U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRUCE A. ESTRADA and DEPARTMENT OF THE NAVY, PUBLIC WORKS CENTER, San Francisco, Calif.

Docket No. 97-1671; Submitted on the Record;
Issued April 6, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

On May 16, 1995 appellant, a 70-year-old supervisory electrical engineer, filed a claim for benefits (Form CA-2) based on occupational disease, contending that he was exposed to and contaminated by poly chlorinated biphenyl (PCB) at the employing establishment. Appellant contended that this exposure resulted in incurable nerve damage in his feet and hands, prostate cancer, skin rashes on his face and scalp and damaged eyesight which required corrective surgery in both eyes. Appellant asserted that he became aware that these conditions were caused or aggravated by his employment on June 7, 1987. Appellant retired from federal employment on November 30, 1990.

The employing establishment submitted an investigative report, dated November 23, 1994, which revealed that on May 26, 1987, 13 to 20 PCBs were released from a junction box of a 2000 transformer, resulting in the immediate evacuation of all personnel at the employing establishment. The employing establishment conducted clean up efforts from May 27 to June 8, 1987 in order to contain all visible PCB oil from floors, walls and electrical panel surfaces. The employing establishment's naval environmental preventive medicine unit conducted an assessment and survey regarding the PCB incident, and concluded that appellant was a risk group IV worker; these were employees that were neither contaminated nor involved in any clean-up activities.

By letter dated July 10, 1995, the employing establishment controverted the claim.

By letters dated August 11 and October 20, 1995, the Office advised appellant that it required additional information regarding his claim. In its October 20, 1995 letter, the Office requested that appellant clarify which of his medical conditions were due to the PCB incident,

and requested a specific date as to when he first became aware that these medical conditions were related to the PCB incident. The Office also requested medical evidence in support of the claim, including a comprehensive medical report containing a rationalized medical opinion supporting appellant's belief that there was a causal relationship between the claimed conditions and the May 26, 1987 PCB incident, and explaining how appellant became aware that there was such a causal relationship. The Office requested such supplemental evidence for each condition which appellant believed was caused by the PCB incident.

In response, appellant's attorney submitted a December 20, 1995 letter to the Office, in which he stated that he had attached a November 25, 1995 medical report from Dr. K.M. Chen, a specialist in neurology and appellant's treating physician, and a December 20, 1995 affidavit from appellant. Dr. Chen stated in his report that appellant was a member of the clean-up team conducting operations at the power plant following the March 27, 1987 PCB incident. He opined that "[a]s the result of his exposure to PCB, [appellant] has come down over the years with the symptoms attributable to PCB poisoning." Dr. Chen reviewed appellant's medical history, discussed findings on examination and indicated that appellant had developed peripheral neuropathy and skin lesions due to his exposure to PCB. In his affidavit, appellant asserted that he believed he had sustained the conditions of peripheral neuropathy, skin lesions, and liver dysfunction,[1] and that he first became aware or realized that these medical conditions were related to the 1987 PCB incident on or about March 4, 1992, based on the motor nerve conduction study results interpreted by Dr. Chen.

By decision dated January 8, 1996, the Office denied appellant compensation for his various medical conditions, finding that he did not timely file a notice of injury pursuant to section 8122(a), (b)(2).[2] The Office stated that appellant initially was informed that his current medical conditions were causally related to his exposure to PCB at the employing establishment on March 4, 1992, according to his own affidavit, and that he did not file a claim under the Federal Employees' Compensation Act until May 5, 1995, more than the three years allowed for filing a latent claim pursuant to section 8122(b)(2). Therefore, the Office found, his claim was untimely.

In a letter dated April 3, 1996, appellant's attorney requested reconsideration of the Office's January 8, 1996 decision. Appellant's attorney asserted in this letter that appellant's failure to file a timely claim under section 8122(b)(2) should be waived pursuant to section 8122(d)(3), which permits the Secretary the discretion to excuse the failure to provide timely notice "on the grounds that such notice could not be given because of exceptional circumstances." Appellant's attorney apparently contended that appellant's participation in a class action lawsuit filed in federal court against the United States government constituted "exceptional circumstances", which warranted a waiver of section 8122(b)(2). Appellant's attorney also argued that section 8122(b)(2) should be waived because appellant missed the filing deadline of section 8122(b)(2) by only two months and because "no material prejudice"

[1] Dr. Chen indicated in his November 25, 1995 report that some patients exposed to PCB poisoning develop liver dysfunction; however, Dr. Chen advised that appellant's liver functions were within normal limits.

[2] 5 U.S.C. §§ 8122 (a), (b)(2).

resulted to the United States government as a result of appellant's failure to file a claim within the three-year time limitation.

By decision dated May 13, 1996, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[3] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[4] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[5]

In the present case, appellant failed to show in his April 3, 1996 letter that the Office erroneously applied or interpreted a point of law or fact not previously considered by the Office; nor did he advance a point of law not previously considered by the Office. Neither has he submitted relevant and pertinent evidence not previously considered by the Office. Further, appellant submitted no new and relevant evidence with the April 3, 1996 reconsideration request. Appellant's attorney conceded in his letter that appellant failed to comply with the provisions of section 8122(b)(2), and requested that the Office exercise its discretion to waive this failure due to the "exceptional circumstances" provision contained in section 8122 (d)(3). The Office did not abuse its discretion in denying the request for reconsideration, however, on the basis that appellant failed to submit new and relevant evidence regarding exceptional circumstances prevented him from filing a timely claim or demonstrate an error in fact or law. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

[3] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.138(b)(2).

[5] *See Eugene F. Butler*, 36 ECAB 393, 398 (1984).

The decision of the Office of Workers' Compensation Programs dated May 13, 1996 is affirmed.

Dated, Washington, D.C.
April 6, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member