U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RALPH B. SOLETHER and DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Alpine, AZ

Docket No. 99-2167; Submitted on the Record;
Issued February 21, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant's claim for compensation is barred by the time limitation provisions of the Federal Employees' Compensation Act;[1] and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On October 22, 1997 appellant, then a 61-year-old former federal employee, filed a notice of occupational disease alleging that his exposure to Agent Orange caused "neural degeneracy and associated physical symptomatic disorders." He noted that he was exposed while employed as a ranger at the Black River Ranger District, Apache National Forest in Arizona. Appellant became aware of his condition in June 1972 but indicated that he did not know when he was first aware that his condition was caused or aggravated by federal employment. On the reverse side of the form, the employing establishment noted that appellant was initially treated by Dr. George Wells, now deceased, in October 1974.[2]

In an undated narrative received by the Office on October 22, 1997, appellant stated: "Thirty years ago I was intensively exposed to a herbicide that came to be known as Agent Orange when it was used as a defoliant during the Vietnam War." Specifically, he stated he was exposed for "approximately four to six hours daily for two days each week in a one-month period" in the summers of 1966 and 1967. He stated that the herbicide caused nervous and gastrointestinal system dysfunction, loss of coordination and balance, abdominal spasms and pain and restless leg syndrome.

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[1] 5 U.S.C. §§ 8101-8193.

[2] The Board notes that the record contains no medical report from Dr. Wells. Appellant, in a December 2, 1996 letter received by the Office on July 10, 1998, referred to "an original report from Dr. Wells in 1973 in which he refers to something called peripheral neuropathy."

By letter dated December 1, 1997, the Office stated that the information appellant submitted was insufficient to determine his eligibility for compensation benefits. The Office noted that filing requirements for injuries sustained between December 7, 1940 and September 6, 1974, require written notice within 48 hours of the injury. However, this requirement was automatically waived if appellant filed a claim within one year of the injury, or if the immediate supervisor had actual notice of the injury within 48 hours of the injury. The Office further noted that the one-year requirement could be waived if the claim were filed within five years and the claimant could show that his failure to comply was due to circumstances beyond his control. The Office requested additional information pertaining to appellant's job requirements and evidence relating to his medical condition.

In a letter dated January 5, 1998, appellant responded to the Office's December 1, 1997 request noting that he had misplaced the Office's letter but stating that "a great deal of this information was attached to the original CA-2 form."

On January 22, 1998 the Office received appellant's personnel file.

On February 28, 1998 the Office sent a complete copy of the file to appellant and requested that he furnish all the necessary information requested in its December 1, 1998 letter, within 30 days from the date of the letter.

By decision dated June 29, 1998, the Office denied appellant's claim on the grounds that it was untimely filed. In an attached memorandum, the Office found that the date of appellant's last exposure was August 31, 1967, that written notice was made October 22, 1997, that appellant had a medical condition in 1974 and that he was aware or should have been aware of a possible causal relationship between his condition and his employment as of February 1, 1986, the date of his retirement.

By letter dated July 7 and received by the Office on July 10, 1998, appellant requested reconsideration.

In support of his request, appellant submitted a copy of his March 15, 1986 letter to the Office of Personnel Management (OPM) in which he stated that he had accepted a November 12, 1985 early-out retirement offer from the employing establishment although he believed he was entitled to disability retirement because he "suffered illness from exposure to Agent Orange."[3] Appellant advised OPM that he was "writing this letter to initiate a claim for disability." On May 11, 1987 appellant repeated his request to OPM for information about the procedure for a disability claim, noting he had received no response to his March 15, 1986 letter.

In a letter dated December 19, 1990 to the employing establishment, appellant alleged that he was exposed to Agent Orange while a federal employee from 1966 to 1968, "with latent symptoms occurring in 1971 to 1972 and continuing thereafter." He also noted that he accepted an early-out retirement effective February 1986, "[b]ut I was ill at the time and considering

[3] The Board notes that appellant's effective date of retirement was February 1, 1986, the day the Office determined that appellant knew or should have reasonably known of a possible causal relationship between his condition and his employment.

applying for disability retirement. The short time frame to make a decision on early-out seemed the best choice, while I could then look into the disability." He added that he had been recently hospitalized for an illness, which he believed was causally related to his work exposure to Agent Orange. Appellant then noted: "Please advise me how to proceed."

Appellant followed up with a letter dated September 8, 1991, noting that he had received no answer to his December 19, 1990 inquiry and asking that the employing establishment send him "whatever forms are necessary."

In a letter to the employing establishment dated July 14, 1995, appellant stated: "The purpose of this letter is to initiate a claim for disability directly related to my employment," adding that he was exposed to Agent Orange from 1966 to 1968 while in the performance of duty.

By merit decision dated October 8, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. In an attached memorandum, the Office found that appellant mailed a Form CA-2 to the employing establishment on August 4, 1997,[4] but this was not sufficient to establish a timely filed claim. The Office noted: "The claimant never mentioned filing a claim for workers' compensation benefits until his letter dated February 4, 1997, which was addressed to an attorney."

By letter dated January 27, 1999, appellant requested reconsideration asserting that his March 15, 1986 letter to OPM and his December 19, 1990 letter should be construed "as the first step in filing a workers' compensation claim."

By nonmerit decision dated May 7, 1999, the Office denied appellant's request for reconsideration.

The Board finds that appellant's compensation claim is barred by the time limitation provisions of the Act.

Section 8122(b) requires in cases of injury prior to September 7, 1974 that a claim for compensation be filed within one year of the date that the claimant was aware, or reasonably should have been aware, that the disabling condition may have been caused by factors of his federal employment. In this case, appellant stated in his claim that he was initially aware that his exposure to chemicals caused his disease in June 1972, further, the employing establishment stated that he was last exposed to chemicals during the spraying operations in the Black River Ranger District in June 1967. The requirement may be waived if the claim is filed within five years and such failure was due to circumstances beyond the control of the person claiming

[4] The Office did not explain why it determined that appellant filed a claim on August 7, 1997. The record contains an August 15, 1997 reference to a claim filed in connection with Agent Orange, but the Office note referred to an unnamed appellant who was in Vietnam in 1970. In any event, appellant stated that he had filed a claim with the employing establishment on December 2, 1996.

benefits or that such a person has shown sufficient cause or reason in explanation thereof and material prejudice to the interests of the United States has not resulted from such a failure.[5]

The Board finds that appellant's December 19, 1990 letter is insufficient notice to the employing establishment that he intended to file a claim for workers' compensation. Appellant initially sent inquiries in 1986 and again in 1987 to OPM regarding his intention to file a claim for disability retirement, but made no reference to a workers' compensation claim. His subsequent December 1990 letter to the employing establishment noted his belief that he had a medical condition based on his employment exposure to Agent Orange, but made no reference to his intention to file a workers' compensation claim. Although appellant requested forms from the employing establishment in 1991, the record remains silent for three years until July 14, 1995, at which time he stated that he wished to file a disability claim. The Board notes that OPM in December 1994 advised appellant to contact his employing establishment for the purposes of filing a claim, but appellant did not act on this information until July 1995.

To permit waiver of the one-year period of limitation, "sufficient cause or reason" has to be shown in explanation of failure to file a claim within one year. The test of whether such cause or reason has been shown is whether appellant prosecuted the claim with that degree of diligence which an ordinarily prudent person would have exercised in protecting his rights under the same or similar circumstances.[6]

In November 1985 appellant elected an early-out retirement, effective February 1, 1986, from the employing establishment. He then wrote to OPM in March 1986 to initiate a claim for disability retirement. He again notified OPM in May 1987 about his previous letter. The record is silent for more than three years, until December 19, 1990. At that time appellant notified the employing establishment that he believed that his recent medical condition was attributable to work-related exposure to Agent Orange. However, appellant provided no medical evidence to establish that he was exposed to Agent Orange or that his recent medical condition was caused by such exposure. He then wrote one letter in 1991 and remained silent until July 1995 when, in a letter to the employing establishment, he noted his intention to file a claim for disability compensation.

During this entire period, from November 1985 when he elected an early-out retirement to August 4, 1997, the date he filed a claim for disability, appellant did not provide any medical evidence that would establish a causal relationship between his condition and his employment. Nor did he explain his delay in pursuing his claim other than to cite the failure of the employing establishment and OPM to respond to his inquiries in a timely manner. Under these circumstances of an allegedly employment-related medical condition caused by exposure to Agent Orange, the Board cannot find that appellant prosecuted his claim with that degree of diligence, which an ordinarily prudent person would have exercised in protecting his rights under the same or similar circumstances. Accordingly, appellant's claim was not timely filed.

[5] 5 U.S.C. § 8122(c) (1966).

[6] *Francis Robert Boyer*, 27 ECAB 670 (1976).

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

On January 27, 1999 appellant requested reconsideration. In support of his request, appellant submitted a narrative report and copies of personnel records including his position description.

Section 8128(a) of the Act[7] does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.[8] Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under section 8128(a), the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration.[9] By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.606 and 10.607 of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[10] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[11] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his application for review within one year of the date of that decision.[12] When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office, whether to reopen a case for further consideration under section 8128(a) of the Act.[13]

Section 10.608 provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[14]

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[7] 5 U.S.C. § 8128(a).

[8] *Jeanette Butler*, 47 ECAB 128, 129-30 (1995).

[9] *Id.*

[10] 5 U.S.C. §§ 8101-8193.

[11] 20 C.F.R. §§ 10.606(b)(2).

[12] 20 C.F.R. § 10.607(a).

[13] *Joseph W. Baxter*, 36 ECAB 228 (1984).

[14] 20 C.F.R. § 10.608.

Evidence which does not address the particular issue involved, or evidence which is repetitive or cumulative of that already in the record, does not constitute a basis for reopening a case.[15] However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence, which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[16]

In support of his request for reconsideration, appellant submitted a narrative regarding his claim including his assertion that he filed his claim initially on March 15, 1986 and in December 19, 1990. However, these issued had been presented previously by appellant. Further, the administrative evidence he submitted was not relevant to the issue of whether his disability was attributable to his federal employment. Consequently, the newly submitted evidence had either been considered previously by the Office or was not relevant to the issue, the Office properly determined that this new evidence did not constitute a basis for reopening the case.[17]

The decisions of the Office of Workers' Compensation Programs dated May 7, 1999, October 8 and June 29, 1998 are affirmed.

Dated, Washington, DC
February 21, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[15] *Daniel Deparini*, 44 ECAB 657, 659 (1993).

[16] *Id.*

[17] *See Alton L. Vann*, 48 ECAB 259, 269 (1996) (evidence that does not address the particular issue involved does not constitute a basis for reopening a case).