U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID J. STOUT and DEPARTMENT OF THE INTERIOR, FISH & WILDLIFE SERVICE, Hadley, MA

Docket No. 02-1635; Oral Argument Held June 5, 2003; Issued October 9, 2003

Appearances: *David J. Stout, pro se*; *Thomas G. Giblin, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On March 7, 1995 appellant, then a 42-year-old field biologist, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that on June 18, 1992 he contracted Lyme disease after finding an engorged deer tick on his leg. In a December 8, 1993 report, Dr. Robert A. Moyer, a rheumatologist, noted that appellant described at least two episodes of fevers, arthralgias, myalgias and disabling fatigue but that none of these features were definitive for Lyme disease. In a May 15, 1995 report, the Office medical adviser indicated that the diagnosis of Lyme disease had not been established.

In a May 16, 1995 decision, the Office denied appellant's claim finding that appellant had not established that an injury had been sustained in the performance of duty, as alleged.

Appellant requested a hearing and submitted additional medical evidence, including a report from Dr. Joseph P. Matus, an osteopath, who stated that appellant was at high risk for Lyme disease and that it was certainly likely that he acquired the disease from a tick bite in 1992. In an October 30, 1995 decision, the hearing representative remanded the case for further medical development.

Appellant was referred for examination by Dr. Martin Jan Bergman, a rheumatologist. In a March 27, 1996 report, Dr. Bergman reviewed appellant's symptoms and noted that the diagnosis of Lyme disease was not established. He addressed treatment of Lyme disease and noted that testing for the disease was not 100 percent, stating that there were "both frequent false-positives and frequent false-negatives." Dr. Bergman concluded that "[g]iven the

uncertainties of the exact diagnosis, it is impossible to say whether or not his problems can be claimed as a work-related injury." In a June 18, 1996 follow-up report, Dr. Bergman noted that he was in receipt of appellant's Lyme titer "both ELISA [enzyme-linked immunosorbent assay] and [w]estern blot, both of which are negative." Dr. Bergman related that he had an additional conversation with appellant, who related a history of having coworkers pulling ticks off their bodies and being diagnosed with Lyme disease. Based on this, Dr. Bergman indicated that appellant's exposure to ticks would have occurred on the job and not during nonemployment-related hunting trips.

The record also contains a July 1, 1996 report from Dr. S. Chandra Swami, a general practitioner and attending physician, who made a "confident diagnosis" of Lyme disease. In making the diagnosis, Dr. Swami stated:

> "I am an innocent victim of this disease due to my love of nature photography. My nurse and one other staff member have it as well as a few of there [sic] family members. My dog dies of this illness…."

By decision dated July 9, 1996, the Office denied appellant's claim finding that the medical evidence did not establish a definitive diagnosis of Lyme disease as there were no positive immunologic titres (blood tests); nor did the medical evidence establish a causal relationship between appellant's claimed condition and his federal employment.

On February 20, 2002 appellant requested reconsideration. In support of his request, appellant submitted laboratory results from a 1996 western blot blood test that diagnosed Lyme disease. In a March 6, 2002 decision, the Office denied reconsideration finding that the reconsideration request was untimely and that the evidence submitted in support of the request did not establish clear evidence of error.

The Board finds that the Office properly denied appellant's request for reconsideration on the basis that his request was untimely and failed to establish clear evidence of error.

The only decision before the Board on this appeal is the Office's March 6, 2002 decision denying appellant's request for reconsideration of the July 9, 1996 decision. Because more than one year has elapsed between the issuance of the Office's July 9, 1996 decision and May 31, 2002, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the merits of the 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 a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[3] To be entitled to a merit

[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b)(2).

review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[4] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[5]

In its March 6, 2002 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on July 9, 1996 and appellant's request for reconsideration was dated February 20, 2002, more than one year after July 9, 1996.

The Office, however, may not deny an application for review solely on the ground that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[6] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[7]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which 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 which 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

[4] 20 C.F.R. § 10.607(a).

[5] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[6] *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein states, "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 that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, 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...."

[8] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[9] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[10] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

so as to produce a contrary conclusion.[11] 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.[12] 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.[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 merit review in the face of such evidence.[14]

Appellant attributes his symptoms of Lyme disease to exposure to a tick in his federal employment in June 1992. The medical evidence of record pertaining to the diagnosis of appellant's condition was equivocal, at best. The December 8, 1993 report of Dr. Matus, an osteopath, addressed flu-like symptoms, including fatigue and weakness, and noted none of appellant's symptoms were definitive for Lyme disease. Blood testing obtained on December 7, 1993, approximately 18 months after the alleged exposure, was nonreactive for Lyme disease antibodies. Dr. Kirsten A. Hauer, a specialist in infectious disease, examined appellant at the request of Dr. Matus and noted in an April 18, 1994 report that appellant's ELISA and western blot serologies had been negative. Nonetheless, appellant underwent multiple courses of tetracycline therapy. Appellant was also seen by Dr. Raymond A. Adelizzi, an osteopathic specialist in musculoskeletal pain, in consultation with Dr. Matus. In a May 31, 1994 report, Dr. Adelizzi diagnosed chronic arthralgias and myalgias of undetermined etiology. In a follow-up report of August 15, 1994, Dr. Adelizzi noted appellant's blood tests were negative for Lyme disease and repeated his diagnoses. Appellant was seen by Dr. Andrew R. Pachner, a Board-certified neurologist, who reported on May 31, 1995 that his examination of appellant revealed classical manifestations of fibromyalgia.

The only positive serological testing is that dated December 20, 1996; a test obtained but not commented upon by any physician of record. The medical narrative reports all predate this one positive test result. While appellant contends that this blood test now establishes his Lyme disease diagnosis, in light of Dr. Bergman's discussion of frequent false-positive and false-negative test results, the Board finds that his contention does not establish clear evidence of error. Moreover, the reports of Dr. Swami, who made the diagnosis, were not well explained on the issue of causal relationship and appear to have been greatly influenced by factors outside the medical record in this case. Based on these considerations, the Board finds that the December 20, 1996 test result is not sufficient to shift the weight of medical evidence in favor of the claimant or to raise a substantial question as to the correctness of the Office's decision denying the claim.

[11] *See Leona N. Travis*, *supra* note 9.

[12] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[13] *Leon D. Faidley, Jr.*, *supra* note 5.

[14] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458, 466 (1990).

The March 6, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 9, 2003

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member