

FACTUAL HISTORY

This case has previously been before the Board. Appellant, then a 26-year old clerk, filed a claim for benefits on June 5, 1979, alleging that he sustained a contusion when he slipped and hit his head on a mail tray. The claim was accepted for a scalp contusion. By decision dated January 31, 1980, OWCP found that appellant did not have disability causally related to the June 5, 1979 injury. By decision dated August 7, 1980, an OWCP hearing representative affirmed the January 31, 1980 decision. By nonmerit decision dated June 9, 1981, OWCP denied reconsideration of the January 31, 1980 decision. In an October 13, 1981 decision,¹ the Board affirmed the January 31, 1980 and June 9, 1981 OWCP decisions. The facts of this case as set forth in the Board's October 13, 1981 decision are incorporated herein by reference.

By letter dated October 20, 2010, appellant requested a hearing. He contended that reports he submitted from Dr. Thomas M. Stanley, Board-certified in internal medicine and neurology, established that he had an arm condition causally related to his employment.

By decision dated November 29, 2010, OWCP denied appellant's request for an oral hearing. It noted that section 8124 of FECA² provided for hearings and reviews of the written record only after a final decision has been issued by the district OWCP; in the instant case, a final decision was rendered by OWCP on January 31, 1980 and by the Board on August 7, 1981. Therefore, appellant was not entitled to a hearing.

By letter dated December 20, 2010, appellant requested reconsideration. He argued that OWCP erred in its January 31, 1980 decision and denied him due process by failing to schedule a medical evaluation after receiving reports from Dr. Stanley which established a *prima facie* case for causation. Appellant also stated that OWCP erred by failing to award compensation for a Form CA-2a he filed on November 11, 1980.

By letters dated January 14 and 24, 2010, appellant requested an oral hearing.

In a February 27, 1996 report, received by OWCP on January 27, 2011, Dr. Stanley stated that he had treated appellant since 1979 for complaints of pain in the dorsal hands, over the dorsal surface of the extensor arm and also to the supraclavicular area. He stated that appellant had a history of repetitive movements as a postal worker and had complained of pain while working at his clerk position. Dr. Stanley opined that appellant's arm pain and cramping might be secondary to tendinitis brought about by repetitive injury. He noted that appellant had requested being placed on light duty in May 1979, after which time he returned to keyboard duties. Dr. Stanley diagnosed right forearm and hand pain, tendinitis, probably related to repetitive work.

By decision dated March 1, 2011, OWCP denied appellant's request for an oral hearing. It noted that section 8124 of FECA³ provided for hearings and reviews of the written record only

¹ Docket No. 81-1654 (issued October 13, 1981).

² 5 U.S.C. § 8124.

³ *Id.*

after a final decision has been issued by the district OWCP; in the instant case, a final decision was rendered by OWCP on January 31, 1980 and by the Board on October 13, 1981.

By decision dated March 23, 2011, OWCP denied appellant's request for reconsideration without a merit review, finding the request was untimely and that appellant had not established clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of FECA provides that a claimant is entitled to a hearing before an OWCP representative when a request is made within 30 days after issuance of and OWCP's final decision.⁴ A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.⁵ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.⁶ In such a case, it will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not abuse its discretion in denying appellant's request for hearing as the last merit decision issued in this case was the Board's decision dated August 7, 1981 and no right to hearing before the Branch of Hearings and Review accompanies a decision of the Board.⁸ Also as appellant's January 14, 2011 request for a hearing was postmarked more than 30 days after OWCP's January 31, 1980 decision denying compensation, he is not entitled to a hearing as a matter of right. OWCP properly exercised its discretion and advised that appellant could address the issue in this case by submitting to OWCP new and relevant evidence with a request for reconsideration. The Board finds that OWCP properly exercised its discretion in denying appellant's request for a hearing. The Board therefore affirms the March 1, 2011 decision denying appellant an oral hearing by an OWCP hearing representative.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA⁹ does not entitle an employee to a review of an OWCP decision as a matter of right.¹⁰ This section, vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.

⁴ *Id.* at § 8124(b)(1).

⁵ 20 C.F.R. § 10.131(a)(b).

⁶ *William E. Seare*, 47 ECAB 663 (1996).

⁷ *Id.*

⁸ 20 C.F.R. § 10.616 (a).

⁹ 5 U.S.C. § 8128(a).

¹⁰ *Thankamma Mathews*, 44 ECAB 765 (1993).

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),¹¹ OWCP would not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision.¹² OWCP, 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 the claimant to submit sufficient evidence for a merit review before implementing the new one-year time limitation.¹³

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.”¹⁴

OWCP 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.¹⁵ The procedures further provide that, if the original denial was issued before June 1,

¹¹ 20 C.F.R. § 10.138(b)(1) (1998).

¹² *Id.* at § 10.138(b)(2) (1998).

¹³ Effective January 4, 1999, OWCP regulations were revised. Section 10.606(b)(2) of the 1999 regulations contain essentially the same requirements for a reconsideration application as those found in former section 10.138(b)(1).

¹⁴ FECA Bulletin No. 87-40 (issued June 26, 1987).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)(2) (January 2002).

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.¹⁶

ANALYSIS

OWCP improperly determined in this case that appellant failed to file a timely application for review. The last merit decision in this case was October 13, 1981, the date the Board affirmed a January 31, 1980 OWCP merit decision. Appellant requested reconsideration on December 20, 2010.

By decision dated January 31, 1980, OWCP, in a merit decision, found that appellant did not have disability causally related to the June 5, 1979 injury, accepted for a scalp contusion. The appeal rights accompanying that decision advised him 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, 1987.¹⁷ 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. OWCP 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 OWCP's regulations.¹⁸ The case will be remanded for OWCP to further review appellant's December 20, 2010 reconsideration request in accordance with its regulations and procedures.

¹⁶ *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 OWCP, provides that OWCP 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.”

¹⁷ See 20 C.F.R. § 10.136 (1986).

¹⁸ See *Charles E. Puff*, 48 ECAB 429 (1997).

CONCLUSION

The Board finds that OWCP erred in finding appellant's December 20, 2010 reconsideration request untimely.

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2011 decision of the Office of Workers' Compensation Programs is affirmed. The March 23, 2011 decision is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: May 22, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board