U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD J. HENDRICKSON and DEPARTMENT OF THE AIR FORCE, BEALE AIR FORCE BASE, CA

Docket No. 97-2892; Submitted on the Record;
Issued January 18, 2000

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

This case has previously been before the Board on appeal. By decision dated December 23, 1991, the Board found that the reports of Dr. Marc B. Schenker, an impartial medical specialist, resolving a conflict of medical opinion, were sufficient to meet the Office's burden of proof to establish that appellant had no employment-related residuals of his exposure to pesticides after April 4, 1986.[1] On March 6, 1992 the Board issued an order denying appellant's petition for reconsideration.

By decision dated May 13, 1992, the Office found appellant's March 25, 1992 request for reconsideration insufficient to warrant review of its prior decisions on the basis that no new evidence was submitted and the issues raised were previously reviewed. By decision dated September 30, 1992, the Office found appellant's July 1, 1992 request for reconsideration insufficient to warrant review of its prior decisions on the basis that no new evidence was submitted. By decision dated August 18, 1994, the Office found that appellant's July 11, 1994 request for reconsideration was not timely filed and did not demonstrate clear evidence of error. On October 24, 1994 appellant filed an appeal with the Board. By decision dated July 23, 1996, the Board dismissed appellant's appeal on the basis that appellant had requested that the case be returned to the Office so that new medical evidence he submitted to the Board could be reviewed by the Office.[2]

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[1] Docket No. 91-608.

[2] Docket No. 95-539.

By undated letter received by the Office on November 12, 1996, appellant submitted a medical report dated November 9, 1995 from Dr. Stephen A. McCurdy, who is Board-certified in internal medicine and in preventive medicine. Appellant asked what his next move was. By letter dated November 22, 1996, the Office advised appellant that the report from Dr. McCurdy was insufficient to establish a conflict of medical opinion with the opinion of the impartial medical specialist, Dr. Schenker, and that his claim remained denied. By letter dated January 7, 1997, the Office advised appellant that his claim for pesticide exposure remained closed and that "no further action will be taken unless you submit detailed medical evidence/opinion that both acknowledges Dr. Schenker's November 1986 report and opinion and is sufficiently rationalized to create a conflict with his conclusions."

By letter dated May 11, 1997, appellant requested reconsideration. By decision dated June 17, 1997, the Office found that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The only Office decision before the Board on this appeal is the Office's June 17, 1997 decision denying appellant's request for reconsideration on the basis that it was not filed within the one-year time limit set forth by 20 C.F.R. § 10.138(b)(2), and that it did not present clear evidence of error. Since no decision on the merits of appellant's claim has been issued since the Board's December 23, 1991 decision, the Board lacks jurisdiction to review the merits of appellant's claim.[3]

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:

> "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 awarded; or
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> '(2) award compensation previously refused or discontinued.'"

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).[4]

[3] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

[4] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

In the present case, the most recent merit decision was issued by the Board on December 23, 1991, which denied appellant's petition for reconsideration on March 6, 1992. Appellant had one year from the date of this decision to request reconsideration, and requested reconsideration on March 25 and July1, 1992. The Office issued decisions on these requests on May 13 and September 30, 1992. As these decisions were not reviews of the merits of appellant's claim, they did not renew the one-year time limitation for requesting reconsideration.[5] The Office properly determined that appellant's application for review dated May 11, 1997 was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2).

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.[6] 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.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[8] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[9] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[10] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[11] This entails a limited review by the Office of

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[5] *Naomi L. Rhodes*, 43 ECAB 645 (1992).

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

[7] 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 a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."

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

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

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

[11] *See Leona N. Travis*, *supra* note 9.

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.[12] 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 and raise a substantial question as to the correctness of the Office decision.[13] 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 on the face of such evidence.[14]

The Board finds that appellant has not established clear evidence of error.

With his May 11, 1997 request for reconsideration, appellant submitted an October 3, 1989 statement from the employing establishment that an occupational illness/injury report completed on August 9, 1984 for building 440 did not exist and an August 9, 1984 employing establishment investigation of appellant's working environment and conditions. As appellant's compensation was terminated on the basis that the weight of the medical evidence showed he had no employment-related residuals, the evidence appellant submitted with his May 11, 1997 request for reconsideration cannot show clear evidence of error. The November 9, 1995 report from Dr. McCurdy also does not show clear evidence of error. In this report, Dr. McCurdy noted that appellant indicated his symptoms were temporarily related to his exposures at the employing establishment; he concluded, "Although I consider it possible that his symptom complex is causally related to his exposures, the absence of information characterizing these exposures make it impossible to implicate the exposures with any certainty." This evidence is not precise, positive and explicit regarding the determinative issue of causal relation, and is not of sufficient 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 decision.

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

[13] *Leon D. Faidley, Jr.*, *supra* note 4.

[14] *Gregory Griffin*, *supra* note 6.

The decision of the Office of Workers' Compensation Programs dated June 17, 1997 is affirmed.

Dated, Washington, D.C.
January 18, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member