

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD W. ECKENRODE and DEPARTMENT OF THE NAVY,
CHARLESTON NAVAL SHIPYARD, Charleston, S.C.

*Docket No. 96-1339; Submitted on the Record;
Issued January 15, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

By decision dated January 28, 1993, the Office denied appellant's occupational disease claim for reduced pulmonary function related to asbestos exposure during his employment. In an undated letter received by the Office on February 8, 1993, appellant requested an oral hearing before an Office hearing representative. The hearing was held on June 23, 1993. At the hearing, appellant testified that he started working in the shipyard in 1965 and he was told in 1989 by a doctor at the employing establishment's dispensary, Dr. S.R. Davis, that he had pleural thickening due to asbestos exposure. He testified that both his physicians stated that his lung volume was at the lower end of the normal range and he was heavily exposed to asbestos in the shipyard. Appellant retired on June 1, 1993. Appellant also submitted some medical evidence. By decision dated January 3, 1994, the Office hearing representative affirmed the Office's January 28, 1993 decision, stating that the evidence of record failed to establish that appellant's employment caused his pulmonary condition. By letter dated October 14, 1994, which was postmarked April 18, 1995, and received by the Office on April 20, 1995, appellant requested reconsideration of the Office's January 3, 1994 decision and submitted additional evidence. In the top right hand corner of the reconsideration request, appellant wrote that a copy of the letter was mailed on "the date above," *i.e.*, October 14, 1994, but the Office claimed it did not receive it. By decision dated June 22, 1995, the Office denied appellant's reconsideration request as untimely and found that the evidence submitted did not establish any error in the Office's initial decision.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹ The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.² When an application for review is untimely, the Office takes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.³ The timeliness of the application for review is determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself is used.⁴

Although appellant indicated in his handwritten note in his October 14, 1994 reconsideration request that he submitted the request on that date, he provided no independent proof that it was submitted on that date. The Board therefore finds that the date appellant's reconsideration request was filed is the postmark date on the envelope which is April 18, 1995. The Board further finds that, since more than one year had elapsed since the date of issuance of the Office's January 3, 1994 merit decision, to the date that appellant's request for reconsideration was filed, April 18, 1995, appellant's request for reconsideration is untimely. Moreover, the Board further finds that the evidence submitted by appellant in support of such request does not raise a substantial question as to the correctness of the Office's January 3, 1994 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim.

In this regard, appellant submitted a medical report from his treating physician, Dr. Wayne C. Vial, a Board-certified internist with a sub-specialty in pulmonary diseases, dated May 5, 1994 and progress notes from the employing establishment's medical clinic dated from November 28, 1989 through August 31, 1990. In his May 5, 1994 report, Dr. Vial noted that appellant had a substantial exposure to asbestos dust at the employing establishment. He stated that appellant's chest x-ray from April 1992 showed some bilateral mid-thoracic pleural thickening, although it was only several millimeters in thickness. Dr. Vial stated that appellant had pulmonary function studies in April 1992 which suggested a restrictive defect at the lower limit of normal. He believed that appellant had some degree of progressive functional loss based on pulmonary function studies dated from July 6, 1979 through August 21, 1990 which showed that his forced vital capacity (FVC) and forced expiratory volume (FEV) were 105 percent and 101 percent, respectively, in 1979 but by 1990 had fallen to 75 and 77 percent, respectively. Dr. Vial stated that if there was no plausible explanation for this, one would have to conclude that it was related to appellant's prior asbestos exposure and to either the presence of asbestos-related pleural thickening or radiographically occult asbestosis. In his November 28, 1989 progress note, Dr. Davis stated that appellant had asbestos exposure as a welder in the shipyard from 1966 to 1978 and that new findings showed q and t type lesions at 1/1 and progressive FVC in the past several years. He noted pulmonary function results and stated, "[illegible] since 1966

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.138(b)(2); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

³ *Thankamma Matthews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁴ *Willie H. Walker*, 45 ECAB 126, 131 (1993).

presence confusing picture.” Dr. Davis diagnosed early asbestosis. The other progress notes stated that appellant was exposed to asbestos and had fibrosis and pleural thickening.

The Board finds, however, that Dr. Vial and Dr. Davis did not explain how the factors of employment aggravated or caused appellant’s progressive pulmonary restriction or early asbestosis. Dr. Vial’s opinion that if there was no other explanation for appellant’s pulmonary condition, appellant’s condition was related to his asbestos exposure is too vague and speculative to establish the requisite causal connection particularly where appellant had a history of cigarette smoking.⁵ Dr. Davis did not specifically state how the pulmonary function results documented asbestosis and how the results related to appellant’s employment. Further, the other progress notes do not explain how appellant’s pulmonary condition resulted from his employment. Dr. Vial’s medical report and the progress notes are therefore insufficiently rationalized to establish appellant’s claim.

As appellant has not, by the submission of medical evidence, raised a substantial question as to the correctness of the Office’s January 3, 1994 decision, he has failed to establish clear evidence of error and the Office did not abuse its discretion in denying a merit review of his claim.

The decision of the Office of Workers’ Compensation Programs dated June 22, 1995 is hereby affirmed.

Dated, Washington, D.C.
January 15, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

⁵ See *William S. Wright*, 45 ECAB 498, 504 (1994).