

# Decisions, decisions, decisions, Part 9: Merit vs. non-merit decisions

**T**he OWCP's regulations establish a one-year time limit for requesting timely reconsideration<sup>1</sup> (20 CFR 10.607(a)). The one-year period begins on the date of the original decision. Its end is measured by the date OWCP receives the request. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following a reconsideration, any merit decision by the Employees' Compensation Appeals Board (ECAB), and any merit decision following action by the ECAB.<sup>2</sup>

Because this right to reconsideration renews itself with each new merit decision, it is crucial that claimants understand the difference between merit and non-merit decisions. Failing to grasp the implications of a non-merit decision can have negative consequences for the outcome of a claim.

**Claimants can appeal only formal decisions by OWCP.** They can identify a formal decision because it has appeal rights attached to it and contains a notice that if the claimant disagrees with the decision, he or she may pursue the avenues of appeal outlined in the decision. Formal decisions can either be merit decisions or non-merit decisions. Almost every initial formal disallowance or formal decision from Hearings and Review will be a merit decision. Decisions from a reconsideration review or the ECAB, however, can be either a merit review decision or a non-merit review decision.

A merit decision will usually identify itself as a merit review. In the case of reconsideration, it often will state so in the cover letter:

We have not modified our prior decision. However, we have evaluated the evidence you submitted and have reviewed the merits of your case.

A non-merit review decision from reconsideration is technically a denial of the application for reconsideration. This can happen when the application is untimely and fails to present any clear evidence of error or when the application is timely but is not supported by additional evidence or argument for error in fact or law.<sup>3</sup> In such instances, OWCP will issue a non-merit review decision that states something similar to the following:

We have reviewed your appeal request for reconsideration of our decision dated \_\_\_\_\_. Because your request neither raised substantive legal questions nor included new and relevant information, it is insufficient to warrant review of our prior decision at this time.

**As is the case with all formal decisions, non-merit review decisions from an application for reconsideration will con-**

tain appeal rights. These rights, however, are limited to appeals to ECAB:

If you disagree with this decision, namely, our refusal to review our prior decision, you have the right to appeal to the Employees' Compensation Appeals Board (ECAB) for review of the decision. This is your only right of appeal.

Confusion and problems can arise when claimants receive a non-merit review decision from reconsideration and think that ECAB is the only avenue of appeal in their case. Often it is not. While ECAB may be the only route for appeal for the non-merit review decision, if the claimant has received a merit decision within the last year, he or she may still apply for reconsideration of that decision even after a non-merit review. If this is the case, there are several things that claimants should consider in deciding whether to appeal to ECAB or to apply again for reconsideration.

First, any time a claimant appeals to ECAB, he or she should do so with a clear objective.

Second, ECAB will review all decisions, including merit decisions, that fall within the 180-day period prior to the date of the ECAB appeal, even if the appeal is of a non-merit decision. This is important, because when ECAB reviews a merit decision as part of the non-merit appeal, its decision will be a merit review decision. This renews the one-year limit for requesting timely reconsideration.

Finally, if the non-merit decision is more than 180 days from the last merit review, the ECAB will conduct only a non-merit review of the case. If the claimant appeals to ECAB in such a case and is still within a year of the last merit review at the date of the appeal, by the time he or she receives the non-merit decision from ECAB, it may well be beyond the one-year limit for requesting timely reconsideration, thus exhausting the avenues of appeal.

**Next month's column will continue this discussion of merit and non-merit decisions and look at how to keep a claim alive "on the merits."**

1. 20 CFR 10.607(a)

2. This right to reconsideration does not include pre-recoupment hearing decisions.

3. FECA Procedure Manual 2 1602.7; 20 CFR 10.608(b). This column in March and April discussed "error in fact and law" and "new evidence" in applications for reconsideration.