

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGE L. DARBY and SMALL BUSINESS ADMINISTRATION,
Dallas, TX

*Docket No. 02-316; Submitted on the Record;
Issued June 4, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's February 20, 2001 request for reconsideration.

In a decision dated November 17, 2000, the Office found that the weight of the medical evidence, as represented by the opinion of Dr. William Gregory Hodges, a Board-certified gastroenterologist and impartial medical examiner, established that the work-related aggravation of appellant's gastritis had ceased.

On February 20, 2001 appellant requested reconsideration. He stated that he was basing his request on new evidence, points of law and an abuse of discretion by the Office who issued the November 17, 2000 decision. He broke down the basic problems with the Office's decision into three parts. The first part dealt with the most recent impartial medical examiner, the physician and his report, and the Office's decision and comments. The second part dealt with reasons the Office should base any decision on the opinion obtained from a previous impartial medical examiner. The third part dealt with reasons the Office should reinstate his compensation immediately.

To support his request appellant submitted a packet of material organized into the three parts he described in his February 20, 2001 cover letter. He argued that the impartial medical examiner's opinion did not constitute the weight of the medical evidence and was inadequate to discharge the Office's burden of proof. Appellant argued that the impartial medical examiner's opinion was speculative, equivocal, incomplete and not based on a proper factual or medical background. He argued that the opinion of the previous impartial medical examiner, rejected for its "speculative tone and direction," should be accepted as the weight of the medical evidence. The Office's rejection of it, he stated, was biased and pernicious. Appellant explained that the Office should reinstate his benefits without further delay, as it had not met its burden of proof. He later amended his request for reconsideration by asserting that the Office had asked improper questions of the previous impartial medical examiner.

Appellant submitted copies of documents from the record to support his arguments. He also submitted new evidence, including a report from Ann McIlvain, a doctor of pharmacy, and published articles about ulcers and dyspepsia.

In a decision dated September 10, 2001, the Office denied appellant's request for reconsideration. The Office found that appellant failed to show that the Office had erroneously applied or interpreted a point of law, that he advanced no new legal contentions and that he submitted no new and relevant evidence. The Office denied appellant's request as insufficient to warrant a merit review of his case.

An appeal to the Board must be mailed no later than one year from the date of the Office's final decision.¹ Because appellant mailed his December 7, 2001 appeal more than one year after the Office's November 17, 2000 decision terminating compensation for the accepted aggravation of gastritis, the Board has no jurisdiction to review that decision. The only decision the Board may review is the Office's September 10, 2001 decision denying appellant's February 20, 2001 request for reconsideration. The only issue before the Board is whether the Office properly denied that request.

The Board finds that the Office improperly denied appellant's February 20, 2001 request for reconsideration.

The Office's procedure manual provides that when a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to have review of the merits of the case by the Board, the Office should conduct a merit review. That is, the basis of the original decision and any new evidence should be considered and, if there is no basis to change the original decision, an order denying modification (rather than denying the application for review) should be prepared. There is no obligation to conduct a merit review on insufficient evidence if the maximum one-year time limit for requesting review by the Board will have expired within the 90-day period following the Office's receipt of the claimant's reconsideration request.²

Appellant filed a timely request for reconsideration on February 20, 2001, about three months after the Office's November 17, 2000 decision terminating his compensation for the accepted aggravation of gastritis. When the Office denied appellant's request on September 10, 2001, about seven months later, it left him only two months or so to appeal the November 17, 2000 decision to the Board. The Board finds that the Office's delay in issuing a decision on appellant's request for reconsideration thereby jeopardized his right to have the Board review the termination of his compensation.

Pursuant to both the Office's procedure manual and case precedent, the Board finds that the Office abused its discretion in denying appellant's February 20, 2001 request for

¹ 20 C.F.R. § 501.3(d) (time for filing); *see id.* at § 501.10(d)(2) (computation of time).

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7 (November 1993); *see Debra E. Stoler*, 43 ECAB 561 (1992); *Carlos Tola*, 42 ECAB 337 (1991) (remanding cases for merit review pursuant to the procedure manual).

reconsideration. On remand, the Office shall issue an appropriate final decision on the termination of his compensation for the accepted aggravation of gastritis.

The September 10, 2001 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
June 4, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member