

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PETE VILORIA and DEPARTMENT OF THE NAVY, LONG BEACH
NAVAL SHIPYARD, Long Beach, Calif.

Docket No. 97-531; Submitted on the Record;
Issued January 8, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Worker's Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On December 13, 1982 appellant, then a sheet metal worker, filed a claim for an occupational disease (Form CA-2) assigned number A13-699700 alleging that in June 1974, he first realized that his asthma was employment related. Appellant stated that he was exposed to asbestos, paint fumes, fiberglass and smoke while working at the employing establishment. Appellant stopped work on March 12, 1979.¹

By letter dated June 14, 1984, the Office accepted appellant's claim for aggravation of childhood onset asthma.

On October 5, 1988 the Office issued a notice of proposed termination of compensation on the grounds that the medical evidence of record established that appellant no longer had any employment-related disability. By decision dated January 26, 1989, the Office terminated appellant's compensation effective February 12, 1989.

¹ Previously, on June 7, 1978, appellant filed a Form CA-2 assigned number A13-0585128 alleging that he first realized that he suffered from employment-related asbestosis on June 7, 1968. By decision dated March 21, 1980, the Office found the evidence of record insufficient to establish that appellant suffered from an asbestosis-related disease that was caused by his federal employment.

In a February 7, 1989 letter, appellant, through his counsel, requested reconsideration of the Office's decision noting that he had previously submitted medical evidence in response to the Office's January 9, 1989 letter advising him to submit medical evidence supportive of his contention that he remained disabled due to his hypertension and obesity which were caused by his asthma medications.² By decision dated August 17, 1989, the Office denied appellant's request for modification based on a merit review of the claim. In an accompanying memorandum, the Office found the medical evidence of record insufficient to establish that appellant was disabled due to his obesity and hypertension resulting from his asthma medications.

In a January 2, 1990 letter, appellant, through his counsel, requested reconsideration of the Office's decision. In a March 13, 1990 decision, the Office denied appellant's request for modification based on a merit review of the claim.

In a May 13, 1990 letter, appellant requested reconsideration of the Office's decision contending that his hypertension and obesity were causally related to his employment-related asthma. In a decision dated July 16, 1990, the Office denied appellant's request for modification based on a merit review of the claim.

Appellant appealed the Office's decision to the Board. In a December 6, 1991 decision, the Board affirmed the Office's finding that appellant no longer had any disability causally related to his employment-related aggravation of his preexisting asthma as of February 12, 1989. The Board found a conflict in the medical opinion evidence regarding the issue whether appellant's hypertension or obesity were causally related to the medications prescribed for the aggravation of his asthma. Accordingly, the Board vacated the Office's decision and remanded the case to the Office.³

In a June 11, 1992 letter, the Office accepted appellant's claim for permanent aggravation of hypertension and temporary aggravation of obesity.

By decision dated November 20, 1992, the Office found that while the evidence of record established a permanent aggravation of hypertension and a temporary aggravation of obesity, appellant's disability from the customary employment after April 23, 1990 was related to the underlying condition and not to any work-related condition. In an accompanying memorandum, the Office found that appellant was still entitled to medical benefits for the aggravation of his hypertension.

In a November 30, 1992 letter, appellant requested reconsideration of the Office's decision. By decision dated January 4, 1993, the Office denied appellant's request for modification based on a merit review of the claim.

In a September 4, 1996 letter, appellant, through his counsel, requested reconsideration of the Office's decision. By decision dated September 11, 1996, the Office denied appellant's

² The record reveals that appellant submitted a January 21, 1989 medical report of Dr. Deo Martinez, a Board-certified internist, indicating that his hypertension and obesity were caused by his asthma medications.

³ Docket No. 90-1675 (issued December 6, 1991).

request for reconsideration on the grounds that it was untimely filed and that it did not establish 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.⁴ Inasmuch as appellant filed his appeal with the Board on November 12, 1996, the only decision properly before the Board is the Office's September 11, 1996 decision denying appellant's request for a review of the merits of its prior decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁵ (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent 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 When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁸

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. 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.⁹ 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 section 8128(a).¹⁰

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹¹ The Office issued its last merit decision in this case on January 4, 1993 wherein it denied appellant's request for modification of its November 20, 1992 decision finding that appellant no longer had any disability from his customary employment after April 23, 1990 due to employment-related aggravation of his

⁴ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Thankamma Mathews*, 44 ECAB 788 (1993); 20 C.F.R. § 101.38(b)(1)-(2).

⁷ 20 C.F.R. § 10.138(b)(2).

⁸ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁹ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); 20 C.F.R. § 10.138(b)(2).

¹⁰ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

¹¹ *Larry L. Lilton*, 44 ECAB 243 (1992).

hypertension and obesity. Inasmuch as appellant's September 4, 1996 request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed.

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.¹² Office procedures state that 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.¹³

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁴ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁵ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁷

In support of his request for reconsideration, appellant submitted an August 22, 1996 medical report of Dr. Leslie M. Stricke, a Board-certified internist. In this report, Dr. Stricke provided a history of appellant's medical treatment and employment with the employing establishment, and a review of medical records. Dr. Stricke opined that:

“[Appellant's] exposure to the dusty environment in the setting in which he worked clearly appears to have aggravated his symptoms of wheezing and asthma and very likely contributed to his increased episodes of allergic rhinitis. Despite a past history of smoking, there was no evidence of hyperinflation to suggest emphysema from smoking which would suggest that his symptoms were in large part related to an exogenous source such as the environment where he was exposed to a great deal of dust and very likely other irritants from the environment.

The exact nature of these are not clear but the removal and installation of ventilation equipment very likely could have added a whole host of exacerbating factors to his asthma. The interstitial lung disease may have been contributed to by the asbestos exposure at work and this

¹² *Gregory Griffin, supra* note 9.

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3b (January 1990) (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). *Thankamma Mathews, supra* note 6; *Jesus D. Sanchez, supra* note 10.

¹⁴ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁵ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁶ *Jesus D. Sanchez, supra* note 10.

¹⁷ *Leona N. Travis, supra* note 15.

certainly may not be a reversible factor and contribute to persistent shortness of breath. Pleural thickening may also have been contributed to by the asbestos exposure.

This would suggest that part of his lung disease may have been a permanent affliction although I have not seen him in follow up since December 1992.”

The Board has held that medical opinions which are speculative are of limited probative value.¹⁸ Because Dr. Stricke’s medical report is couched in speculative terms regarding whether appellant’s interstitial lung disease “may have been” a permanent disability, it is of diminished probative value and is insufficient to establish continued disability causally related to the employment-related aggravation of appellant’s childhood asthma. Further, Dr. Stricke’s medical report failed to address whether appellant was disabled from performing his usual work duties as a sheet metal worker due to the employment-related aggravation of his hypertension and obesity. Therefore, appellant has failed to establish that he is totally disabled from work due to the employment-related aggravation of his hypertension and obesity.

Inasmuch as the evidence submitted by appellant in support of his request for reconsideration report does not manifest on its face that the Office committed error in the September 11, 1996 decision, the Office did not abuse its discretion by refusing to reopen appellant’s case for merit review under section 8128(a) of the Act on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The September 11, 1996 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
January 8, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

¹⁸ See *Jennifer Beville*, 33 ECAB 1970 (1982); *Leonard J. O’Keefe*, 14 ECAB 42 (1962).