

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FORREST F. BURRIS and DEPARTMENT OF THE NAVY,  
MILITARY SEALIFT COMMAND PACIFIC, Oakland, CA

*Docket No. 98-1383; Submitted on the Record;  
Issued December 3, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration on the merits under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act on the grounds that the application for review was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and that the application failed to present clear evidence of error.

On August 8, 1992 appellant, then a 74-year-old merchant marine, filed a notice of occupational disease and claim for compensation alleging that he developed kidney cancer as a result of asbestos exposure in his federal employment. The Office accepted that appellant was exposed to asbestos while employed with the federal government.

In support of his claim, appellant submitted hospitalization and employment records. A renal ultrasound dated June 22, 1991 revealed a solid 10 centimeter mass, upper pole, in appellant's right kidney. A cystoscopy, right radical nephrectomy was then performed on August 2, 1991, in which a diagnosis of adenocarcinoma of the right kidney was confirmed.

In a report dated March 20, 1992, Dr. Leonard A. Brant, a Board-certified urologist and appellant's treating physician, opined that there was a possibility of a relationship between appellant's asbestos exposure and his carcinoma even though the right kidney showed no evidence of asbestos during appellant's cystoscopy. Dr. Brant referenced two medical journal articles which he attached to his report.

By letter dated April 23, 1992, the Office referred appellant to Dr. James Clever, a Board-certified internist and oncologist, for a second opinion evaluation. In a report dated June 7, 1992, Dr. Clever stated that, based on the medical literature, it was possible but not probable that appellant's kidney cancer was caused by factors of his federal employment. He stated that "the likelihood [was] less than 50 [to] 50."

The Office also requested a second opinion evaluation by Dr. Wesley H. Jan, a physician who is Board-certified in nephrology. In an August 10, 1992 report, Dr. Jan acknowledged that

he could not completely discount the possibility of a causal relationship between appellant's asbestos exposure and his renal kidney cancer. He noted, however, that in appellant's case the possibility of a causal relationship was low given that appellant's occupational exposure to asbestosis was lower than that of the subjects cited in the medical journals who were considered to be at risk in developing cancer. Dr. Jan also noted in general that there was no proven association between asbestosis exposure and kidney cancer.

In a decision dated September 9, 1992, the Office denied appellant's claim for compensation on the grounds that the evidence was insufficient to establish a causal relationship between appellant's kidney cancer and factors of his federal employment.

On October 8, 1992 appellant filed a letter requesting reconsideration of his claim. His letter, however, raised no new legal arguments. Appellant also failed to provide new evidence.

In a decision dated November 10, 1992, the Office denied appellant's request for a merit review.

By letter dated July 7, 1997, appellant requested that the Office reopen his claim. He submitted copies of medical records, medical articles, and other employment documents that were already a part of the record. Appellant also submitted a printout of a payroll detail from "Seafarers Management Information System" dated April 1993.

In a decision dated September 29, 1997, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed and it failed to show clear evidence that the Office's final merit decision was erroneous.

The Board finds that the Office properly found that appellant's reconsideration request was not timely filed and that such request did not present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>1</sup> As appellant filed his appeal with the Board on March 12, 1998, the only decision properly before the Board is the Office's September 29, 1997 decision.

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>4</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary

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<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> 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 his own motion or on application."

authority under 5 U.S.C. § 8128(a).<sup>5</sup> As one such limitation, the Office has stated that it 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.<sup>6</sup> The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>7</sup>

In this case, appellant's request for reconsideration was dated July 7, 1997. Since this is more than one year after the Office's last merit decision on September 9, 1992, the request is untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that 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.<sup>8</sup> In accordance with Office procedures, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>11</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> 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.<sup>14</sup> 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

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<sup>5</sup> Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

<sup>6</sup> 20 C.F.R. § 10.138(b)(2).

<sup>7</sup> *See Leon D. Faidley, Jr.*, *supra* note 3.

<sup>8</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>10</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>11</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>12</sup> *See Jesus D. Sanchez*, *supra* note 3.

<sup>13</sup> *See Leona N. Travis*, *supra* note 11.

<sup>14</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

and raise a substantial question as to the correctness of the Office decision.<sup>15</sup> 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 merit review in the face of such evidence.<sup>16</sup>

In the instant case, the Office denied appellant's occupational disease claim because there was insufficient medical evidence of record to establish the causal relationship between appellant's kidney cancer and factors of his federal employment. In conjunction with his untimely reconsideration request, appellant has failed to raise any new legal arguments with respect to the Office's September 9, 1992 merit decision or submit any evidence clearly establishing error in the September 9, 1992 decision. All of the medical and employment records submitted by appellant were already of record. Moreover, the payroll information provided by appellant on reconsideration does not address the relevant issue in this case, which is whether appellant's kidney disease was causally related to his asbestosis exposure. The Board, therefore, concludes that appellant has failed to establish clear evidence of error on behalf of the Office in denying his claim.

The decision of the Office of Workers' Compensation Programs dated September 29, 1997 is hereby affirmed.

Dated, Washington, D.C.  
December 3, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>15</sup> *Leon D. Faidley, Jr.*, *supra* note 3.

<sup>16</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).