

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH P. BEDWAY, JR. and ENVIRONMENTAL PROTECTION
AGENCY, Wheeling, WV

*Docket No. 03-301; Submitted on the Record;
Issued June 23, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's May 10, 2001 request for reconsideration.

On June 10, 1996 appellant, then a 54-year-old former electrical engineering technician, filed a claim asserting that he developed asbestosis as a result of his federal employment. He reported that he first became aware of the disease or illness approximately September 10, 1995. An x-ray report dated September 28, 1995 noted abnormalities that were "consistent with asbestosis."

The Office accepted the following exposure history:

(1) Upper Ohio River Basin Project (forerunner to EPA), Engineering Aide/Technician, 1964 to 1969. Exposed to asbestos for about four hours a week for five years. Job duties included using asbestos insulation wrap for water pipes and electronic cables at dams, water treatment plants and power plants. No protective equipment was available.

(2) Environmental Protective Agency, Electrical Engineering Technician, 1969 to 1979. Exposed to asbestos insulation on electrical cables and water pipes about six hours a day on a daily basis. Performed inspection, testing and sampling work.

(3) Department of Labor, Mine Safety and Health Administration, 1969 to 1987, Electrical Engineering Technician. Exposed to asbestos two hours a week for about eight years. Duties included inspecting machines, which caused contact with asbestos during inspection of packing glands.

In a decision dated July 22, 1997, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish that his condition was caused by the

employment factor. The initial medical evidence contained no reasoned opinion on whether appellant had occupational asbestosis. The Office found that the weight of the medical evidence rested with the March 26, 1997 opinion of the referral physician, Dr. Michael W. Blatt, a Board-certified specialist in pulmonary diseases. Dr. Blatt reviewed appellant's medical records:

“Review of records presented reveals an emergency room evaluation for what appears to be an acute exacerbation of asthmatic bronchitis. Review of notes from Dr. Robert B. Altmeyer, a Board-certified specialist in pulmonary diseases, reveals that [appellant] had an acute exacerbation of chronic obstructive lung disease. Of note is that there was no mention of him having asbestosis in his evaluation. He was evaluated three or four times in Dr. Altmeyer's office, including the initial exam[ination] on January 25, 1993. The next is a certificate of medical exam[ination] performed by Dr. Bobus. There is no mention in discussion regarding asbestosis of [appellant's].”

Dr. Blatt noted appellant's history of exposure and an adequate latency period; however, he reported that appellant's chest x-ray was not diagnostic of asbestosis:

“Based upon the information I have, there is insufficient evidence to suggest that [appellant] has the presence of asbestosis. I base this on my review of the history, the examination of [appellant'], previous medical records from Dr. Altmeyer's service and the chest x-ray. It is my medical opinion, with a reasonable degree of medical certainty, that [appellant] does not have asbestosis, but rather has chronic obstructive lung disease as a result of smoking.”

The chest x-ray report obtained by Dr. Blatt on March 26, 1997 noted a mild overall increase to the lung markings with mild flattening of the diaphragms and no obvious pleural calcifications. The impression was given as “Mild chronic changes suggested. No prior exam[ination] on file.”

On May 20, 2001 appellant requested reconsideration. In support thereof, he submitted the March 2, 2001 report of Dr. Altmeyer related appellant's occupational, cardiopulmonary and smoking history. He described his findings on physical examination and the results of a pulmonary function study performed on May 10, 1996. Dr. Altmeyer reported the following:

“[Appellant] brought a fairly recent chest x-ray, from January 10, 2001, from Wheeling Hospital, which clearly shows interstitial changes present. The film which I was asked to read, however, was from September 28, 1995, taken at Doctors Urgent Care. This film shows category 1/1 t/t in both mid and both lower lung zones by the ILO International Classification of Radiographs of Pneumoconiosis. The heart is within normal limits in size and shape. The tracheal air column, soft tissues and bony structures are within normal limits.”

* * *

“Based on the above data, it is my opinion that [appellant] has asbestosis. I make that diagnosis, with a reasonable degree of medical certainty, on the basis of interstitial changes radiographically consistent with asbestosis, persistent crackles

on auscultation of the chest, a significant exposure to asbestos in the workplace with an appropriate latency period and a reduction in the diffusing capacity. [Appellant] also had severe chronic obstructive lung disease and that accounts for some of the reduction in his diffusing capacity and it is the result of chronic cigarette smoking. He is at an increased risk for the development of lung cancer, mesothelioma and loss of lung function because of asbestosis and asbestos exposure. [Appellant] currently has about 80 to 100 times the chance of developing lung cancer because of the combination of asbestosis/asbestos exposure and recent cigarette smoking. I advise him never to resume cigarette smoking and to have close follow-up by his pulmonologist.”

In a decision dated August 29, 2001, the Office denied appellant’s request because it was untimely filed and failed to present clear evidence of error.

Appellant appealed to the Board. Due to a delay in the transmission of the case record, the Board remanded the case for reconstruction and proper assemblage and, to fully protect appellant’s appeal rights and issue an appropriate decision on his claim.¹

In a decision dated August 12, 2002, the Office denied appellant’s May 10, 2001 request for reconsideration because the request was made more than a year after the July 22, 1997 decision denying his claim and failed to present clear evidence of error. The Office found that Dr. Altmeyer’s March 2, 2001 report was sufficient to create a conflict with Dr. Blatt but that the mere creation of a conflict was insufficient to establish that the Office’s July 22, 1997 decision was wrong at the time it was made.

The Board finds that the Office properly denied appellant’s May 10, 2001 request for reconsideration.

Section 8128(a) of the Federal Employees’ Compensation Act does not grant a claimant the right to a merit review of his case.² Rather, this section vests the Office with discretionary authority to review prior decisions:

“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.”³

¹ Docket No. 02-0241 (issued May 22, 2002).

² *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

³ 5 U.S.C. § 8128(a).

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). Section 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. This section further provides that 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.⁴

Because appellant made his May 10, 2001 request for reconsideration more than one year after the Office's July 22, 1997 decision denying his claim for asbestosis, the Office properly found the request to be untimely. The question for determination, therefore, is whether appellant's request demonstrates clear evidence of error on the part of the Office in its July 22, 1997 decision.

The Board finds that appellant's request for reconsideration fails to demonstrate clear evidence of error. To support his request, appellant submitted a March 2, 2001 report from his attending pulmonary specialist and certified B reader, Dr. Altmeyer, who diagnosed asbestosis with a reasonable degree of medical certainty. While this evidence tends to support appellant's claim, there is some question on which films Dr. Altmeyer based his diagnosis. He noted that a fairly recent chest x-ray from January 10, 2001 clearly showed the presence of interstitial changes, but he then indicated that he was not asked to read this film. The film he was asked to read was taken on September 28, 1995. If this is the film on which Dr. Altmeyer based his diagnosis of asbestosis, his report would create a conflict in medical opinion with Dr. Blatt, the Office referral specialist, who reported in 1997 that appellant's chest x-ray at that time was not diagnostic of the disease. However, the submission of evidence creating an unresolved conflict does not shift the weight of the evidence in appellant's favor and does not demonstrate that the Office made an error in denying his claim. Office procedures address this very issue:

"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 an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, 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 would not require a review of the case on the Director's own motion."⁵

Because Dr. Altmeyer did not make clear on which film he based his diagnosis of asbestosis, his report is insufficient to establish clear evidence of error.

⁴ 20 C.F.R. § 10.607 (1999).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991).

The August 12, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 23, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member