U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BROOK L. BEESLEY and DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Alameda, CA

Docket No. 00-905; Submitted on the Record;
Issued May 3, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, PRISCILLA ANNE SCHWAB

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

The Board has duly reviewed the case record and finds that the Office acted within its discretion in denying appellant's request for review.

The only decision before the Board in this appeal is the Office's decision dated September 1, 1999 denying appellant's application for review. As more than one year elapsed between the date of the Office's most recent merit decision issued on June 19, 1998 and the date of appellant's appeal, November 29, 1999, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's regulations provide that an application for reconsideration must set forth arguments that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[3] 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

[1] 20 C.F.R. § 501.3(d)(3). By letter dated December 27, 2000, appellant was asked to inform the Board by January 11, 2001 if he wanted oral argument in this case. As no response was received, the Board has decided the case on the record.

[2] 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." 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b).

consideration under section 8128(a) of the Act.[4] To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[5]

On May 6, 1997 appellant, then a 37-year-old firefighter, filed an occupational disease claim noting the nature of his illness as: "long-term unprotected potential toxic exposures to officially identified 'probable human carcinogens.'"[6]

By letter dated June 10, 1997, the Office advised appellant that he had not submitted a detailed statement regarding his claimed exposure to harmful toxic elements. The Office requested that appellant submit medical evidence within 21 days of the date of the letter to establish that a medical condition resulted from his exposure to harmful toxic elements.

By letter dated July 9, 1997, appellant submitted a narrative report summarizing his exposure to toxic materials and noting his medical conditions as a "skin condition and elevated liver function blood tests (LFT), past and present."

By letter dated July 28, 1997, the Office notified appellant to submit a medical report that included a definite diagnosis of his polychlorinated biphenyl (PCB) condition, prognosis, treatment plan and statement regarding the relationship between his condition and factors of his employment.

In a report dated July 30, 1997, Dr. Michael R. Lozano, appellant's treating physician and Board-certified in internal medicine and in occupational medicine, initially treated appellant in March 1997, when he reviewed appellant's liver enzymes tests which revealed mild elevation. Dr. Lozano noted that subsequent hepatitis A, B and C studies as well as a liver ultrasound were normal. Appellant's serum PCB level was also "found to be within normal limits." Dr. Lozano opined that "a definite etiology of the liver function elevation cannot be stated at this time." He added that appellant was asymptomatic and had no evidence of chloracne, an acne-like skin disorder caused by prolonged exposure to chlorinated hydrocarbons. Although, appellant's documentation established exposure to PCBs and dioxins at the work site, Dr. Lozano noted: "The significance of the long-term exposure is what is in question."

By decision dated August 22, 1997, the Office rejected appellant's claim finding that the evidence failed to establish that the claimed medical conditions were causally related to appellant's employment.

By letter dated September 20, 1997, appellant requested an oral hearing.

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[4] *Carol Cherry*, 47 ECAB 658 (1996).

[5] 20 C.F.R. § 10.607.

[6] In a letter dated May 6, 1997, the employing establishment stated that appellant waited "until the agency was being disestablished to present this claim." The employing establishment noted that correspondence should be forwarded to the Naval Aviation Depot, North Island, San Diego, CA, using a new coded address for the Naval Air Station, Alameda.

A hearing at which appellant testified was held on April 13, 1998.

By decision issued on July 19, 1998, the hearing representative affirmed the Office's August 22, 1997 decision that appellant failed to establish that he sustained a work-related injury. The hearing representative found that, although appellant was exposed to hazardous materials during his employment, he had not established that he had sustained a medical illness or compensable condition as a result of such exposure.

By letter dated June 15, 1999, appellant requested reconsideration and submitted a March 29, 1999 letter from the Office of Special Counsel, noting that it had transmitted appellant's allegations of unlawful exposure by the employing establishment from 1989 to 1993 to the Secretary of the Navy.

By decision dated September 1, 1999, the Office denied appellant's request on the grounds that the evidence submitted in support was irrelevant and immaterial and therefore insufficient to warrant a merit review.

In this case, appellant submitted additional evidence in support of his request for reconsideration. However, the letter from the Office of Special Counsel is not medical evidence that would establish that appellant's occupational exposure to hazardous materials resulted in a medical condition. Nor did this letter establish that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office. Consequently, the evidence submitted by appellant did not meet the requirements at section 10.606. For these reasons, the Office's refusal to reopen the case for a merit review did not constitute an abuse of discretion.

The September 1, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 3, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member