U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY G. GRAMLICH and PANAMA CANAL COMMISSION, PEDRO MIGUEL LOCKS DIVISION, Panama City, Panama

Docket No. 03-1230; Submitted on the Record;
Issued June 18, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On December 29, 1998 appellant filed an occupational disease claim alleging that he sustained asbestosis due to exposure to asbestos dust in the workplace. He claimed that this exposure occurred while he worked in various positions for the employing establishment between 1965 and 1986.[1] Appellant submitted several medical reports concerning his pulmonary condition.

By decision dated March 28, 2000, the Office denied appellant's claim that he sustained employment-related asbestosis. The Office accepted that he was exposed to asbestos in the workplace as alleged, but that he did not submit sufficient medical evidence that he sustained a medical condition as a result. On December 3, 2001 appellant requested reconsideration of his claim.[2] He submitted copies of the findings of pulmonary testing and a July 31, 2001 report of Dr. James P. Krainson, an attending Board-certified internist. By decision dated February 16, 2003, the Office refused to reopen appellant's case for merit review on the grounds that his application for review was not timely filed and failed to present clear evidence of error.[3]

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[1] There is some indication in the record that appellant filed a similar claim on February 26, 1998, but that the claim form was lost.

[2] In late 2000 appellant had requested a hearing before an Office hearing representative, but he later withdrew his request.

[3] The Office noted that, although its decision was issued more than 90 days after appellant's reconsideration request, the delay did not jeopardize his right to a merit review. Therefore, the Office determined that it was not required to conduct a merit review of appellant's claim; *see Anthony A. Degenaro*, 44 ECAB 230, 239-40 (1992).

The Board finds that the Office properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's February 16, 2003 decision denying appellant's request for a review on the merits of its March 28, 2000 decision. Because more than one year has elapsed between the issuance of the Office's March 28, 2000 decision and April 14, 2003, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the March 28, 2000 decision.[4]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[5] 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.[6] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[7] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[8]

In its February 16, 2003 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on March 28, 2000 and appellant's request for reconsideration was dated December 3, 2001, more than one year after March 28, 2000.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[9] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in

[4] *See* 20 C.F.R. § 501.3(d)(2).

[5] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.606(b)(2).

[7] 20 C.F.R. § 10.607(a).

[8] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[9] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] 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.[15] 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 decision.[16]

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's March 28, 2000 decision and is insufficient to demonstrate clear evidence of error. In support of his untimely reconsideration request, appellant submitted copies of the findings of pulmonary testing and a July 31, 2001 report of Dr. Krainson, an attending Board-certified internist. In his report, Dr. Krainson discussed findings on examination and diagnostic testing and indicated that appellant exhibited evidence of pulmonary asbestos and related diseases, including a restrictive pulmonary pattern and pleural plaque formation. However, none of these reports contains any

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (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 an error (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."

[11] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

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

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

[14] *See Leona N. Travis*, *supra* note 12.

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

[16] *Leon D. Faidley, Jr.*, *supra* note 8.

opinion regarding the cause of appellant's condition. Therefore they are not relevant to the main issue of the present case and do not show clear evidence of error by the Office in its prior decision.

The February 16, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 18, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member