, it would appear that elemental considerations of fairness and due process dictate that the party cannot be thus deprived of its right to appeal). This precedent establishes that lack of notice to a party of the Board’s decision does not affect the determination of whether the decision has been “filed” or “issued.” In this case, therefore, the Board’s decision was filed, pursuant to Section 802.403(b), on July 22, 2010, irrespective of the fact that employer did not receive a copy of the Board’s decision. We, therefore, decline to reissue the Board’s decision. *See generally Hileman*, 897 F.2d 1277, 13 BLR 2-382 (court accepted an appeal where Board addressed on the merits an untimely motion for reconsideration).

Accordingly, employer's motion for reconsideration is accepted out of time, but the relief requested is denied. 20 C.F.R. §802.409.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge