

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GINA C. CARDENAS (widow of ALEJANDRO P. CARDENAS) and U.S.
POSTAL SERVICE, SECONDARY POST OFFICE, Memphis, TN

*Docket No. 03-31; Submitted on the Record;
Issued February 27, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128 on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

This case has been before the Board previously. By decision dated September 17, 2001, the Board found that the employee's death on March 24, 1998 was not causally related to his federal employment.¹ On September 25, 2001 appellant filed a petition for reconsideration with the Board. In an order dated February 21, 2002, the Board denied her petition for reconsideration. The law and the facts as set forth in the previous Board decision and orders are incorporated herein by reference.

On January 6, 2002 appellant submitted a request for reconsideration to the Office, along with a history and physical report completed by Dr. Margaret R. Todd on December 19, 1997. By decision dated February 26, 2002, the Office denied appellant's reconsideration request, finding that it had not been filed within one year of its decisions dated August 1 and May 26, 2000 and did not show clear evidence of error. The instant appeal follows.

The Board finds that the Office improperly determined that appellant's request for reconsideration was not timely filed.

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.² The Office, through regulations, has imposed limitations on the exercise of its

¹ Docket No. 01-200.

² 5 U.S.C. § 8128(a).

discretionary authority under section 8128(a).³ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁴ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).⁵

In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁶ In the instant case, the Board issued its merit review of the case on September 17, 2001. On January 6, 2002 appellant requested reconsideration and submitted additional evidence. As this date was within one year of the date of the Board's September 17, 2001 decision, the Office's denial of appellant's reconsideration request as untimely filed was in error.⁷ The case must, therefore, be remanded to the Office to determine whether appellant is entitled to review of the merits of her claim under 20 C.F.R. § 10.606(b).

³ The Office will deny a timely application for reconsideration without reopening a case for review on the merits if it fails to meet certain standards. The regulations state that the application for review and supporting documentation must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b) (1999).

⁴ 20 C.F.R. § 10.607(a) (1999).

⁵ *See Marilyn F. Wilson*, 51 ECAB 234 (1999); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ *See Howard Y. Miyashiro*, 51 ECAB 253 (1999); *Larry A. Lilton*, 44 ECAB 243 (1992).

⁷ *Id.*

The decision of the Office of Workers' Compensation Programs dated February 26, 2002 is set aside and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, DC
February 27, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member