U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUFINO A. SOLOMON and DEPARTMENT OF THE ARMY, CONSTRUCTION CORP OF THE PHILIPPINES, Samar, Philippines

Docket No. 98-132; Submitted on the Record;
Issued July 1, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs refusal to reopen appellant's case for reconsideration on the basis that appellant's May 4, 1995 request for reconsideration was not timely filed within the one-year limitation set forth in 20 C.F.R. § 10.138(b)(2) and did not present clear evidence of error, constituted an abuse of discretion.

On May 27, 1991 appellant filed a notice of traumatic injury alleging that on September 14, 1946 he suffered an injury when a building collapsed and he was struck by a pole in the chest in the course of his federal employment.

Appellant subsequently submitted documents indicating that he and coworker, Simeon A. Naoe, were honorably discharged from the employing establishment in 1946.

Appellant also submitted a July 22, 1987 letter indicating that he was injured on September 14, 1946, but that the employing establishment failed to give him a physical examination prior to his discharge. Appellant urged that if the employing establishment would have provided the examination as it was required to do then it would have had knowledge of his injury.

Mr. Naoe provided an affidavit on June 9, 1987 indicating that he witnessed appellant's alleged injury.

By decision dated March 30, 1992, the Office rejected appellant's claim because it was not timely filed. In an accompanying memorandum, the Office noted that for injuries occurring between December 7, 1940 and September 6, 1974, 5 U.S.C. § 8119 provides that written notice should be given within 48 hours. The Office noted that this requirement could be waived if the employee filed notice within one year of the date of injury, or if the immediate supervisor had actual knowledge of the injury within 48 hours. The Office further noted that the one-year requirement could be waived if the claim was filed within five years of the date of injury. The

Office noted that the injury occurred on September 14, 1946. It further indicated that appellant did not file his claim within five years of his injury and that the record was devoid of any evidence establishing that appellant's immediate supervisor had actual knowledge of the injury within 48 hours of the injury. It therefore denied appellant's claim for monetary compensation and medical benefits.

On April 27, 1992 appellant requested an oral hearing which the Office denied as untimely in decisions dated March 12 and June 29, 1993. Following appellant's appeal, the Board affirmed the Office's decision denying the hearing request as untimely.[1]

On May 4, 1995 appellant requested reconsideration of the Office's June 29, 1993 decision which denied his request for a hearing as untimely. In support of his request, appellant resubmitted his notice of traumatic injury, the honorable discharges both he and Mr. Naoe received from the employing establishment in 1946, Mr. Naoe's June 9, 1987 affidavit indicating that he witnessed appellant's injury and his July 22, 1987 letter indicating that he was injured on September 14, 1946, but that the employing establishment failed to give him a physical examination prior to his discharge. Appellant also submitted a joint affidavit signed by Mr. Naoe and himself which indicated that appellant was injured on September 14, 1946 and discharged without the required physical examination which would have revealed his injury to his supervisor.

By decision dated August 7, 1997, the Office denied appellant's request for reconsideration pursuant to 20 C.F.R. § 10.138(b)(2) because it was not filed within one year of its April 3, 1995 decision. The Office further found that pursuant to 20 C.F.R. § 10.138(a) appellant failed to present clear evidence of error.

The Board has duly considered the case record and concludes that the Office properly refused to reopen appellant's claim for further reconsideration of the merits in its August 7, 1997 decision under 5 U.S.C. § 8128(a) on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b) and that the application failed to present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation and states in relevant part:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may --
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> (1) end, decrease, or increase the compensation previously awarded; or
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> (2) award compensation previously refused or discontinued."

[1] *Rufino A. Solomon*, Docket No. 93-2309 (April 3, 1995) (unpublished).

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that the Office will not review, … "a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision." 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).[2]

On May 4, 1995 appellant requested reconsideration. The most recent decision on the merits prior to appellant's request was the Office's March 30, 1992 decision. The one-year limitation period, therefore, began to run on March 31, 1992 and appellant's May 13, 1996 request for reconsideration was clearly untimely.[3]

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[4] 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.[5]

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

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[2] *Mamie L. Morgan*, 47 ECAB __ (Docket No. 94-610, issued January 22, 1996).

[3] *Larry J. Lilton*, 44 ECAB 243 (1992). With regard to when the one-year limitation period begins to run, the Office's Procedure Manual provides:

> "The one-year [limitation] period begins on the date of the original [Office] decision…."

[4] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991), states:

> "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in the medical opinion requiring further development, is not clear evidence of error and would not require a review of the case.…"

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. 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.[6]

The Board finds that the evidence submitted in support of appellant's untimely May 4, 1995 request for reconsideration fails to establish clear evidence of error. The Office denied appellant's claim as untimely. Appellant alleged that he sustained his injury on September 14, 1946, yet he filed his claim on May 27, 1991. The Act[7] requires in cases of injury prior to September 7, 1974 that a claim for compensation be filed within one year of the date that the claimant was aware or reasonably should have been aware that the condition may have been caused by the employment factors. The one-year filing requirement may be waived if the claim is filed within five years and: (1) it is found that such failure was due to the circumstances beyond the control of the person claiming benefits; or (2) that such person has shown sufficient cause or reason in explanation thereof, and material prejudice to the interest of the United States has not resulted from such failure.[8] The evidence on reconsideration, however, fails to address whether appellant filed his claim within five years of the date of injury. In addition, for injuries occurring between December 7, 1940 and September 6, 1974, the Office procedure manual indicated that written notice of the injury should be given within 48 hours as specified in section 8119 of the Act, but that this requirement would be automatically waived if the immediate supervisor had actual knowledge of the injury within 48 hours after its occurrence.[9] The evidence on reconsideration fails to indicate that appellant's supervisor had actual knowledge of the injury within 48 hours after its occurrence. Appellant, therefore, failed to establish that he filed a timely claim for compensation for his September 14, 1946 alleged injury.

Accordingly, the evidence submitted in support of appellant's untimely request for reconsideration does not raise a substantial question as to the correctness of the Office's decision rejecting appellant's claim. As appellant's untimely request for reconsideration failed to demonstrate clear evidence of error, the Board finds that the Office properly denied appellant's request for reconsideration.

[6] *Thankamma Mathews*, 44 ECAB 765 (1993).

[7] 5 U.S.C. §§ 8101-8193.

[8] *Edward Lewis Maslowski*, 42 ECAB 839 (1991).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2.801.7 (September 1990).

The decision of the Office of Workers' Compensation Programs dated August 7, 1997 is affirmed.

Dated, Washington, D.C.
July 1, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member