

**United States Department of Labor
Employees' Compensation Appeals Board**

ADELL ALLEN, CLAIMING AS EXECUTRIX OF THE ESTATE OF MELVIN L. ALLEN, Appellant)	
)	
and)	Docket No. 04-208
)	Issued: March 18, 2004
)	
DEPARMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND, Pensacola, FL, Employer)	
)	

Appearances:
E.T. Boywid, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 29, 2003 appellant, through her attorney, filed a timely appeal from the Office of Workers' Compensation Programs' decision dated August 1, 2003, which denied her reconsideration request as untimely filed. Because more than one year has elapsed between the last merit decision dated October 8, 1997 and the filing of this appeal on October 29, 2003, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

On March 13, 1995 the employee, then a 76-year-old former aircraft cleaner, filed a notice of occupational disease alleging that he sustained a back injury in October 1964, when he lifted an airplane wing filled with water. The Office denied the employee's claim on November 7, 1995 on the grounds that it was not timely filed. The employee requested review by the Board and, by order dated November 25, 1996,¹ the Board remanded the case upon the Director's motion for additional development and an appropriate decision.

The employee died on November 11, 1996. The Office continued to communicate with appellant, the employee's widow and informed her on April 25, 1997 that the claim had been found to be timely. The Office requested medical evidence in support of the employee's alleged employment injury and resultant disability. By decision dated August 7, 1997, the Office informed appellant that the claim was denied due to lack of medical evidence establishing a medical condition as a result of his employment.

Appellant requested reconsideration on September 9, 1997. By decision dated October 8, 1997, the Office denied modification of its August 7, 1997 decision finding that the evidence did not establish a causal relationship between his employment and the claimed condition or disability.

Appellant, through her attorney, again requested reconsideration on October 7, 1998. In a letter dated November 19, 1998, the Office requested that appellant provide letters of administration to establish that she was the executrix of the employee's estate. Appellant did not respond. By letter dated January 14, 1999, the Office advised her that, as she was not designated the executrix of the employee's estate, there would be no further action on the claim.

On October 3, 2002 appellant's attorney forwarded to the Office letters of administration and order appointing personal representative requesting further reconsideration of appellant's claim. On February 8, 2002 the probate division of the circuit court for Escambia County Florida appointed appellant "[p]ersonal [r]epresentative of the estate with full power to administer the estate according to law, to ask, demand, sue for, recover and receive the property of the decedent; ... and to make distribution of the estate according to law." By letter dated April 3, 2003, appellant's attorney requested adjudication of appellant's request for reconsideration.

By decision dated August 1, 2003, the Office found that appellant's October 7, 1998 request for reconsideration was not timely filed within one year of the October 8, 1997 merit decision as appellant was not authorized as executrix of the employee's estate until February 8, 2002 and that, therefore, the request for reconsideration was not valid until February 8, 2002, more than one year after the October 8, 1997 merit decision. The Office further found that the evidence submitted in support of the reconsideration request did not establish clear evidence of error in the Office's prior decisions.

¹ Docket No. 96-1930 (issued November 25, 1996).

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right.³ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁴ The Office, through regulation, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office 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.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁶

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulation.⁷ Office regulation states that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² 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.¹³ To show clear

² 5 U.S.C. § 8128(a).

³ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁴ *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

⁵ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁶ 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

⁷ *Thankamma Mathews*, *supra* note 3 at 770.

⁸ 20 C.F.R. § 10.607(b).

⁹ *Thankamma Mathews*, *supra* note 3 at 770.

¹⁰ *Leona N. Travis*, 43 ECAB 227, 241 (1991).

¹¹ *Jesus D. Sanchez*, *supra* note 4 at 968.

¹² *Leona N. Travis*, *supra* note 10.

¹³ *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

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.¹⁴ The Board must make 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.¹⁵

ANALYSIS

On October 7, 1998 appellant requested reconsideration of a merit decision of the Office dated October 8, 1997. Appellant filed her request for reconsideration within one year of the date of the most recent merit decision. However, the Office found that, as appellant was not designated as the executrix of the employee's estate by an appropriate court until February 8, 2002, the reconsideration request was not appropriately made until February 8, 2002 and was, therefore, untimely.

Under the governing law of the state of Florida, "The powers of a personal representative, (an administratrix or executrix of an estate) relate back in time to give acts by the person appointed, occurring before appointment and beneficial to the estate, the same effect as those occurring after appointment."¹⁶ The Supreme Court of Florida has held that "whenever letter of administration or testamentary are granted they relate back to the intestate's or testator's death."¹⁷ Under the State law governing appellant's appointment as personal representative, the request for reconsideration would be considered timely. The Board finds that the October 7, 1998 request for reconsideration was timely filed. As the request for reconsideration was timely, the Office must consider the evidence submitted and determine whether it warrants review of the merits of the claim.

CONCLUSION

Appellant filed a timely request for reconsideration given the state law governing her appointment as "personal representative" of the employee's estate. As the Office considered the evidence submitted under an improper standard, the case must be remanded for the Office to evaluate the evidence submitted in support of the timely request for reconsideration and determine whether it warrants review of the merits of appellant's claim. After this and such other consideration as the Office deems necessary, the Office should issue an appropriate decision.

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

¹⁵ *Gregory Griffin*, *supra* note 5.

¹⁶ FLA. STAT. ANN. § 733.601 (West 2001).

¹⁷ *See Griffin v. Workman*, 73 So.2d 844, 846 (Fla. 1954).

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2003 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: March 18, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member