U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRY C. KENNARD and DEPARTMENT OF THE AIR FORCE, EIELSON AIR FORCE BASE, Alas.

Docket No. 96-1875; Submitted on the Record;
Issued September 3, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs, by its September 20, 1995 decision, properly refused to reopen appellant's case for further review of the merits of his claim; and (2) whether the Office, by its February 26, 1996 decision, properly determined that appellant's request for reconsideration was untimely filed and did not establish clear evidence of error.

The only Office decisions before the Board on this appeal are the Office's February 26, 1996 decision denying appellant's request for reconsideration on the basis that it was not filed within the one-year time limit set forth by 20 C.F.R. § 10.138(b)(2) and that it did not present clear evidence of error, and the Office's September 20, 1995 decision finding that the additional evidence and arguments presented by appellant were not sufficient to warrant a review of the merits of his claim. Since more than one year elapsed between the date of the Office's most recent merit decision on September 16, 1994 and the filing of appellant's appeal on May 28, 1996, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

The Board finds that the Office, by its September 20, 1995 decision, properly refused to reopen appellant's case for further review of the merits of his claim.

Under 20 C.F.R. §10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary

[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

value and does not constitute a basis for reopening a case.[2] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[3]

By its September 16, 1994 decision, the Office found that the weight of the medical evidence supported that the employment-related temporary aggravation of appellant's asthma had resolved, and that the medical evidence did not support that appellant was disabled by an employment-related condition from March 6 to April 16, 1994. In his August 10, 1995 request for reconsideration, appellant challenged the reliability of the methacholine challenge test performed for Dr. Teresa Jacobs, a Board-certified pulmonary specialist to whom the Office referred appellant for a second opinion. Specifically, appellant contended that the technician who performed the test was unsure of what she was doing, and called another local clinic to receive directions, and may have interchanged vials of methacholine and dilution. Appellant also contended that Dr. Jacobs did not have his medical records when she examined him, and that the methacholine challenge test done for Dr. Jacobs was not consistent with three other such tests, which were done on November 19 and 30, 1992 and on May 25, 1995.

The Board notes that the results of the first methacholine challenge test, done on November 19, 1992, were inconclusive due to appellant's "very unusual change in level of alertness," and that the remaining three such tests all showed airway hyperreactivity typical of asthma. That, Dr. Jacobs characterized this hyperreactivity as mild or minimal does not establish that the March 24, 1994 test was incorrectly administered, nor does it bear on the validity of Dr. Jacobs' conclusions. Even if Dr. Jacobs did not have appellant's medical records at the time she examined appellant, these records were extensively reviewed by another member of the panel, as shown by the panel report, which was signed by Dr. Jacobs. The Office did not err by refusing to reopen appellant's case for further review of the merits of his claim based on the contentions in his August 10, 1995 request for reconsideration. The additional medical evidence appellant submitted with his request for reconsideration also was not sufficient to require the Office to reopen his case for further merit review, as it consisted of results of a pre-employment physical examination, of reports addressing a claimed December 1994 recurrence of disability, and of reports regarding the May 25, 1995 methacholine challenge report. None of this new evidence is relevant to the issue decided in the Office's September 16, 1994 decision.

The Board further finds that the Office, by its February 26, 1996 decision, properly determined that appellant's request for reconsideration was untimely filed and did not establish clear evidence of error.

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:

[2] *Eugene F. Butler*, 36 ECAB 393 (1984).

[3] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

> "The Secretary of Labor may review an award for or against payment of compensation at any time 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). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision." 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 5 U.S.C. § 8128(a).[4]

In the present case, the most recent merit decision by the Office was issued on September 16, 1994. Appellant's August 10, 1995 request for reconsideration did not result in a decision on the merits of his claim, and the Office's September 20, 1995 decision refusing to reopen the case for further review does not extend the one-year time period for requesting reconsideration.[5] As appellant's February 6, 1996 request for reconsideration was not filed within one year of the Office's most recent merit decision issued on September 16, 1994, the Office properly determined that appellant's February 6, 1996 application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[6] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[8] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[9] Evidence which does not

---

[4] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] *Naomi L. Rhodes*, 43 ECAB 645 (1992).

[6] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

[8] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[9] *See Leona N. Travis*, 43 ECAB 227 (1991).

raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[12] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[13] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[14]

In his February 6, 1996 request for reconsideration, appellant pointed out that the Office's statement of accepted facts that was provided to Dr. Jacobs contained an erroneous statement that he had a history of pulmonary disease prior to his federal employment. Appellant has pointed out an error in the Office's statement of accepted facts, but this does not meet the requirement to show clear evidence of error, as the error must be in the Office's decision. A review of Dr. Jacobs' report shows that the doctor based her opinion that appellant's asthma was temporarily aggravated by his employment exposures not on the statement of accepted facts but on the results of her examination of appellant, on the seasonal component of his condition, and on the absence of exposure to solvents or chemicals that have been implicated in the development of occupational asthma. The additional medical evidence appellant submitted could at best create a conflict of medical opinion, which is not sufficient to establish clear evidence of error. The notice of termination due to loss of military membership dated November 21, 1995 and the additional reports regarding possible exposures at the employing establishment have no bearing on the correctness of the Office's decision that appellant's temporary aggravation of asthma ended. Appellant has not shown clear evidence of error in the Office's September 16, 1994 decision.

[10] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[11] *See Leona N. Travis*, *supra* note 9.

[12] *Nelson T. Thompson*, 43 ECAB 919 (1992).

[13] *Leon D. Faidley, Jr.*, *supra* note 4.

[14] *Gregory Griffin*, *supra* note 6.

The decisions of the Office of Workers' Compensation Programs dated February 26, 1996 and September 20, 1995 are affirmed.

Dated, Washington, D.C.
September 3, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member