



appellant's March 26, 1997 chest x-ray was not diagnostic of asbestosis. In an attached statement of review rights, the Office notified appellant that any request for reconsideration must be made within one year from the date of that decision.

Appellant requested reconsideration on May 20, 2001 and submitted the March 2, 2001 report of Dr. Robert B. Altmeyer, a Board-certified specialist in pulmonary diseases. Dr. Altmeyer noted that a January 10, 2001 chest x-ray clearly showed interstitial changes. He was asked, however, to read a chest x-ray from September 28, 1995, which showed "category 1/1 t/t in both mid and both lower lung zones by the ILO International Classification of Radiographs of Pneumoconiosis." Dr. Altmeyer reported that appellant's heart, tracheal air column, soft tissues and bony structures were within normal limits. "Based on the above data," he stated with a reasonable degree of medical certainty, "it is my opinion that [appellant] has asbestosis." He explained that he was making that diagnosis based on 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 diffusing capacity, some of which was attributable to severe chronic obstructive lung disease from chronic cigarette smoking.

In a decision dated August 12, 2002, the Office denied a reopening of appellant's claim for a review on the merits. The Office found that appellant's request for reconsideration was untimely and failed to present clear evidence of error in the prior decision.

On June 23, 2003 the Board affirmed.<sup>1</sup> The Board noted that if Dr. Altmeyer based his diagnosis of asbestosis on the chest x-ray taken on September 28, 1995, his report would create a conflict in medical opinion with Dr. Blatt, who reported that appellant's March 26, 1997 chest x-ray was not diagnostic of the disease. The Board explained, however: "[T]he 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." The Board added: "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."

On October 8, 2003 appellant requested reconsideration. In support thereof he submitted July 2, 2003 report from Dr. Altmeyer, which stated in its entirety as follows:

"This letter is in response to your letter to me of July 2, 2003. This letter is to clarify that the x-ray I used in the determination of asbestosis on this patient, was an x-ray taken on September 28, 1995. That film was taken at Doctors Urgent Care. Thank you."<sup>2</sup>

In a decision dated October 29, 2003, the Office denied a reopening of appellant's case for a review on the merits. The Office found that appellant's October 8, 2003 request for reconsideration was untimely and failed to present clear evidence of error.

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<sup>1</sup> Docket No. 03-301 (issued June 23, 2003).

<sup>2</sup> Appellant initially submitted this evidence on July 17, 2003 and argued that this was clear evidence of error. It makes no difference whether appellant's request for reconsideration is dated October 8 or July 17, 2003.

## LEGAL PRECEDENT

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.”<sup>3</sup>

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 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 Office will consider an untimely application 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.<sup>4</sup>

## ANALYSIS

The most recent merit decision in this case, indeed the only decision addressing the merits of appellant's case, is the Office's July 22, 1997 decision denying his claim for compensation. As appellant made his October 8, 2003 request for reconsideration more than six years after this decision, his request is untimely. The question for determination, therefore, is whether the request shows clear evidence of error in the Office's July 22, 1997 decision.

Dr. Altmeyer, appellant's specialist in pulmonary diseases, clarified that he had based his diagnosis of asbestosis on the chest x-ray from September 28, 1995. At best, this creates a conflict in medical opinion with Dr. Blatt, the Office's referral specialist in pulmonary diseases, who reported that appellant's chest x-ray on March 26, 1997 was not diagnostic of asbestosis. Because the disagreement between these physicians is unresolved, the weight of the evidence cannot show that the denial of appellant's claim was clearly in error. As the Board noted in the prior appeal, the Office's procedure manual directly addresses 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

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607 (1999).

further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."<sup>5</sup>

Appellant has chosen to ignore this explanation of the law. Instead, he builds his argument for reconsideration on a single sentence excised from the Board's prior decision. Therein the Board stated: "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." The statement is true. The fallacy appellant commits is one of illicit obversion, wherein he draws a false inference that the obverse must also true. The Board's prior decision in no way implies that if Dr. Altmeyer did make clear on which film he based his diagnosis of asbestosis, then his report would be sufficient to establish clear evidence of error. To the contrary, the Board well explained in its prior decision that if Dr. Altmeyer based his opinion on the September 28, 1995 film, as he now states that he did, his report would create a conflict that would leave the matter unresolved and would not demonstrate clear evidence of error on the part of the Office in denying appellant's claim for compensation.

### **CONCLUSION**

The Board finds that the Office properly denied a reopening of appellant's case for a review on the merits. Appellant's October 8, 2003 request for reconsideration was untimely and failed to present clear evidence of error in the Office's July 22, 1997 decision.

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 29, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 17, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member