U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of TYSON PARKER, claiming as dependent child of CHERYL PARKER and DEPARTMENT OF THE NAVY, SEA SYSTEMS COMMAND, Vallejo, CA

*Docket No. 99-1391; Submitted on the Record;*
*Issued July 24, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review of his claim under 5 U.S.C. § 8128; and (2) whether the Office 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.

On January 2, 1997 Kathleen Haley, the legal guardian of appellant (hereinafter guardian), Tyson Parker (hereinafter appellant), the minor child of decedent, Cheryl Parker (hereinafter employee), filed a death benefits claim (Form CA-5) and alleged that the employee's death on July 9, 1992 was due to her employment-related asbestos exposure.[1] The guardian indicated that the employee's exposure to asbestos at the employing establishment from September 1975 to March 1978 caused her death.

Accompanying the claim was a November 25, 1996 report from Dr. Kate O'Hanlan, a Board-certified gynecological oncologist, who opined that she treated the employee in October 1991 for her diagnosis of ovarian cancer and she wondered if the exposure to asbestos at the employing establishment during the period from 1974 to 1976 might have been linked in some causal fashion to her subsequent development of ovarian cancer. Dr. O'Hanlan then stated that she had researched the computerized medline and Dr. O'Hanlan's search revealed a link of ovarian carcinoma risk to asbestos exposure.

In a decision dated December 5, 1997, the Office found that, although the employee may have been exposed to asbestos at work, it was not established that there was a relationship between the employee's death and factors of her federal employment. The Office denied appellant's claim on the basis that causal relationship was not established.

[1] The record indicates that the guardian is also the adoptive parent.

In a letter received by the Office on September 11, 1998, the guardian requested reconsideration. She supplied another report from Dr. O'Hanlan, several research articles and copies of medical records not previously submitted.

An October 30, 1991 pathology report from Dr. Jeffrey L. Stern, a Board-certified obstetrician and gynecologist, was submitted. In his report, he described the employee's condition including a description of the tumors on both ovaries.

A January 23, 1992 pathology report from Dr. Sean Mulvihill, a Board-certified surgeon, was also submitted. Dr. Mulvihill's report revealed that the employee had metastatic ovarian cancer, gallstones and a 10.0 centimeter tumor on the right lobe of her liver.

In a second report dated August 17, 1998, Dr. O'Hanlan reiterated, almost word for word, the subject matter of her previous letter dated November 25, 1996. She opined that the employee's asbestos exposure might have caused her subsequent development of ovarian cancer. Dr. O'Hanlan referred to the previously-mentioned articles that showed a relationship between ovarian cancer and fiber exposure.

By decision dated November 4, 1998, the Office denied appellant's request for review of the merits of the case after finding that the evidence submitted in support of the request for review was cumulative in nature and not sufficient to warrant a merit review of the prior decision.

In a letter received by the Office on December 30, 1998, the guardian requested reconsideration of the matter.

In a decision dated February 19, 1999, the Office determined that appellant's application for reconsideration was denied, as it was untimely filed and clear evidence of error was not established.

The Board finds that the Office properly exercised its discretion in refusing to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[2] As appellant filed her appeal with the Board on March 1, 1999, the only decisions properly before the Board are the November 4, 1998 and February 19, 1999 decisions.

[2] 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

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 and provides:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may--
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.138(b)(1)(1998), a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[3] 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.[4]

In the present case, appellant's guardian filed a request for reconsideration, which was received by the Office on September 11, 1998. Appellant's guardian submitted an August 17, 1998 report from the employee's Dr. O'Hanlan. The report from her, dated August 17, 1998, essentially repeated the content of Dr. O'Hanlan's previous report of November 25, 1996 almost verbatim. The submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[5] She did not address a causal relationship between the employee's diagnosed condition and the implicated employment factors in any manner different from her November 25, 1996 report. Appellant's guardian also submitted several excerpts from medical publications concerning ovarian cancer. However, these documents do not warrant reopening of appellant's claim. The Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship between a claimed condition and employment factors because such materials are of general application and are not determinative of whether the specifically claimed condition is related to the particular employment factors alleged by the employee.[6]

In its November 4, 1998 decision, the Office correctly noted that appellant did not provide any new evidence or argument sufficient to warrant a merit review. Appellant did not

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[3] 20 C.F.R. § 10.138(b)(1) (1998).

[4] 20 C.F.R. § 10.138(b)(2) (1998).

[5] *See Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

[6] *Dominic E. Coppo*, 44 ECAB 484 (1993).

argue that the Office erroneously applied or interpreted a point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the above-noted requirements under 10.138(b)(1) (1998). Accordingly, the Board finds that the Office did not abuse its discretion in denying appellant's August 31, 1998 request for reconsideration.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Act[7] does not entitle an employee to a review of an Office decision as a matter of right.[8]

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[9] 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.[10] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted to the Office under 5 U.S.C. § 8128(a).[11]

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on December 5, 1997. Appellant requested reconsideration on December 28, 1998 thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

In those cases, where a request for reconsideration is not timely filed, the Office's regulations provide that the Office will nevertheless undertake review of the case when there is clear evidence of error pursuant to the untimely request.[12] Office procedures state that the Office

[7] 5 U.S.C. § 8128(a).

[8] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[9] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits a claim by (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b)(2) (1999).

[10] 20 C.F.R. § 10.607(a) (1999).

[11] *See* cases cited *supra* note 8.

[12] 20 C.F.R. § 10.607(b) (1999).

will reopen an appellant's case for merit review, notwithstanding the one-year filing limitation set, if the application for review shows "clear evidence of error" on the part of the Office.[13]

To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by the Office.[14] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[15] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[16] It is not merely enough to show that the evidence could be construed so as to produce a contrary conclusion.[17] 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 evidence of error on the part of the Office.[18] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict of 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.[19] 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.[20]

In support of her December 28, 1998 request for reconsideration, appellant's guardian argued that she had submitted probative medical evidence. She argued that Dr. O'Hanlan not only treated the employee and suspected a link early on that her asbestos exposure at least contributed to her cancer and subsequent death but she also supported her conclusion with the research.

Appellant's guardian did not supply any additional information. She did not present any evidence to *prima facie* shift the weight of the evidence in favor of appellant and raise a substantive question as to whether the Office's final merit decision was erroneous.

For these reasons, the Board finds that the Office's February 19, 1999 decision was proper in its denial of appellant's request for reconsideration based upon the grounds that it was untimely and his guardian did not demonstrate clear evidence of error.

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[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996); *see* 20 C.F.R. § 10.607(b) (1999).

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

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

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

[17] *See Leona N. Travis, supra* note 15.

[18] *See Nelson T. Thompson,* ECAB 919 (1992).

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

[20] *Thankamma Matthews,* 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

The decisions of the Office of Workers' Compensation Programs dated February 19, 1999 and November 4, 1998 are hereby affirmed.

Dated, Washington, D.C.
July 24, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member