U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES WAYNE BEETS and DEPARTMENT OF DEFENSE, DEFENSE CONTAINMENT MANAGEMENT COMMAND, Sarasota, FL

Docket No. 02-12; Submitted on the Record;
Issued June 5, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

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.

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

The only decision before the Board on this appeal is the Office's August 23, 2001 decision denying appellant's application for reconsideration of the Office's October 31, 1994 decision.[1] Because more than one year has elapsed between the issuance of the Office's October 31, 1994 merit decision and September 10, 2001, the postmarked date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the October 31, 1994 decision.[2]

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.

[1] This decision denied appellant's claim for hearing loss for the reason that the evidence of file failed to demonstrate that appellant sustained an injury as alleged.

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

The Secretary of Labor may review an award for or against payment of compensation at any time on his 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."[3]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). One such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office. The evidence must be positive, precise and explicit and must show on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[4] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[5] This determination of clear error entails a limited review by the Office of the evidence submitted with the reconsideration request and whether the new evidence demonstrated clear error on the part of the Office.[6] 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 a merit review in the face of such evidence.[7]

In the instant case, the first submission to the Office after the October 31, 1994 decision occurred when appellant submitted new evidence on his behalf by letter dated January 11, 2001. On April 30, 2001 the Office received a request for review of the case from appellant's congressional representative. Accordingly, appellant did not request reconsideration within one year of the last decision, October 31, 1994.

In support of his request for reconsideration, appellant stated that he did not know about the Office's decision denying his claim until May 30, 2000. Under the mailbox rule, in the absence of evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have arrived at the mailing address in due course.[8] The Office's

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[5] *Id.*

[6] *Id.*

[7] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[8] *Marlon G. Massey*, 49 ECAB 650, 652 (1998).

October 31, 1994 decision was addressed to appellant at the American Embassy at Tel Aviv/DCMAO, PSC 98, Box 100, APO AE 09830-9700, appellant's address of record and is, therefore, presumed to have arrived in due course. The Board notes that appellant had regularly corresponded with the Office from this address prior to the issuance of the decision. Furthermore, in addition to the October 31, 1994 decision, the Office sent appellant a letter, dated October 7, 1994, wherein it advised him that he should be receiving a decision denying his claim within 30 days. Accordingly, this Board finds appellant's argument that he did not receive the Office's decision until May 2000 to be without merit.

As appellant's request for reconsideration was untimely, the request for reconsideration is reviewed under the clear evidence of error standard. In the case at hand, appellant has not established clear evidence of error. The Office based its October 31, 1994 denial of his claim for hearing compensation on the opinion of Dr. Yoav P. Talmi, an otolaryngologist, that appellant saw while he was living in Israel. The Office noted that Dr. Talmi was of the opinion that appellant had bilateral hearing loss with conductive loss in the right ear and mild to profound mixed hearing loss in the left ear. The Office further noted that he determined that appellant's bilateral hearing loss was not due to his federal employment and, therefore, denied his claim. The Office stated that the statement of accepted facts, dated October 27, 1993, was accurate with regard to federal noise exposure that, although it also, without distinct separation, included nonfederal noise exposure, this fault did not distract from Dr. Talmi's opinion.

In support of his request for reconsideration, appellant submitted a medical report by Dr. Jeff P. Chicola, a Board-certified otolaryngologist, dated December 4, 2000, wherein he discussed the audiograms appellant had at his office and noted:

> "The tests are extremely consistent. The hearing is normal in the right ear at 500, 1,000 and 2,000 and shows a significant high frequency hearing loss between 2,000 and 8,000. This is consistent with the noise exposure. The left ear is nonfunctioning and has been nonfunctioning since your first visit with us. There has never been any demonstrable evidence of a conductive loss and clearly I have to disagree totally with the report from the [physician] in Israel. As mentioned, we have tested you on three separate occasions with totally consistent tests, again proving that the test from Israel is erroneous."

Although Dr. Chicola's medical opinion represents an opinion contrary to that of Dr. Talmi, it is not sufficient to demonstrate clear evidence of error on the part of the Office. 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.[9]

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

The decision of the Office of Workers' Compensation Programs dated August 23, 2001 is hereby affirmed.

Dated, Washington, DC
June 5, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member