U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERRY D. RAGAN, claiming as widow of RONALD D. RAGAN and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Palmdale, CA

Docket No. 97-2715; Submitted on the Record;
Issued September 16, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs' denial of merit review in relation to appellant's request for reconsideration pursuant to section 8128 of the Federal Employees' Compensation Act constituted an abuse of discretion; and (2) whether the Office properly denied appellant's March 5, 1997 request for reconsideration on the grounds that it was untimely and lacking clear evidence of error.

On April 23, 1995 appellant, the employee's widow, filed a claim for death benefits. She indicated on her claim form that the cause of the employee's death was inhalation of toxic chemicals causing chronic obstructive pulmonary disease.[1] Appellant noted that the death certificate dated May 5, 1995 was signed by Dr. Sherwin Levin, appellant's treating physician and a Board-certified internist. Dr. Levin indicated that the immediate cause of death was metastatic melanoma and under other significant causes he listed chronic obstructive pulmonary disease and noted a prior excision of melanoma on March 10, 1993. In a decision dated August 21, 1995, the Office denied appellant's claim for death benefits on the grounds that the evidence of record did not establish that the employee's death was causally related to his accepted September 2, 1988 employment injury. In a merit decision dated September 13, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to establish that modification of the prior decision was warranted. In decisions dated November 28, 1995, July 19 and November 15, 1996, the Office denied appellant's requests for reconsideration on the grounds that the evidence submitted was not sufficient to warrant reopening the record for merit review. By decision dated May 21, 1997, the Office denied appellant's fifth request for reconsideration on the grounds that it was not timely filed and did not present clear evidence of error.

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[1] The employee, Ronald D. Ragan was a 50-year-old quality assurance specialist. He filed an occupational disease claim on April 11, 1994 for chronic obstructive pulmonary disease and stopped work December 10, 1993. The Office accepted the employee's claim for aggravation of preexisting asthma.

The Board has duly reviewed the entire case record on appeal and finds that the Office properly denied appellant's request for reconsideration dated November 14, 1996.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of her claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. 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 requirements, the Office will deny the application for review without reviewing the merits of the claim.[2] 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.[3] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[4]

In the present case, with appellant's request for reconsideration dated November 14, 1996, she submitted a complete copy of all of the medical records for the employee. Although some of these reports were relevant to the acceptance of the employee's occupational disease claim for disability, most of the records were immaterial as the reports do not relate the employee's death to his accepted employment injury. In addition, the record contains the medical diagnosis and treatment regimen for the employee's prior melanoma which was excised in March 1993. While this evidence may be relevant to the cause of the employee's death, it does not establish a causal nexus between that melanoma and the employee's accepted injury, aggravation of his preexisting asthma or factors of his federal employment. The medical evidence submitted with the November 1996 request for reconsideration is either not relevant to the present issue on appeal, *i.e.*, whether the employee's death was related to his accepted employment injury or is repetitive of medical evidence in the record that was previously reviewed by the Office. Therefore, appellant has not submitted evidence which is sufficient to warrant merit review of the prior decisions.

The Board also finds that the Office properly denied appellant's March 5, 1997 request for reconsideration on the grounds that her request for reconsideration was untimely and lacking clear evidence of error.

Under section 8128(a) of the Act,[5] the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) of the implementing federal regulations[6] which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "the Office

[2] 20 C.F.R. § 10.138(b)(2).

[3] *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[4] *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[5] 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.138(b).

will not review … a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision."[7] In *Leon D. Faidley, Jr.*,[8] the Board held that the imposition of the one-year time limitation period for filing an application for review was not an abuse of discretionary authority granted the Office under section 8128(a) of the Act.

With regard to when the one-year time limitation period begins to run, the Office's Procedure Manual provides:

> "The one-year [time limitation] period for requesting reconsideration begins on the date of the original [Office] decision. However, a right to reconsideration within the one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written decision, any denial of modification following reconsideration, and decision by the Employees' Compensation Appeals Board, but does not include prerecoupment hearing/review decisions."[9]

The Office properly determined that appellant's March 5, 1997 request for reconsideration was not timely as it issued its last "decision denying or terminating a benefit," *i.e.*, a merit decision, on September 13, 1995. The March 5, 1997 request for reconsideration was received outside of the one-year time period for requesting reconsideration. Although appellant filed four timely requests for reconsideration, the last three requests did not contain evidence which was sufficient to warrant reopening the record. Thus, the last decision on the merits of her claim was dated September 13, 1995, and the Office properly found that appellant filed an untimely application for review.

However, the Office may not deny an application for review based solely on the grounds that the application was not timely filed. For proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which is decided by the Office.[11] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to

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[7] 20 C.F.R. § 10.138(b)(2).

[8] 41 ECAB 104 (1989).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602(3)(a) (May 1991).

[10] *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[11] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[12] *Leona N. Travis*, 43 ECAB 227 (1991).

establish clear evidence of error.[13] It is not enough to show that the evidence could be construed so as to produce a contrary conclusion.[14] This entails a limited review by the Office of how the evidence submitted with the request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[15] To show clear evidence of error, however, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish 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 fundamental question as to the correctness of the Office decision.[16] 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.[17]

In the present case, appellant argues that the accepted employment injury of aggravation of preexisting asthma was not a proper characterization of the employee's medical condition and urges that the diagnosis of melanoma was also inappropriate. She indicates that a review of the medical record reveals that the employee had a definitive melanoma excision performed in September 1990 and was cleared of melanoma in July 1994. Appellant believes that melanoma "came into play only because that was a malignant cancer and the doctors treating him did not know about all the toxic exposures." Appellant submitted a report dated November 16, 1992 by Dr. Matthew F. Margulies who indicated that neurotoxicity was not ruled out given the employee's long term exposure to polyurethane paint. This evidence is not relevant to the cause of the employee's death and does not address whether there was any causal relationship between his death and the accepted employment injury or factors of his federal employment. Therefore, appellant has not established clear evidence of error, and the Office properly denied her untimely request for reconsideration.

[13] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[14] *See Leona N. Travis, supra* note 12.

[15] *Nelson T. Thompson*, 43 ECAB 919 (1992).

[16] *Leon Faidley, Jr., supra* note 8.

[17] *Gregory Griffin supra* note 10.

The decisions of the Office of Workers' Compensation Programs dated May 21, 1997 and November 15, 1996 are hereby affirmed.

Dated, Washington, D.C.
September 16, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member