U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUAN M. RIVERA and EQUAL EMPLOYEMNT OPPORTUNITY COMMISSION, HOUSTON DISTRICT OFFICE, Houston, Tex.

Docket No. 97-196; Submitted on the Record;
Issued December 3, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

On March 31, 1982 appellant, then a 64-year-old equal opportunity specialist, filed a claim for traumatic injuries sustained during an elevator accident which occurred in the course of his federal employment. Appellant's claim was subsequently accepted by the Office and appropriate compensation benefits were paid. Appellant did not return to work.

On March 1, 1995 the Office issued a notice of proposed termination of compensation and medical benefits on the grounds that the weight of the medical evidence established that appellant's injury related conditions had ceased. Appellant submitted additional factual and medical evidence in support of his claim, however, in a decision dated April 18, 1995, the Office determined that the weight of the medical evidence continued to support a finding that appellant's accepted cervical strain and temporary aggravation of cervical osteoarthritis had resolved. The Office's decision was accompanied by a letter explaining appellant's rights of appeal.

By letter to his congressman dated June 17, 1995 and subsequently forwarded to the Office, appellant indicated his desire for an oral hearing before an Office representative.

In a decision dated July 31, 1995, the Office denied appellant's request for an oral hearing on the grounds that his request was untimely.

Subsequent to the Office's July 31, 1995 decision, appellant corresponded with numerous elected public officials and Office personnel regarding his claim and submitted copies of this correspondence to the Office. By letters dated July 31, August 23, October 24, November 1, 1995, February 8, February 11 and March 13, 1996, the Office explained appellant's rights of

appeal and invited him to choose a course of action. In the Office's March 13, 1996 letter, the Office explicitly explained to appellant that writing to public officials was not an exercise of his appeal rights, that as of that date no review process was in progress with respect to either the Office's April 18 or July 31, 1995 decisions and that if he thought he had already requested that his claim be reconsidered or otherwise reviewed he was mistaken. The Office further reminded appellant that he had one year from the date of the April 18, 1995 merit decision to request reconsideration and explained to appellant the essential differences between a request for reconsideration and an appeal to the Board. The Office again provided appellant with the correct address for requesting reconsideration.

Appellant continued to submit inquiries regarding his claim, as well as copies of correspondence with various elected officials. By letters dated April 8, 11 and 30, 1996, the Office again advised appellant that he had not yet chosen an avenue of appeal.

In a letter to his congressman dated June 6, 1996 which was forwarded to the Office and subsequently received on June 25, 1996, appellant stated that he would like to avail himself of his appeal rights, and was requesting either an oral hearing or reconsideration, whichever was appropriate. Appellant asked his congressman to assist him in this matter.

By decision dated August 8, 1996, the Office denied appellant's request for reconsideration because it was not filed within one year of its last merit decision dated April 18, 1995. In addition, the Office determined that appellant had not submitted any evidence that established that its final merit decision was erroneous.

The only decision before the Board on this appeal is the August 8, 1996 decision. As more than one year has elapsed from the date of the Office's April 18 and July 21, 1995 decisions, to the date of the filing of appellant's appeal on October 9, 1996, the Board lacks jurisdiction to review the prior decisions.[1]

The Board finds that appellant timely requested reconsideration of the Office's April 18, 1995 decision.

[1] *See* 20 C.F.R. § 501.3(d).

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] This section 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 --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[4] 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.[5] 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).[6]

With regard to the content of the request for reconsideration, the Office's procedures provide: "While no special form is required, the request must be in writing, identify the decision and the specific issue(s) for which reconsideration is being requested, and be accompanied by relevant and pertinent new evidence or argument not considered previously."[7]

In the present case, the Office determined that appellant did not request reconsideration until his June 6, 1996 letter to his congressman, subsequently forwarded to the Office, which was more than one year after the April 18, 1995 decision and therefore was untimely. The Board finds, however, that at a minimum, appellant's letters dated February 11, March 17 and April 18, 1996, constitute timely requests for reconsideration. In the letter to the Director dated February 11, 1996 and received April 4, 1996, appellant identified the Office's decision terminating his compensation benefits decision and indicated that, in addition to evidence

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[2] 5 U.S.C. § 8128(a).

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

[4] 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).

[5] 20 C.F.R. § 10.138(b)(2).

[6] *See Leon D. Faidley, Jr., supra* note 3.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (May 1991); *see also* 20 C.F.R. § 10.138(b)(1).

previously submitted, he had enclosed additional information as grounds for a "logical defense." The Office had, in fact, received on February 5, 1996, a narrative report from appellant's attending physician dated January 24, 1996. Appellant concluded his February 11, 1996 letter by stating: "After considering the contents of this letter and you decide that you need more information to substantiate my claim for Workers' Compensation, disability retirement, or just retirement; please let me know…."

In his letter to the Director dated March 17, 1996, appellant again referenced the April 18, 1995 decision terminating his benefits and stated that while he did not have additional [medical] evidence to submit, he was enclosing "data that you may consider." Appellant concluded his letter, stating: "Specifically, when making your decisions, please refer to the applicability of items 49, 71, 91 and 109 from the FECA pamphlet 550." The Board notes that subsequent to appellant's February 11, 1996 letter, but prior to his March 17, 1996 letter, appellant did submit additional medical evidence not previously considered.

Finally, in his letter dated April 18, 1996,[8] appellant referenced both an earlier letter that he had submitted to Senator Phil Gramm, which had in turn been previously forwarded to, and reviewed by, the Office, and his March 17, 1996 letter to the Director. In his April 18, 1996 letter, appellant specifically stated that his March 17, 1996 letter had been "submitted for RECONSIDERATION under the FECA Appeals Rights to the Honorable Gramm for reference to the appropriate authorities and so that it would be submitted on time…. So if I have not met the one-year limitation for RECONSIDERATION please inform me. All evidence that I might have to present at RECONSIDERATION has been submitted to the Honorable Gramm." (Emphasis in the original).

Given the fact that in each of these letters appellant identified the Office decision, indicated that additional medical evidence had been submitted, and stated that he was waiting for a response, the Board finds that the February 11, March 17 and April 18, 1996 letters constitute requests for the Office to reconsider the April 18, 1995 decision based on the new medical evidence submitted.[9] The Office's denial of appellant's reconsideration request as untimely was therefore in error, but in this case constitutes harmless error.

To require the Office to reopen a case for reconsideration, 20 C.F.R. § 10.138(b)(1) provides, in relevant part, that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and the specific issues within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by: (1) showing that the Office erroneously applied or interpreted a point of law; (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting

[8] This letter is date stamped received by the Office on April 24, 1996, however, the letter itself is dated April 18, 1996 and no envelope is contained in the record. It is well established under the Office's procedures that the timeliness of a reconsideration request is determined by the postmark on the envelope, but if the envelope is not available, the date of the letter itself is used. Federal (FECA) Procedure Manual, Part 2 -- Claims, Reconsiderations, Chapter 2.1602.3(b) (May 1996).

[9] *Vicente P. Taimanglo*, 45 ECAB 504 (1994).

relevant and pertinent evidence not previously considered by the Office.[10] Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.[11]

In support of his February 11, March 17 and April 18, 1996 requests for reconsideration, appellant submitted a January 24, 1996 follow-up report from Dr. Gregg Diamond, in which the physician diagnosed failed lumbar syndrome, arachnoiditis of the lumbar region, epidural fibrosis and intractable pain syndrome, and discussed his treatment plan, but did not offer any opinion regarding disability. Appellant also submitted treatment and progress notes dated July 6, September 28 and November 3, 1995, and January 19, 1996. The relevant issue in the case is whether appellant had any continuing disability due to the accepted medical conditions sustained in the March 31, 1982 employment accident. As neither Dr. Diamond's report nor the various treatment notes address this issue, these reports do not constitute relevant new evidence. Since appellant also did not demonstrate that the Office erroneously applied or interpreted a point of law, nor advanced a point of law or fact not previously considered by the Office, the Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim. The Board therefore concludes that the Office did not abuse its discretion by declining to reopen appellant's claim for merit review.[12]

The decision of the Office of Workers' Compensation Programs dated August 8, 1996 is hereby affirmed as modified.

Dated, Washington, D.C.
December 3, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[10] 20 C.F.R. § 10.138(b)(1).

[11] 20 C.F.R. § 10.138(b)(2).

[12] *See Mohamed Yunis*, 42 ECAB 325 (1991).