

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 and submitted the March 2, 2001 report of Dr. Robert B. Altmeyer, a Board-certified specialist in pulmonary diseases, who reported that a January 10, 2001 chest x-ray clearly showed interstitial changes. Dr. Altmeyer also read a chest x-ray from September 28, 1995. He reported that it was his opinion that appellant had asbestosis.

On August 12, 2002 the Office denied a merit review of appellant's case. The Board affirmed, noting that the submission of evidence that could create an unresolved conflict did not shift the weight of the evidence in appellant's favor and did not demonstrate clear evidence of error in the Office's July 22, 1997 decision denying his claim.¹

When Dr. Altmeyer clarified that he based his diagnosis of asbestosis on the September 28, 1995 x-ray, the Office again denied a merit review of the case. The Board again affirmed, as this evidence at best created a conflict with Dr. Blatt, which was insufficient to show that the denial of appellant's claim was clearly in error.²

On October 25, 2005 appellant requested reconsideration. He argued that Dr. Blatt, on whose opinion the Office relied to deny the claim, was not a certified B reader and was not qualified under Office regulations to read chest x-rays. Appellant added that his physician, Dr. Altmeyer, was qualified. Citing *Mary S. Brock*, 40 ECAB 461 (1989), appellant argued that Dr. Altmeyer's opinion was entitled to greater weight because he possessed additional certification as a B reader. He argued that it was clear error for the Office to adopt the finding of an unqualified physician over the finding of a qualified one. Appellant referred the Office to regulations of the National Institute for Occupational Safety and Health (NIOSH).

To support his request, appellant submitted the October 27, 2004 report of Dr. Altmeyer, who confirmed that he was a NIOSH certified B reader and that the September 28, 1995 film was consistent with a diagnosis of asbestosis, given appellant's significant exposure, appropriate latency period and no other obvious cause for interstitial lung disease.

In a decision dated January 6, 2006, the Office denied further merit review of appellant's case. The Office found that appellant's request for reconsideration was untimely and failed to present clear evidence of error. The Office noted that Dr. Blatt and Dr. Altmeyer were both pulmonary disease specialists and that Dr. Blatt's medical opinion was, therefore, not less creditable.

¹ Docket No. 03-301 (issued June 23, 2003).

² Docket No. 04-633 (issued May 17, 2004).

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.”³

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.⁴

The term “clear evidence of error” is intended to represent a difficult standard.⁵ If clear evidence of error has not been presented, the Office should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.⁶

ANALYSIS

The Office's July 22, 1997 decision denying appellant's claim is the only merit decision in this case. The Office properly notified appellant that any request for reconsideration must be made within one year of that decision. Appellant's October 25, 2005 request for reconsideration is, therefore, untimely. The question is whether this request nonetheless presents clear evidence of error in the Office's July 22, 1997 decision.

Appellant argued that Dr. Blatt, the Office referral physician, was not qualified under Office regulations to read chest x-rays because he was not a certified B reader. Neither the Act nor the Office's regulations impose such a restriction. Office medical examination requirements in asbestos disease cases state that chest x-rays shall be read by either a Board-certified

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607 (1999).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (January 2004).

⁶ *Id.* at Chapter 2.1602.3.d(1).

radiologist or pulmonary specialist.⁷ These Office procedures do not require NIOSH B reader certification. Dr. Blatt was a Board-certified specialist in pulmonary disease and was clearly competent and qualified to read appellant's March 26, 1997 chest x-ray.

Appellant cited to *Brock*, for the argument that Dr. Altmeyer's opinion was entitled to greater weight because he possessed additional certification as a B reader. But *Brock* involved a claim for inflammatory intestinal diseases, not asbestosis. Certification as a B reader was not an issue. In *Brock*, the Board observed that a psychiatric evaluation was not germane to an analysis of the claimant's intestinal illness, that opinions of physicians who have training and knowledge in a specialized medical field have greater probative value concerning medical questions peculiar to that field than do the opinions of other physicians.⁸ This authority does not support appellant's assertion that Dr. Altmeyer's opinion should carry more weight than that of Dr. Blatt. Both are Board-certified specialists in pulmonary disease.⁹ Under the clear evidence of error standard, appellant's untimely request must establish "on its face" that the Office's July 22, 1997 decision was erroneous.

Appellant asserted in his October 25, 2005 request for reconsideration that the Office adopted the finding of an unqualified physician over the finding of a qualified one. This misrepresents what happened in the case. The Office did not have Dr. Altmeyer's March 2, 2001 finding when it reviewed the merits of his claim and denied compensation on July 22, 1997. The medical evidence giving rise to a possible conflict came later, when appellant filed an untimely request for reconsideration. The Board explained in its 2003 decision, 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 will not require a merit review of the case.¹⁰ The Board will affirm the Office's January 6, 2006 decision to deny such a review.

CONCLUSION

The Board finds that appellant's October 25, 2005 request for reconsideration is untimely and fails to present clear evidence of error in the Office's July 22, 1997 merit decision.

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.8(b) (September 1994 and December 1995), (Exhibit 7) (December 1994).

⁸ 40 ECAB 461, 473, citing *Lee R. Newberry*, 34 ECAB 1294 (1983).

⁹ See *Leona N. Travis*, 43 ECAB 227 (1991) (it is not enough to show that the evidence could be construed so as to produce a contrary conclusion).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (April 1991).

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 1, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board