U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMY T. VEST and DEPARTMENT OF THE ARMY, ARMY CORPS OF ENGINEERS, Almaty, Kazakhstan

Docket No. 01-157; Submitted on the Record;
Issued October 25, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that his request was untimely and failed to show clear evidence of error.

On June 27, 1994 appellant, then a 59-year-old project engineer for the American Embassy renovation program at Almaty, Kazakhstan, filed a claim alleging that on December 31, 1993 he sustained head injuries when, upon entering his apartment, after returning from work, he was attacked, beaten and robbed by two armed men. In support of his claim, appellant submitted a narrative statement from his supervisor, David L. Cox, who described the attack on appellant and requested that he be reimbursed for the cost of a fitness-for-duty examination, taken at Mr. Cox's request. Appellant also submitted the results of the fitness-for-duty examination.

The record contains a March 24, 1994 facsimile cover sheet from Mr. Cox to appellant, which contains a notation by Sheila Whidbee, apparently in response to a request by appellant for workers' compensation coverage for his injuries, which states:

> "I talked with Effie Woodruff, our human resources officer and she said that since you are PCSed to Almaty and since your injuries took place at home while you were off duty, you could not collect anything [from] workers' compensation according to TAD. If you had been in Almaty on a TDY basis, you could file for worker's compensation. She said I could send you the forms if you still wanted to try and file."

By letter dated March 4, 1997, the Office asked the employing establishment to provide additional factual information. The Office specifically requested that the employing

establishment clarify whether appellant was provided with government or agency owned housing by the U.S. Embassy in Kazakhstan, and added:

> "[Appellant] is notified by copy of this letter that it is his responsibility to insure that a declaration of provision of government housing is received by this office within 30 days of today's date or this claim may be denied."

There is no indication in the record that either appellant or the employing establishment responded to the Office's letter.

In a decision dated April 22, 1998, the Office denied appellant's claim on the grounds that he was not in the performance of duty when the attack occurred.[1]

By letter dated April 15, 1999, appellant requested reconsideration of the Office's April 22, 1998 decision and submitted additional medical evidence in support of his claim.[2] Appellant stated that he took exception to the Office's conclusion that he had not been in government housing when he was attacked and submitted a copy of his initial claim form, highlighting the statement contained thereon that the "injury occurred after duty hours in government provided quarters."

In a decision dated June 23, 1999, the Office declined to reopen appellant's claim on the grounds that appellant's request for reconsideration neither raised substantive legal questions nor included new and relevant evidence and, therefore, was not sufficient to warrant merit review of the prior decision.

By letter dated November 2, 1999, appellant objected to the Office's June 23, 1999 decision and submitted a July 19, 1999 statement from Mr. Cox, his supervisor, detailing the agreement under which housing had been provided for appellant during his tenure at Almaty.[3]

In a decision dated March 28, 2000, the Office denied appellant's request for reconsideration on the grounds that the request was not timely submitted within one year of the Office's April 22, 1998 decision and failed to show clear evidence of error. In its decision, the Office stated that it had reviewed appellant's November 2, 1999 reconsideration request to determine whether he presented clear evidence that the Office's April 22, 1998 decision denying compensation benefits was in error but that no clear evidence of error was found.

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[1] The Office specifically noted that appellant had been advised by letter dated September 29, 1997, that the initial evidence of record was insufficient to establish that his injury arose out of and in the course of employment, but had not responded to this letter. The Board notes that the record does not contain a copy of the described September 29, 1997 Office letter.

[2] Appellant explained that his delay in requesting reconsideration was due to the fact that, shortly after receiving the Office's April 22, 1998 decision, he was sent TDY to Germany and was unable to devote his attention to his claim.

[3] Appellant's November 2, 1999 letter is addressed to the Board and was received by the Board on November 8, 1999. It appears, however, that the letter was subsequently forwarded to the Office for adjudication as a request for reconsideration.

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's November 2, 1999 request for reconsideration was untimely filed and failed to present clear evidence of error.

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.[4] As appellant filed his appeal with the Board on September 8, 2000, the only decision properly before the Board is the Office's March 28, 2000 decision denying appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act[5] does not entitle a claimant to a review of an Office decision as a matter of right.[6] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[7] 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, 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.[8] 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).[9]

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[10] In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[11] To establish clear evidence of error, a claimant must submit

[4] 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

[5] 5 U.S.C. § 8128(a).

[6] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[7] *Leon D. Faidley, Jr.*, *supra* note 6. *Compare* 5 U.S.C. § 8124(b) which entitles a claimant to a hearing before an Office hearing representative as a matter of right, provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

[8] 20 C.F.R. § 10.607.

[9] *See Gregory Griffin* and *Leon D. Faidley, Jr.*, *supra* note 6.

[10] *Leonard E. Redway*, 28 ECAB 242, 246 (1977).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996). The Office therein 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 a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion.

evidence relevant to the issue, which was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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's decision.[17] 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.[18]

In support of his November 2, 1999 request for reconsideration, appellant submitted a statement from his supervisor, Mr. Cox, which stated:

> "During the period [appellant] was assigned to Almaty, Kazakhstan he served as the Project Engineer for the Embassy Renovation there. [Appellant] was employed by the U.S. Army Corps of Engineers (COE) and I, [Mr.] Cox, was the COE Program Manager. [Appellant] worked for me, indirectly. I was his second level supervisor.
>
> "All of the COE employees working in the remote locations on this program were provided housing as part of the contract. The housing was located and leased by the construction contractor, using contract funds and provided to the employee as "Government Housing," *per se*. The apartments were not private in the true sense of the word. They in essence became government furnished facilities, leased and maintained by the contractor utilizing U.S. Government funds.
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> "The robbery and beating of [appellant] in his apartment, therefore, in my opinion, took place in what could be classed as government housing."

[12] *See Jeanette Butler*, 47 ECAB 128, 131 (1995).

[13] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[14] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[15] *See Leona N. Travis*, *supra* note 13.

[16] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[17] *See Jeanette Butler*, *supra* note 12.

[18] *Id*.

The Board finds that this new evidence provided by appellant is insufficient to raise a substantial question as to the correctness of the Office's April 22, 1998 decision. The record contains evidence that appellant's employment in Almaty was not a temporary-duty assignment or a special mission for the employing establishment[19] but that Almaty, Kazakhstan was his regular duty station. While injuries occurring to employees at their residences are not generally compensable, the Board notes that if "an employee is required or expected to live in quarters or premises furnished or made available by his employer and is injured during the reasonable use or occupancy of such premises," such injuries have been held to have occurred in the performance of duty and to be compensable.[20] This rule has been referred to as the "Bunkhouse rule." The Bunkhouse rule is further set forth in the Office's procedures,[21] which state, in pertinent part:

> "(1) An employee has the protection of the A[ct] if injured during the reasonable use of premises which he or she is required or expected to occupy and which are provided by the employer. In this category of cases, the official superior should be requested to submit a statement showing:
>
> > (a) Whether the employee was required or expected to occupy the quarters where the injury occurred and, if so, this should be explained fully;
> >
> > (b) Whether the employer provided the quarters for the employee and, if so, this should be explained fully; and
> >
> > (c) In what activity the employee was engaged at the time of the injury."

While appellant has provided a statement from his second level supervisor indicating that, in his opinion, the attack on appellant "took place in what could be classed as government housing," this is insufficient to establish that appellant was required or expected to live in this apartment, that there was no other housing available, that the housing was in fact provided by government and not the private employer, or the nature of the contract under which the housing was provided. As the evidence submitted by appellant contains only the opinion of his second level supervisor and does not contain any information which establishes, definitively, that appellant's injury occurred in circumstances which bring it within the purview of the "Bunkhouse rule," it does not manifest on its face that the Office committed error in the April 22, 1998 decision. Therefore, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) of the Act on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

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[19] An employee on a temporary assignment or special mission for his or her employer in a place different from his or her regular employment remains in the course of his or her employment 24 hours a day as long as he or she is engaged in activities essential or incidental to the special assignment. *Karl Kuykendall*, 31 ECAB 163 (1979).

[20] *Edmond B. Wagoner*, 39 ECAB 758 (1988); *Eleanor Abood*, 10 ECAB 466 (1959).

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.4(e) (April 1995).

The decision of the Office of Workers' Compensation Programs dated March 28, 2000 is hereby affirmed.

Dated, Washington, DC
October 25, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member