U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEAN L. RISNER, claiming as widow of ROBERT D. RISNER and TENNESSEE VALLEY AUTHORITY, WATTS BAR NUCLEAR PLANT, Spring City, TN

Docket No. 03-119; Submitted on the Record;
Issued March 6, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, 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.

The deceased employee's claim, filed on June 14, 1999, alleged that his diagnosed malignant mesothelioma resulted from his exposure to asbestos from 1953 through retirement in November 1983 while inspecting construction and equipment at dams and power plants. In support of his claim, he submitted x-ray reports and medical evidence as well as a position description.

In a June 7, 1999 report, Dr. J. Randall Thomas, an oncologist, stated that the overwhelming majority of patients who developed malignant mesothelioma had documented asbestos exposure. Although the employee initially denied asbestos exposure, he later explained to Dr. Thomas that he often worked for prolonged periods of time around piping insulated with asbestos material. Dr. Thomas opined that the employee's development of his lung disease was related to his occupational exposure.

By letters dated February 17 and December 5, 2000 the Office asked the employee and the employing establishment to submit detailed information on his exposure to asbestos. On June 5, 2000 the employee died and his widow filed for survivor's benefits. Cause of death was listed as respiratory failure due to mesothelioma. No autopsy was performed.

The employing establishment replied on December 15, 2000 that it had no record of the employee being exposed to asbestos in either of the two jobs he had held. The Office asked the employing establishment to comment on the employee's detailed statement of his exposure to asbestos directly or indirectly while working around various types of roofing material and insulated pipes.

On February 21, 2001 the employing establishment submitted copies of the employee's performance reviews and job description dated from 1953 through 1956 when the employee indicated that he had inspected roofing and insulated piping at the John Sevier steam plant. The job description included duties of making corrections and revisions to drawings and tracings, plotting cross-sections, and operating a print machine, all in an office environment without exposure to asbestos. The performance reviews noted inspection of riveting and welding of structural steel and masonry units. The employee also served as an assistant instrument man in surveying plants and locations and collecting data for the filed engineers.

On March 28, 2001 the Office denied the claim on the grounds that the employee had failed to establish that he was exposed to asbestos while in the performance of duty. The Office noted that the employing establishment had found no evidence of such exposure and enclosed the appropriate appeal rights.

On May 2, 2002 appellant requested that the Office correct the March 28, 2001 decision, which contained a "grievous error," namely, the decision stated that the employee's job was to view "carious" structures, which made "virtually impossible a rational response" to the decision.

On July 8, 2002 the Office denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The only Office decision before the Board on appeal is dated July 8, 2002, denying appellant's request for reconsideration. Because more than one year has elapsed between the last merit decision dated March 28, 2001 and the filing of this appeal on October 2, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

Section 8128(a) of the Federal Employees' Compensation Act[2] vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[3]

> "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."[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

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[1] 20 C.F.R. §§ 501.2(c); 501.3(d)(2). *See John Reese*, 49 ECAB 397, 399 (1998).

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8128(a).

[4] 5 U.S.C. § 8128(a).

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, appellant's letter requesting reconsideration of the March 28, 2001 decision was dated May 2, 2002, more than one year later, 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 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]

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[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).

[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 (1998); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.a. (June 2002).

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

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 no new evidence with her request that the Office reconsider its March 28, 2001 decision. She merely pointed out that the Office had a typographical error in the decision. The Board finds that this error is harmless because the decision clearly reflects the basis for denying the claim, which was that the employee failed to establish that he was exposed to asbestos during his employment. Thus, the typographical error does not rise to the level of clear evidence of error.[15] Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review.[16]

The July 8, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
March 6, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

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

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

[15] *See Theresa Johnson*, 50 ECAB 317, 318 (1999) (finding that appellant submitted no evidence addressing the timely filing of her request for reconsideration or showing clear evidence of error.)

[16] Appellant submitted many documents on appeal, including affidavits from three men who worked with the employee, describing their experiences with asbestos exposure, supporting literature about the diseases produced by such exposure and the employee's employment record. The Board has no jurisdiction to review this evidence. S*ee* 20 C.F.R. § 501.2(c); *Thomas W. Stevens*, 50 ECAB 288, 289 (1999) (the Board is precluded from reviewing evidence that was not before the Office when it issued its final decision).