

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of PETE P. CARREON and DEPARTMENT OF THE AIR FORCE,
BROOKS AIR FORCE BASE, San Antonio, TX

*Docket No. 03-2047; Submitted on the Record;
Issued November 14, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that it was untimely filed and failed to show clear evidence of error.

This case is on appeal to the Board for the third time. The findings of fact and conclusions of law in the Board's previous decisions are hereby incorporated by reference.¹

To briefly summarize the facts, by decision dated July 11, 2002, the Board affirmed the decision of the Office dated October 23, 2001, wherein the hearing representative found that the Office properly terminated appellant's compensation benefits effective October 6, 2000. The Board noted that the weight of the medical evidence rested with the opinion of Dr. John S. Toohey, a Board-certified orthopedic surgeon and the independent medical examiner, who opined that the work-related injury had temporarily aggravated appellants underlying degenerative condition, but that the aggravation had resolved. The Board denied reconsideration of its decision on November 18, 2002.

By letter from appellant's congressman dated June 18, 2003 and received by the Office on June 26, 2003, appellant requested reconsideration. In support thereof, appellant submitted medical opinions by physicians who had their previous reports considered in prior decisions in this case. These opinions included: a February 3, 2003 medical report by Dr. Dennis R. Gutzman, a Board-certified orthopedic surgeon; a March 12, 2003 opinion by Dr. Daniel C. Valdez, a Board-certified orthopedic surgeon; and a May 14, 2003 opinion by Dr. Fernando T. Avila, a Board-certified anesthesiologist. By decision dated July 17, 2003, the Office denied appellant's request for reconsideration on the basis that it was untimely filed and appellant failed to establish clear evidence of error. In the decision, the Office noted that the last merit decision

¹ Docket No. 01-211 (issued July 11, 2002), *petition for recon. denied* (November 18, 2002).

in the case was dated October 23, 2001 and that appellant's reconsideration request, dated June 18, 2003, was received over one-year after this decision.

The Board finds that appellant's June 18, 2003 request for reconsideration was timely filed.

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one-year prior to the filing of the appeal.² As appellant filed the appeal with the Board on August 18, 2003, the only decision before the Board is the July 17, 2003 decision denying appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against compensation at any time or on his own motion or on application. The Secretary, in accordance with the facts found on review may--

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

The Office through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). One such limitation, 20 C.F.R. § 10.607(a), provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).³ The one-year time limitation begins to run on the date following the date of the original Office decision.⁴ However, a right to reconsideration within one-year accompanies any subsequent merit decision on the issues.

In the instant case, the letter from appellant's congressman requesting reconsideration was dated June 18, 2003. The Office found that this was not within one-year of the October 23, 2001 decision and, therefore, concluded that it was not timely filed. However, the last merit decision was the Board's July 11, 2002 decision. As appellant's June 18, 2003 request for reconsideration was filed within one-year of this decision, the request for reconsideration was timely filed and the Office erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard. Therefore, the Board will remand the case to the Office for review of the request under the proper standard of review.

² *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(a) (May 1991).

The July 17, 2003 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
November 14, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member