U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY D. HATCHER and DEPARTMENT OF JUSTICE,
FEDERAL CORRECTIONAL INSTITUTE, El Reno, Okla.

Docket No. 97-1334; Submitted on the Record;
Issued January 21, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application was untimely filed and failed to present clear evidence of error; and (2) whether appellant abandoned his request for a hearing under 5 U.S.C. § 8124(b)(1).

The Board has duly reviewed the case with respect to the issue of denial of merit review and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review as the request was untimely made and presented no clear evidence of error.

The most recent decision before the Board on this appeal is the Office's February 5, 1997 decision, denying appellant's request for a review on the merits of the Office's decision dated August 15, 1995.[1] Because more than one year has elapsed between the issuance of the Office's August 15, 1995 decision and March 11, 1997, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the prior Office decision.[2]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence

---

[1] By this decision, the Office denied appellant's claim for an emotional illness, finding that it did not occur in the performance of duty. The Office found that appellant had failed to implicate any compensable factors of employment in the development of his emotional condition.

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

not previously considered by the Office.[4] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[5] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[6] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[7]

In its February 5, 1997 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on August 15, 1995, and appellant's request for reconsideration was dated January 25, 1997, which was clearly more than one year after August 15, 1995. Therefore, appellant's request for reconsideration of his case on its merits was untimely filed.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[8] Office procedures provide that the Office 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.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[10] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[11] Evidence which does not raise

---

[4] 20 C.F.R. § 10.138(b)(1),(2).

[5] 20 C.F.R. § 10.138(b)(2).

[6] *Joseph W. Baxter*, 36 ECAB 228 (1984).

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

[8] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996). The Office therein states:

> "The term 'clear evidence of error' to represent a difficult standard. The claimant must present evidence which on its face shows that the Office of Workers' Compensation Programs made a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."

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

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

a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] 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.[14] 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.[15] The Board makes an independent determination as to 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.[16]

In the present case, with his January 25, 1997 request for reconsideration of the August 15, 1995 decision, appellant submitted nothing. The request merely referred to the existence of new and additional medical evidence, however, no new and additional medical reports were submitted to the Office and no new legal arguments were offered. Therefore, no demonstration of any clear evidence of error on its face on the part of the Office in its August 15, 1995 decision was made, as the Office properly ascertained. Consequently, the Board now finds that appellant's request letter is insufficient to reopen appellant's case for further consideration of the case on its merits.

As appellant's reconsideration request letter does not raise a substantial question as to the correctness of the prior August 15, 1995 Office decision or shift the weight of the evidence in favor of the claimant, it does not, therefore, constitute grounds for reopening appellant's case for a merit review.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error, correctly determined that it did not and denied appellant's untimely request for a merit reconsideration on that basis.

The Office, therefore, did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of

---

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

[13] *See Leona N. Travis, supra* note 11.

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

[15] *Leon D. Faidley, Jr., supra* note 7.

[16] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

judgment, or actions taken, which are contrary to both logic and probable deductions from established facts.[17] Appellant has made no such showing here.

The Board further finds that appellant abandoned his request for a hearing.

The Office's July 9, 1996 decision, which denied appellant's hearing request, was also issued within a year prior to appellant's filing of his claim with the Board and, therefore, is also within the Board's jurisdiction.

Section 8124(b) of the Act provides claimants under the Act a right to a hearing if they request a hearing within 30 days of an Office decision.[18] Section 10.137 of Title 20 of the Code of Federal Regulations pertaining to postponement, withdrawal or abandonment of a hearing request states in relevant part:

> "A scheduled hearing may be postponed or canceled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in the assessment of costs against such claimant."
>
> * * *
>
> "A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing."[19]

In the present case, by letter dated September 3, 1995, appellant requested a hearing before an Office hearing representative in connection with the Office's August 15, 1995 decision. By notice dated April 30, 1996, the Office advised appellant of the time and place of the hearing scheduled for June 10, 1996.[20] Appellant did not request postponement at least three days prior to the scheduled date of the hearing, nor did he request within 10 days after the scheduled date of the hearing that another hearing be scheduled. Appellant's failure to make such requests, together with his failure to appear at the scheduled hearing, constitutes abandonment of his request for a hearing and the Board finds that the Office properly so determined.

[17] *Daniel J. Perea*, 42 ECAB 214 (1990).

[18] 5 U.S.C. § 8124(b).

[19] 20 C.F.R. § 10.137(a),(c).

[20] The notice listed appellant's address as 4924 Trever Drive, Yukon, Okla., 73099, the only address evident in appellant's record at that point and the address given by him in his request for a hearing.

It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.[21] This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.[22] The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.[23] The Office's finding of abandonment in this case rests on the strength of this presumption. The Office's April 30, 1996 notice, which advised appellant of the time and place of the hearing scheduled for June 10, 1996, was addressed to appellant at 4924 Trever Drive, Yukon, Oklahoma, 73099. This was also the address, to which the Office's August 15, 1995 decision and other documents clearly received by appellant were mailed and, therefore, it must be presumed to be a proper mailing address for appellant. Although appellant listed his address as P.O. Box 757, Auberry, California, 93602, on his September 14, 1996 request for an appeal before the Board, this does not rebut the presumption that the address used by the Office on April 30, 1996, was a proper mailing address.

After the issuance of the Office's July 9, 1996 decision, appellant alleged that he did not receive a copy of the notification of the date and time of the hearing scheduled for June 10, 1996 in that it was mailed to the wrong address. However, the Board's jurisdiction to decide appeals from final decisions of the Office is limited to reviewing the evidence that was before the Office at the time of its final decision and the Board may, therefore, not consider whether appellant's explanation is sufficient to rebut the presumption of receipt raised by the "mailbox rule."[24] The record contains other evidence regarding appellant's hearing request, which was not available to the Office at the time it rendered its July 9, 1996 decision, but the Board cannot consider this evidence for the first time on appeal for the same reason noted above. When the Office issued its July 9, 1996 decision, the record contained no explanation for appellant's failure to appear. The Office's decision, therefore, was proper.[25]

[21] *George F. Gidicsin*, 36 ECAB 175 (1984).

[22] *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

[23] *Larry L. Hill*, 42 ECAB 596 (1991).

[24] *See* 20 C.F.R. § 501.2(c). Appellant may submit such argument and any supporting evidence in a request for review to the Office pursuant to 5 U.S.C. § 8128.

[25] *See Clara T. Norga*, 46 ECAB 473 (1995); *Mike C. Geffre*, 44 ECAB 942 (1993).

Consequently, the decisions of the Office of Workers' Compensation Programs dated February 5, 1997 and July 9, 1996 are hereby affirmed.

Dated, Washington, D.C.
January 21, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member