U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL L. DUNN and DEPARTMENT OF THE ARMY, BLUEGRASS ARMY DEPOT, Lexington, KY

Docket No. 00-403; Submitted on the Record;
Issued April 4, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely and lacking clear evidence of error.

On July 28, 1993 appellant, then a 42-year-old boiler operator, filed a claim for pulmonary disease and tuberculosis, which he related to exposure to mercury in the employing establishment. In a February 4, 1994 claim for occupational disease, appellant indicated that he had asthma. In a March 14, 1994 decision, the Office denied appellant's claim for compensation on the grounds that the fact of injury was not established. In a March 24, 1994 letter, appellant requested a hearing before an Office hearing representative, which was held on October 23, 1995. In a February 12, 1996 decision, the Office hearing representative found that appellant had submitted sufficient evidence to show he was exposed to mercury, coal dust, coal ash and other chemical irritants at the employing establishment. He stated, however, that appellant had not submitted medical evidence that established that he had a disabling condition causally related to his exposure to mercury and other chemicals at work. He, therefore, affirmed the Office's March 14, 1994 decision.

In an April 6, 1999 letter, appellant requested reconsideration. In an August 10, 1999 decision, the Office denied appellant's request for reconsideration on the grounds that it was submitted more than one year after the last merit decision in his case and the evidence submitted did not show clear evidence of error in the Office's prior decision.

The Board finds that the Office properly denied appellant's request for reconsideration as untimely and lacking in clear evidence of error.

Under section 8128(a) of the Federal Employees' Compensation Act,[1] the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the

[1] 5 U.S.C. § 8128(a).

claimant. The Office must exercise this discretion in the implementing federal regulations,[2] which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review. Section 10.607 of the regulations provide 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."[3] In *Leon D. Faidley, Jr.*,[4] the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act. The Office issued its last merit decision on February 12, 1996. As the Office did not receive the application for review until April 6, 1999 the application was not timely filed. The Office properly found that appellant had failed to timely file the application for review.

However, the Office 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 section 8128(a) of the Act, when an application is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.[5]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[6] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[7] Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.[8] It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.[9] 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.[10] To show clear evidence of error, however, 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

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[2] 20 C.F.R. § 10.606.

[3] 20 C.F.R. § 10.607.

[4] 41 ECAB 104 (1989).

[5] *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which states: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error."

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

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

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

[9] *See Leona N. Travis, supra* note 7.

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

and raise a fundamental question as to the correctness of the Office decision.[11] 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.[12]

The evidence appellant submitted in support of his request for reconsideration consisted of a transcript of a hearing before an administrative judge of the Equal Employment Opportunity Commission. The transcript contained excerpts from the testimony of Charles May, appellant's supervisor at the time he filed his claim. Mr. May indicated that there was a mercury spill at the employing establishment and he took steps to have the mercury spill cleaned up. This testimony, however, goes to a point already accepted by the Office hearing representative, that appellant was exposed to mercury and other chemical irritants at the employing establishment. Appellant did not submit any medical evidence, which would establish that his exposure to mercury and the other chemicals at the employing establishment caused his pulmonary conditions or otherwise led to his disability from work. Appellant, therefore, has not submitted clear evidence that would establish the Office hearing representative was in error in finding that appellant had not met his burden of proof in establishing, through medical evidence, that he was disabled because of his exposure to mercury at work.

The decision of the Office of Workers' Compensation Programs, dated August 10, 1999, is hereby affirmed.

Dated, Washington, DC
April 4, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

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

[12] *Gregory Griffin*, *supra* note 5.