

his route. He sought medical treatment on April 15, 2002. Appellant returned to work on April 17, 2002.¹

By decision dated June 21, 2002, the Office denied appellant's claim for a traumatic injury on April 12, 2002, finding that the evidence of record failed to establish that he sustained an injury on April 12, 2002 causally related to factors of his employment.

By letter dated June 8, 2003, appellant, through his attorney, stated that he had requested reconsideration of the Office's June 21, 2002 decision in a November 18, 2002 letter with supporting documentation. He submitted a receipt for certified mail for the November 18, 2002 letter sent to the appropriate district Office on November 18, 2002, with receipt by the Office on November 21, 2002.

By decision dated March 11, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence he submitted was insufficient to warrant further merit review. The Office indicated that the only evidence submitted by appellant was the June 8, 2003 request for reconsideration. The Office stated that the case record for file number 022024084 did not contain a November 18, 2002 request for reconsideration but noted that it was unable to determine whether the November 18, 2002 reconsideration request had been filed inadvertently in the record for file number 020739123 because that case record was unavailable for its review.²

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation on her own motion or on application. The Secretary, in accordance with the facts on review, may end, decrease, or increase the compensation previously awarded; or award compensation previously refused or discontinued.³

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office.⁴ When an application for review of the merits of a claim does not meet at least one of these

¹ The Board notes that appellant also filed a claim alleging that he sustained a recurrence of disability on April 12, 2002 under OWCP file number 020739123. This recurrence claim, along with appellant's claims for recurrences on June 8, 1998, April 10, 2000 and July 5, 2002, was denied by Office decision dated April 17, 2003.

² The Office indicated that the case record for 020739123 was unavailable because it was with the Board pending adjudication of appellant's appeal of a January 29, 2003 Office decision in 0207391223.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

requirements, the Office will deny the application for review without reviewing the merits of the claim.⁵

ANALYSIS

By letter dated June 8, 2003, appellant requested reconsideration of the Office's June 21, 2002 decision in file number 022024084. As noted above, the Office did not issue a decision on appellant's June 8, 2003 request for reconsideration of its June 21, 2002 merit decision until March 11, 2004. However, it appears that there was also a November 18, 2002 reconsideration request in this case.

Appellant asserts on appeal that on November 18, 2002 he requested reconsideration of the Office's June 21, 2002 decision in file number 022024084. The Office indicated in its March 11, 2004 decision that the record for 022024084 did not contain a copy of the November 18, 2002 reconsideration request. However, the record for OWCP file number 020739123⁶ contains a November 18, 2002 letter from appellant requesting reconsideration of the Office's June 21, 2002 decision. With the application for Board review of the case in OWCP file number 022024084, appellant submitted a receipt for certified mail sent to the appropriate district Office on November 18, 2002, with receipt by the Office on November 21, 2002. This November 18, 2002 reconsideration request specifically refers to OWCP file number 022024084.⁷ In this letter, appellant requests that the Office review his brief dated October 29, 2002 which was submitted with the November 18, 2002 reconsideration request.⁸ The Board finds that the evidence is sufficient to establish that a reconsideration request dated November 18, 2002 was mailed to the Office on November 18, 2002 and received by the Office on November 21, 2002. This November 18, 2002 letter requested reconsideration of the June 21, 2002 decision in file number 022024084. However, as noted above, the Office did not issue a decision regarding the June 21, 2002 decision until March 11, 2004, almost 16 months following the November 18, 2002 reconsideration request and 9 months following the June 8, 2003 reconsideration request. When a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to have a review of the merits of the case by the Board, the Office should conduct a merit review. That is, the basis of the original decision and any new evidence should be considered and, if there is no basis to change the original decision, a decision denying modification (rather than denying the application for review) should be prepared.⁹ In the case on appeal, the Office's delay precluded appellant from either filing a second timely

⁵ 20 C.F.R. § 10.608(b).

⁶ OWCP file number 020739123 is the subject of appellant's appeal to the Board docketed as 04-858.

⁷ It appears that the Office crossed out file number 022024084 in the heading of the November 18, 2002 letter and handwrote file number 020379123. However, file number 022024084 is referenced several times in the body of the November 18, 2002 letter.

⁸ The brief dated October 29, 2002 references file number 020739123 and was also submitted with appellant's request for reconsideration of an Office decision in file number 020739123.

⁹ *Cheryl L. Fitch*, 50 ECAB 291 (1999); *Geoma R. Munn*, 50 ECAB 242 (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (June 1997).

request for reconsideration or securing a merit review by the Board. Accordingly, the Board finds that the Office should conduct a merit review of appellant's claim for an injury on April 12, 2002.

CONCLUSION

The Board finds that the Office's actions in delaying a decision on appellant's November 18, 2002 and June 8, 2003 requests for reconsideration effectively prevented appellant from appealing the June 21, 2002 decision such that the Board would have had jurisdiction over that merit decision. Therefore, the case must be remanded for the Office to issue an appropriate merit decision in this case. On remand, the Office should place any documents contained in the record for file number 020379123, which pertain to appellant's claim for a new injury on April 12, 2002 in file number 022024084, into the case record for 022024084.

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: December 1, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member