

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARY A. BELL and DEPARTMENT OF THE AIR FORCE,  
ANDREWS AIR FORCE BASE, MD

*Docket No. 03-2102; Submitted on the Record;  
Issued October 21, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

This case has been before the Board on two prior appeals. The Board last issued a decision on September 10, 2001, which affirmed decisions issued by the Office on September 30, 1999 and April 7, 2000. The Board found that, on September 30, 1999, appellant failed to establish total disability from her light-duty job on or after February 5, 1994 due to accepted work factors. The Board further found that the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.<sup>1</sup>

In a letter dated August 28, 2002, appellant requested reconsideration and submitted treatment notes dated March 15, June 11 and July 22, 2002. The record before the Board contains a copy of the August 28, 2002 letter and supporting evidence, which was imaged by the Office on September 11, 2002. There is also a facsimile transmission dated September 25, 2002, which includes a copy of appellant's August 28, 2002 reconsideration request along with the treatment notes previously discussed.

In a decision dated January 2, 2003, the Office determined that appellant's reconsideration request was untimely filed because it had not been received by the Office within one year of the Board's September 10, 2001 decision or by September 10, 2002. The Office specifically noted that it received appellant's August 28, 2002 reconsideration request by facsimile copy on September 24, 2002, which was past the one-year deadline of September 10, 2002. The Office further considered the medical evidence submitted by appellant

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<sup>1</sup> See Docket No. 00-2578 (issued September 10, 2001) and Docket No. 05-1701 (issued February 18, 1998). The facts of the case as set forth in the prior decision are incorporated by reference.

in support of her reconsideration request and found that it failed to establish clear evidence of error.

By letter dated January 31, 2003, appellant contested the Office's decision and submitted a copy of a postal return receipt dated and signed by a recipient of the Office on September 9, 2002. She alleged that this postal receipt showed that her request for reconsideration had been timely received by the Office on September 9, 2002, within one year of the Board's September 10, 2001 decision. On May 23, 2003 the Office denied appellant's request for review of the January 2, 2003 decision.

The Board finds that this case is not in posture for decision.

Section 10.607 of the Code of Federal Regulations provides that an application for reconsideration must be sent within one year of the date of the Office's decision, for which review is sought.<sup>2</sup> It further provides that the Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, of its face, that such a decision was erroneous.

The Board has carefully considered the record and finds that the postal receipt indicates that appellant sent documentation to the Office on September 9, 2002 and that this documentation was received by the Office within one year of the Board's September 10, 2001 decision. The Board is persuaded that the documentation submitted by appellant on September 9, 2002 included a copy of her August 28, 2002 letter requesting reconsideration since the record before this Board establishes that the Office imaged the August 28, 2002 letter and the new medical evidence on September 11, 2002. The imaging dates do not support the Office's contention that appellant's reconsideration request was not received by the Office until facsimile transmission on September 24, 2002. Thus, because the postal receipt dated September 9, 2002 is consistent with the record and indicates that the Office received appellant's reconsideration request and supporting evidence by September 10, 2002, the Board concludes that appellant's application for reconsideration was timely filed under section 10.607. Insofar as appellant's reconsideration request was timely filed, the Board will remand the case to the Office to consider whether appellant's evidence submitted, in conjunction with that request, was sufficient to warrant a merit review under section 8128.<sup>3</sup>

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<sup>2</sup> 20 C.F.R. § 10.607 (1999).

<sup>3</sup> See 5 U.S.C. § 8128.

The decisions of the Office of Workers' Compensation Programs dated May 23 and January 2, 2003 are hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC  
October 21, 2003

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member