

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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

*Docket No. 02-1707; Submitted on the Record;  
Issued November 15, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's March 7, 2000 request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

The Board has issued decisions in this case on two prior occasions. By decision and order dated December 23, 1991, the Board found that the weight of the medical evidence, represented by the report of an impartial medical specialist resolving a conflict of medical evidence, established that appellant had a temporary aggravation of allergic rhinitis but that he did not have any employment-related residuals after April 4, 1986 when he stopped work at the employing establishment.<sup>1</sup> By order dated March 6, 1992, the Board denied appellant's petition for reconsideration.

The Office found appellant's subsequent requests for reconsideration insufficient to warrant review by decisions dated May 13 and September 30, 1992. 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 present clear evidence of error. Appellant appealed this decision to the Board, which, by order dated July 23, 1996, dismissed his appeal to allow appellant to submit new medical evidence to the Office.<sup>2</sup>

By decision dated July 17, 1997, the Office found that appellant's May 11, 1997 request for reconsideration was not timely filed and did not show clear evidence of error. Appellant appealed this decision to the Board, which affirmed the Office's decision by a January 18, 2000 decision and order.<sup>3</sup>

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<sup>1</sup> Docket No. 91-608.

<sup>2</sup> Docket No. 95-539.

<sup>3</sup> Docket No. 97-2892.

By letter dated March 7, 2000, appellant requested reconsideration. He submitted documents showing that soil contaminated with pesticides would be removed from an area near the building in which he worked at the employing establishment and two new medical reports.

In a report dated February 7, 2000, Dr. Preminder J.S. Bhatia, a Board-certified neurologist, stated:

“I am following [appellant] for peripheral neuropathy and lumbar disc disease. He experiences pain and cramps in his legs, numbness and pain in both feet.

“A direct correlation can be drawn to [appellant’s] toxic exposure to pesticides, *i.e.* DDD, DDE, DDT and his medical condition because the side effects of these pesticides are peripheral neuropathy, pain and numbness in extremities.”

In a report dated August 2, 2000 addressed to the Office, Dr. Bill Falzett, a psychologist, stated:

“I have been asked by [appellant] to respond to your letter of January 3, 2000 with reference to my opinion on the causal relationship between current psychiatric diagnosis and specific factors of past federal employment. As you know, I cannot categorically confirm a direct relationship. I can offer, however, that based on my experience, [appellant’s] current symptoms can be related to what he describes as exposure to toxic chemicals. His symptoms are characteristic of cognitive and affective impairment due to head trauma, PTSD [post-traumatic stress disorder] and/or toxic states. In addition, his symptoms preclude employment at this time and warrant medical and psychological treatment. I believe that his symptoms are the result of exposure to chemicals as described at this workplace at [the employing establishment].

“The stresses of his attempts to get help and attention for the conditions of his injuries have further exacerbated an already difficult situation for him. [Appellant] appears to have been a productive, hard working individual prior to his exposure. By his report, he had no previous psychiatric history. He presents himself as sincere, motivated to return to gainful employment and ready to follow medical/psychological treatments which will improve his condition.”

By decision dated December 17, 2001, the Office found that appellant’s request for reconsideration was not timely filed and did not present clear evidence of error.

The Board finds that appellant’s August 10, 2001 request for reconsideration was not filed within the one-year time limit set forth at 20 C.F.R. § 10.607(a).

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 --

- (1) end, decrease or increase the compensation awarded; or
- (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. § 10.607(a) provides that “An application for reconsideration must be sent within one year of the date of the [Office] decision for which review is sought.” 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).<sup>4</sup>

The most recent merit decision in appellant's case was the Board's decision and order dated December 23, 1991. The Office properly determined that appellant's application for review filed on August 10, 2001 was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

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.<sup>5</sup> 20 C.F.R. § 607(b) provides: “[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.”

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>6</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>7</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>8</sup> It is not enough merely to show that the evidence could be construed so

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<sup>4</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>6</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>7</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>8</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

as to produce a contrary conclusion.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

The Board finds that the evidence submitted with appellant's August 10, 2001 request for reconsideration did not demonstrate clear evidence of error.

The documents showing that soil contaminated with pesticides removed from an area near the building in which he worked at the employing establishment indicate a higher level of pesticides in the soil than previously established, but this does not demonstrate error in the Office's determination that the weight of the medical evidence established that appellant's employment-related condition ended by April 4, 1986. Neither of the new medical reports submitted by appellant contain a history of appellant's specific exposures at the employing establishment and both these reports are speculative and unrationalized with regard to causal relation. Dr. Falzett's citation of the stress of attempting to gain treatment and compensation for his conditions as one of the factors causing his psychiatric condition does not raise a compensable factor.<sup>13</sup> As pointed out above, even if these reports were sufficient to create a conflict of medical opinion, they would not demonstrate clear evidence of error.

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<sup>9</sup> See *Leona N. Travis*, *supra* note 7.

<sup>10</sup> *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>11</sup> *Leon D. Faidley, Jr.*, *supra* note 4.

<sup>12</sup> *Gregory Griffin*, *supra* note 5.

<sup>13</sup> *Virgil M. Hilton*, 37 ECAB 806 (1988).

The December 17, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
November 15, 2002

Michael J. Walsh  
Chairman

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member