U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAMUEL KENNLEY and DEPARTMENT OF THE NAVY, CHARLESTON NAVAL SHIPYARD, Charleston, SC

Docket No. 99-41; Submitted on the Record;
Issued April 18, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

This is the third appeal before the Board. In a decision dated May 20, 1993, the Board affirmed a May 14, 1992 Office decision finding that appellant's request for reconsideration was untimely and failed to show clear evidence of error.[1] By decision dated December 18, 1997, the Board affirmed a November 6, 1995 Office decision, again finding that appellant had submitted an untimely request for reconsideration that failed to show clear evidence of error.[2] The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

In a letter dated July 6, 1998, appellant requested reconsideration of his claim and submitted additional evidence. By decision dated August 19, 1998, the Office found the request was untimely and failed to show clear evidence of error.

The Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal.[3] Since appellant filed his appeal on September 10, 1998, the only decision over which the Board has jurisdiction on this appeal is the August 19, 1998 decision denying his request for reconsideration.

The Board has reviewed the record and finds that the Office properly found that appellant's request for reconsideration was untimely and failed to show clear evidence of error.

[1] Docket No. 92-1640.

[2] Docket No. 96-482.

[3] 20 C.F.R. § 501.3(d).

Section 8128(a) of the Federal Employees' Compensation Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[6] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[7] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[8] 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).[9]

The only decision on the merits of the claim in this case is dated November 7, 1988. Since appellant's July 6, 1998 request for reconsideration is more than year after the merit decision, it is untimely.

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.[10] 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. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[11]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[12] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[13] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to

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[4] 5 U.S.C. § 8128(a).

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

[6] 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."

[7] 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 point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

[8] 20 C.F.R. § 10.138(b)(2).

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

[10] *Leonard E. Redway*, 28 ECAB 242 (1977).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[12] *See Dean D. Beets*, 43 ECAB 1153 (1992).

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

establish clear evidence of error.[14] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[15] 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.[16] 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.[17] 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.[18]

As the Board noted in its prior decisions, the underlying issue in this case is causal relationship between a pulmonary fibrosis and appellant's federal employment. The evidence accompanying the July 6, 1998 reconsideration request included a statement indicating that appellant had been exposed to numerous chemical agents and two new reports from an attending physician, Dr. Cary E. Fechter, a pulmonary specialist, who had previously opined that appellant's pulmonary fibrosis was causally related to exposure to substances in his federal employment from 1985 to 1987.[19] In a report dated January 14, 1998, Dr. Fechter noted that appellant's pulmonary fibrosis did develop after his federal employment began and according to appellant an x-ray prior to federal employment was normal. The Board notes that the lack of symptoms prior to employment does not itself provide rationale in support of a causal relationship between a condition and employment.[20] In a report dated June 22, 1998, Dr. Fechter indicated that appellant was exposed to vapors, gasses, chemicals (such as chrome and cadmium) "all of which are associated with pulmonary fibrosis" and he again opined that appellant's condition was directly a result of exposure in federal employment.

As the Board has noted in the prior appeals, the standard for establishing clear evidence of error is a difficult one. It must be of such probative value that it *prima facie* shifts the weight of the evidence in favor of the claim and raises a substantial question as to the correctness of the underlying decision. In this case, the medical issue is a complex one involving causal relationship between a pulmonary condition and exposure to gasses and chemicals in federal employment. In order to show clear evidence of error, there must be detailed information as to

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

[15] *See Leona N. Travis*, *supra* note 13.

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

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

[18] *Gregory Griffin*, 41 ECAB 458 (1990).

[19] In a February 25, 1994 report, for example, Dr. Fechter indicated that he did not believe the pulmonary fibrosis was idiopathic, but rather was employment related.

[20] *See, e.g., Walter J. Neumann, Sr.*, 32 ECAB 69, 72 (1980).

the nature and extent of exposure to specific agents, and a medical opinion that contains an accurate history and clearly explains the relationship between the exposure and the diagnosed condition. Dr. Fechter states that appellant was exposed to agents associated with pulmonary fibrosis, but he does not explain the nature and extent of any association; *e.g.*, describe how specific agents affect the lungs and contribute to the diagnosed condition, the amount and duration of the exposure required, and other relevant information.

The evidence submitted does not contain sufficient evidence as to the levels of exposure to specific agents, nor does it contain a fully reasoned medical opinion as to causal relationship between the exposure and pulmonary fibrosis. Accordingly, the Board finds that appellant has not established clear evidence of error and the Office properly denied his request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated August 19, 1998 is affirmed.

Dated, Washington, D.C.
April 18, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member