U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARRY B. BERNTSEN and DEPARTMENT OF THE ARMY, MADIGAN MEDICAL CENTER, Fort Lewis, WA

Docket No. 02-1702; Submitted on the Record;
Issued December 6, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

Appellant, then a 46-year-old laundry worker, filed a claim for occupational disease on October 23, 1995, alleging that his exposure to smoke, fumes and lint at work caused respiratory problems. On March 12, 1996 the Office asked appellant to submit further information and medical evidence supporting his claim.

Appellant submitted the May 22, 1996 report of Dr. Erik R. Swenson, Board-certified in internal medicine, who concluded that appellant had developed a significant asthmatic condition which was aggravated and maintained by workplace exposures. Dr. Swenson could not identify a single causative factor among the dusts and fumes which appellant had inhaled, but stated that appellant's asthmatic state persisted after being removed from the environment.[1]

The Office referred appellant for a second opinion evaluation to Dr. W. Harry Lawson, Board-certified in pulmonary medicine. Based on his July 30, 1996 report, the Office denied appellant's claim on August 29, 1996.[2] The Office accepted that appellant sustained a temporary mild asthmatic bronchitis that resolved no later than October 1995 when appellant was placed in a different job by the employing establishment. The Office found that appellant had no disability and that his current pulmonary residuals were related to his exogenous obesity and chronic atrial fibrillation.

By letter dated October 12, 1998, appellant's attorney informed the Office that he would like to review the file to determine the status of appellant's case. He repeated this request on

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[1] Appellant's position was abolished as of July 19, 1996 due to a reduction-in-force.

[2] On September 10, 1996 appellant signed a medical release form and informed the Office that he had retained an attorney.

February 18, 2000. On June 22, 2001 the attorney requested reconsideration and submitted three letters from Dr. Jan V. Hirschmann, Board-certified in internal medicine.

On September 18, 2001 the Office denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error. The Office noted that the record contained no evidence of a conflict in medical opinion between Drs. Swenson and Lawson because both agreed that appellant's asthmatic condition was related to workplace exposure.

The Board finds that the Office acted within its discretion in denying appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[3] 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
>
> (2) award compensation previously refused or discontinued."[4]

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).[5] This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[6]

In this case, the letter from appellant's attorney requesting merit review of his case was dated June 22, 2001, almost five years after the Office's August 29, 1996 decision, and was, therefore, untimely.

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent

[3] 5 U.S.C. §§ 8101-93.

[4] 5 U.S.C. § 8128(a).

[5] *Diane Matchem*, 48 ECAB 532, 533 (1997), citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[6] 20 C.F.R. § 10.607(a).

merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[8] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[9] Evidence that 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. Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.[11]

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but also 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]

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.[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 a merit review in the face of such evidence.[14]

In this case, appellant submitted reports dated January 28, 1997, June 30, 1998 and February 1, 2001 from Dr. Hirschmann. He reported a history of dyspnea from 1993 that worsened during 1994 because of exposure to fumes and lint. Dr. Hirschmann stated that appellant's problem was permanent, based on the persistence of his symptoms since he left the laundry environment and subsequent pulmonary function studies. Dr. Hirschmann also criticized Dr. Lawson's evaluation, pointing out that Dr. Lawson relied on normal pulmonary testing results but that appellant had had other tests that showed decreased values on several occasions.

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[7] 20 C.F.R. § 10.607(b).

[8] *Nancy Marcano*, 50 ECAB 110, 114 (1998).

[9] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[10] *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

[11] *Annie Billingsley*, 50 ECAB 210, 212, n. 12 (1998); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c. (June 2002).

[12] *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

[13] *Jimmy L. Day*, 48 ECAB 654, 656 (1997).

[14] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

While Dr. Hirschmann's conclusion that appellant's respiratory disease is permanent conflicts with the opinion of Dr. Lawson that the aggravation was temporary, the Board has long held that a subsequent conflict of medical opinion between physicians cannot establish clear error on the part of the Office in its prior decision.[15] The Office based its August 29, 1996 decision on medical evidence that indicated a temporary, nondisabling aggravation of appellant's respiratory condition. Dr. Hirschmann's January 28, 1997 report merely disagrees with the conclusion of Dr. Lawson -- it does not demonstrate a *prima facie* case that appellant's ongoing respiratory problems are still related to his workplace exposure, which ended in October 1995 when he was moved to a different job.[16]

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review.

The September 18, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
December 6, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[15] *See Fidel E. Perez*, 48 ECAB 663, 665 (1997) (finding that a conflict in the medical opinion evidence does not establish that the Office's prior decision was erroneous because in such cases the weight of the evidence rests with neither side).

[16] The Board notes that Dr. Hirschmann's 1997 report, if submitted within a year of the August 29, 1996 decision with a request for reconsideration, could have created a conflict in the medical opinion evidence sufficient to require the Office to refer appellant to an impartial medical examiner, as appellant's attorney argues on appeal.