



## **FACTUAL HISTORY**

On March 2, 2007 appellant, then a 32-year-old intelligence specialist, filed a traumatic injury claim alleging that he sustained an injury as a result of a yellow fever vaccination on September 1, 2006. In a report dated November 9, 2006, Dr. Eric Halsey provided results on examination. He noted that appellant reported having symptoms of vertigo one and a half hours after receiving yellow fever vaccine, with additional symptoms while in travel status several days later. In a report dated April 26, 2007, Dr. Louis Heckman, an internist, stated that appellant reported symptoms of dizziness soon after receiving a vaccination and continued to complain of dizziness, nausea, fatigue and palpitations. He stated, "Time wise it certainly would seem that there is an association between symptoms and the administration of the vaccine."

By decision dated May 8, 2007, the Office denied the claim for compensation. It found that the medical evidence was insufficient to establish the claim.

On December 4, 2008 the Office received a report dated November 8, 2008 from Dr. Thomas Hirt, a family practitioner, who stated that appellant had been seen over the last few months with symptoms that included fatigue, dizziness, malaise and headaches. Dr. Hirt further stated, "While the lack of data in the literature makes it difficult to say definitively, it seems that these symptoms resulted after he received a yellow fever vaccination and had encephalitis immediately after receiving the vaccine on [September 1, 2006]." An accompanying letter dated December 2, 2008 from appellant's representative requested the Office to "process accordingly in this matter."

In a letter dated June 7, 2009, appellant requested reconsideration of his claim. Appellant's representative stated that an enclosed report from Dr. Jacob Kitchener, a neurologist, established causal relationship between a vaccination and a medical condition. In a report dated May 26, 2009, Dr. Kitchener stated that there was a recognized medical condition known as yellow fever vaccine-associated viscerotropic disease. He stated that this condition causes multiorgan system failure and although appellant had not experienced multiorgan failure, the plethora of symptoms he has suggests that a diffuse process has caused him to have dysfunction of his cardiac, respiratory and gastrointestinal systems. Dr. Kitchener concluded, "Based on the temporal relationship between [appellant's] symptoms and exposure to the vaccine, I believe the vaccine caused these symptoms and he is suffering a mild form of the yellow fever vaccine-associated viscerotropic disease."

By decision dated June 16, 2009, the Office found that the reconsideration request was untimely. It denied the request on the grounds that appellant had not shown clear evidence of error by the Office.

## **LEGAL PRECEDENT**

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.<sup>2</sup> The employee shall exercise this right through a request to

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<sup>2</sup> 5 U.S.C. § 8128(a).

the district Office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”<sup>3</sup>

Section 8128(a) of the Act<sup>4</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>5</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>6</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>7</sup> As one such limitation, it has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.<sup>8</sup> The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>9</sup>

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.<sup>10</sup> In accordance with this holding, the Office has stated in its procedure manual that it 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.<sup>11</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>12</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>13</sup> Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.<sup>14</sup> It is not enough merely to show that the evidence could be construed

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<sup>3</sup> 20 C.F.R. § 10.605 (1999).

<sup>4</sup> *Supra* note 2.

<sup>5</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> 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 his own motion or on application.”

<sup>7</sup> Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> *See Leon D. Faidley, Jr.*, *supra* note 5.

<sup>10</sup> *Leonard E. Redway*, 28 ECAB 242 (1977).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>12</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>13</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>14</sup> *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

so as to produce a contrary conclusion.<sup>15</sup> The Office performs a limited review of the evidence to determine 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.<sup>16</sup> 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.<sup>17</sup>

### ANALYSIS

The merit decision in the case is dated May 8, 2007. Appellant submitted a medical report on December 4, 2008 with a letter asking the Office to “process accordingly.” The December 2, 2008 letter does not request reconsideration or otherwise indicate that appellant was exercising an appeal right of the May 8, 2007 Office decision.<sup>18</sup> Appellant did not request reconsideration until a letter dated June 7, 2009. Since this is more than one year after the May 8, 2007 decision, it is untimely filed.

As the application for reconsideration was untimely, appellant must establish clear evidence of error by the Office in the denial of the claim. While he submitted supporting medical evidence, it is not sufficient to establish clear evidence of error. Appellant relies on the May 26, 2009 report from Dr. Kitchener, who supports an opinion on causal relationship based on the temporal relationship between the vaccine and symptoms. Dr. Heckman also noted the time period between symptoms and the vaccine. A temporal relationship between an incident and symptoms is generally not sufficient medical rationale to support causal relationship.<sup>19</sup>

The issue of causal relationship in this case is a difficult medical issue. The Board reiterates that it does not have jurisdiction over the merits of the claim. In this case, the issue is whether the evidence of record establishes clear evidence that the Office committed an error in denying the claim. As noted above, to establish clear evidence of error it is not enough to show that the evidence could be construed so as to produce a contrary conclusion. The Board finds that the medical evidence is not of such probative value that it establishes clear evidence of error.

### CONCLUSION

The Board finds that the application for reconsideration was untimely and appellant failed to show clear evidence of error.

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<sup>15</sup> See *Leona N. Travis*, *supra* note 13.

<sup>16</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>17</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon., denied*, 41 ECAB 458 (1990).

<sup>18</sup> Even if the December 2, 2008 letter were considered an application for reconsideration, it was filed more than a year after the May 8, 2007 decision and would be untimely.

<sup>19</sup> See *Joan R. Donovan*, 54 ECAB 615 (2003); *Thomas D. Petrylak*, 39 ECAB 276 (1987).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 16, 2009 is affirmed.

Issued: April 8, 2010  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board