

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AARON A. HOUREL and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, GA

*Docket No. 98-2356; Submitted on the Record;
Issued April 13, 2000*

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 properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b); and (2) whether the Office abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The record in this case indicates that the Office accepted the condition of lumbosacral strain for a December 22, 1989 injury (claim number A06-0477631), the conditions of cervical and lumbar strains for a July 23, 1992 injury (claim number A06-0549066) and the condition of lumbar strain for an October 10, 1993 injury (claim number A06-0582217). The Office combined the factual and medical evidence of the above claims into case number A06-0549066.

By decision dated April 11, 1994, the Office denied appellant's recurrence claim for disability on or after December 29, 1993 finding that appellant's work stoppage was not due to a change in the nature or extent of his injury-related condition or a change in the nature and extent of his light-duty requirements. Appellant, however, remained eligible for medical benefits of his accepted condition. The Office noted that appellant was placed on administrative leave from December 29, 1993 through February 7, 1994 and was removed from the employing establishment for cause effective February 10, 1994.¹

In an August 18, 1997 letter, appellant, through his representative, requested a hearing before an Office representative.

¹ By decision also dated April 11, 1994, the Office found that appellant had forfeited his entitlement to compensation for the period December 11 through 21, 1993, which resulted in an overpayment. By decision dated May 31, 1994, the Office terminated the collection action of the overpayment as the cost of recovery exceeded the amount of the overpayment. The Office issued subsequent letters to appellant denying his CA-7 claims for compensation.

By decision dated October 6, 1997, the Office denied appellant's request for a hearing as untimely under section 8124 of the Federal Employees' Compensation Act. The Office found that the issue in this case could be addressed by the reconsideration process by having appellant submit evidence not previously considered, which establishes that the claimed recurrence of disability on or after December 29, 1993 was causally related to the accepted injury.

In a March 31, 1998 letter, appellant, through his representative, requested reconsideration. The letter stated:

"I am writing this letter requesting reconsideration of injuries sustained December 22, 1989, July 23, 1992 and October 10, 1993. As of this writing my physical condition has continued to deteriorate and I have been advised it will never improve. The [a]dministrative [l]aw [j]udge that held a hearing for Social Security has conducted that the [m]ental status findings of record reasonably establish that as reflected on the PRTF (psychiatric review technique form) that has been completed and appended to decision in accordance with 20 C.F.R. [§] 404.152A and 416.920A I've had a 'moderate' restriction in my activities of daily living and difficulties in maintaining social functioning."

The record establishes that I have a significant physical impairment. I have been treated and evaluated for persistent lower back pain. Magnetic resonance imaging (MRI) scans of the lumbar spine document multi-level degenerative disc and joint disease with neuroforaminal stenosis and disc herniation at L4-5. I also have patellofemoral arthritis from an exertional standpoint. I have reasonably been limited to sedentary work as defined under 20 C.F.R. §§ 404.1567 and 416.967.

Thank you once again for your time and consideration to my claim. May I hear from you within 15 calendar days.

By decision dated April 23, 1998, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and that it did not establish clear evidence of error.

The Board finds that the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² Inasmuch as appellant filed his appeal with the Board on July 21, 1998, the only decisions properly before the Board are the Office's October 6, 1997 decision, denying appellant's request for an oral hearing and the April 23, 1998 decision, denying appellant's request for reconsideration of the April 11, 1994 decision.

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

Section 8124(b)(1) of the Act provides that a “claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.”³ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁴

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant or deny a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office’s procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.⁵

In this case, the Office issued its decision finding that appellant had failed to establish that he sustained a recurrence of disability on or after December 29, 1993 on April 11, 1994. Subsequently, appellant requested an oral hearing in a letter dated August 18, 1997. Inasmuch as appellant did not request a hearing within 30 days of the Office’s April 11, 1994 decision, he is not entitled to a hearing under section 8124 as a matter of right. The Office also exercised its discretion but decided not to grant appellant a discretionary hearing on the grounds that he could have his case further considered on reconsideration by submitting relevant evidence. Consequently, the Office properly denied appellant’s hearing request.

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant’s case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant’s request for reconsideration was untimely filed and failed to present clear evidence of error.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁶ a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁷ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his

³ 5 U.S.C. § 8124(b)(1).

⁴ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

⁵ *Henry Moreno*, 39 ECAB 475 (1988).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 20 C.F.R. § 10.138(b)(1)-(2); *Thankamma Mathews*, 44 ECAB 788 (1993).

or her application for review within one year of the date of that decision.⁸ 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.⁹

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. The Office 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.¹⁰ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).¹¹

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.¹² The Office issued its last merit decision in this case on April 11, 1994 wherein appellant's claim was denied on the grounds that the evidence of record was insufficient to establish that he sustained a recurrence of disability on or after December 29, 1993. Inasmuch as appellant's March 31, 1998 request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed.

In those cases, where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.¹³ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year

⁸ 20 C.F.R. § 10.138(b)(2).

⁹ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

¹⁰ 20 C.F.R. § 10.138(b)(2); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹¹ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

¹² *Larry L. Lilton*, 44 ECAB 243 (1992).

¹³ *Gregory Griffin*, *supra* note 10.

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.¹⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.¹⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁶ Evidence, which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁸

The March 31, 1998 letter in which appellant requested reconsideration does not present any evidence that the April 11, 1994 decision was erroneous. He advises of his medical condition without providing supportive evidence to show it is causally related to his original work injuries. In a May 3, 1996 CA-20 form, Dr. William M. Craven, an orthopedic surgeon, diagnosed low back pain and found that this condition was caused or aggravated by employment activity by checking a "yes" in the appropriate box. The Board has held that an opinion on causal relationship, which consists only of a physician checking "yes" to a medical form report question on whether the claimant's disability was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.¹⁹

Inasmuch as the evidence submitted by appellant in support of his request for reconsideration does not manifest on its face that the Office committed error in the April 23, 1998 decision, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) of the Act, on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3(b) (January 1990) (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); *Thankamma Mathews*, *supra* note 7; *Jesus D. Sanchez*, *supra* note 11.

¹⁵ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁶ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁷ *Jesus D. Sanchez*, *supra* note 11.

¹⁸ *Leona N. Travis*, *supra* note 16.

¹⁹ *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

The April 23, 1998 and October 6, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
April 13, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member