

condition was caused by a particular type of hot melt glue manufactured by the H.B. Fuller Company. The Office noted that documents from the Occupational Safety and Health Administration (OSHA) stated that the glue appellant alleged to have contributed to his condition contained no hazardous ingredients. On February 26, 2003 appellant submitted a statement alleging that he developed “another sinus infection” for the past several years which he attributed to the hot melt glue. He asked that his case be reopened.² On August 29, 2007 appellant requested reconsideration of the April 26, 1984 decision.

Appellant submitted information from the H.B. Fuller Company dated February 14, 1984 to June 23, 2003, regarding the chemical composition of its hot melt glue products.

In a May 10, 1983 report, Dr. Michael D. Widlitz diagnosed right maxillary sinusitis which began in 1980. He stated that the condition “may have been brought on” by appellant’s long-term exposure to glue used in the workplace. A July 8, 1983 report from Dr. William I. Owens contains a diagnosis of nasal septum deformity and chronic rhinitis. On January 14, 1980 appellant had undergone surgery but continued to have pain and postnasal drainage.³

By decision dated September 14, 2007, the Office denied appellant’s request for reconsideration on the grounds that it was not timely filed within one year of the last merit decision on April 26, 1984 and the evidence failed to show clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees’ Compensation Act⁴ (FECA) does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ 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),⁷ 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.”⁸ The Office, in FECA Bulletin No. 87-40 and its procedures, has

² The Office could not locate appellant’s original case record. Some documents were obtained from appellant and the employing establishment.

³ There is no indication in the record on appeal as to whether these medical reports were part of the original case record.

⁴ 5 U.S.C. § 8128(a).

⁵ *Thankamma Mathews*, 44 ECAB 765 (1993).

⁶ *Id.* at 768.

⁷ 20 C.F.R. § 10.138 (b)(1) (1998).

⁸ 20 C.F.R. § 10.138(b)(2) (1998).

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.”⁹

* * *

“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.”¹⁰

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.¹¹ 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-

⁹ 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).

¹⁰ FECA Bulletin No. 87-40 (issued June 26, 1987).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(2) (January 2002).

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.¹²

ANALYSIS

The only decision before the Board is the September 4, 2007 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.

By decision dated April 26, 1984, the Office denied appellant's claim on the grounds that there was no rationalized medical evidence establishing that his claimed sinus condition was causally related to factors of his federal employment. 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, 1987.¹³ 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.¹⁴ The case will be remanded for the Office to further review appellant's August 29, 2007 reconsideration request in accordance with its regulations and procedures.

¹² *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."

¹³ *See* 20 C.F.R. § 10.136 (1986).

¹⁴ *See Charles E. Puff*, 48 ECAB 429 (1997); *Mary Joan Coppolino*, 42 ECAB 489 (1991).

CONCLUSION

The Board finds that the Office erred in finding appellant's August 28, 2007 reconsideration request untimely.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 14, 2007 is set aside. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: May 5, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board