U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TRINIDAD C. CERDA and U.S. POSTAL SERVICE,
POST OFFICE, Coppell, TX

Docket No. 98-1653; Submitted on the Record;
Issued January 5, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing in its October 31, 1997 decision; and (2) whether the Office properly determined that appellant's request for reconsideration received on January 8, 1998 was untimely filed and did not present clear evidence of error.

The Board has duly reviewed the case record and concludes that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a 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."[1]

The Board has held that 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 that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[2] 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,[3] when the request is made after the 30 day period for requesting a hearing,[4] and when the request

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[1] 5 U.S.C. § 8124(b)(1).

[2] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[3] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[4] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

is for a second hearing on the same issue.[5] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[6]

In the present case, appellant's July 3, 1997 hearing request was made after she requested reconsideration in connection with her claim and, thus, appellant was not entitled to a hearing as a matter of right. On June 14, 1995 appellant requested reconsideration of the Office's previous decision and the Office issued a decision on October 18, 1995 denying modification. Hence, the Office was correct in stating in its October 31, 1997 decision that appellant was not entitled to a hearing as a matter of right because she made her request after she had requested reconsideration.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its October 31, 1997 decision, properly exercised its discretion by stating that it considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be equally addressed by requesting reconsideration and by submitting new evidence establishing that appellant continues to suffer residuals from her January 21, 1994 injury. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[7] In the present case, the evidence of record does not indicate the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The Board further concludes that appellant's request for reconsideration received by the Office on January 8, 1998 was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Act[8] does not entitle a claimant to a review of an Office decision as a matter of right.[9] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[10] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application

[5] *John S. Henderson*, 34 ECAB 216, 219 (1982).

[6] *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

[7] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[8] 5 U.S.C. § 8128(a).

[9] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[10] 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).

for review is filed within one year of the date of that decision.[11] 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 5 U.S.C. § 8128(a).[12]

The Office properly determined in this case 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.[13] The Office issued its last merit decision in this case on October 18, 1995 wherein it found that the evidence submitted in support of the reconsideration request was not sufficient to warrant modification of the prior decision. As appellant's reconsideration request received on January 8, 1998 was outside the one-year time limit which began the day after October 18, 1995 appellant's request for reconsideration was untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held 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.[14] Office procedures state 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.[15]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[16] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[17] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[18] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[19] 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.[20] To

[11] 20 C.F.R. § 10.138(b)(2).

[12] *See* cases cited *supra* note 9.

[13] *Larry L. Lilton*, 44 ECAB 243 (1992).

[14] *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

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

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

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

[18] *See Jesus D. Sanchez*, *supra* note 9.

[19] *See Leona N. Travis*, *supra* note 17.

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

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.[21] 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.[22]

In the present case, appellant's benefits were terminated inasmuch as the medical evidence established that she no longer had residuals from her January 21, 1994 accepted employment injuries. In support of her January 8, 1998 request for reconsideration, appellant submitted a September 23, 1997 report from Dr. George E. Medley, her treating physician and a Board-certified orthopedic surgeon, who indicated that appellant continued to suffer residuals from her accepted injuries, right bicipital tendinitis and right lateral epicondylitis. He failed, however, to provide any medical rationale for his conclusion. Consequently, his opinion fails to establish that the denial of appellant's claim was clearly in error.[23] Appellant also submitted a December 29, 1995 report from Dr. Christopher J. Tucker, a doctor of osteopathy, who also indicated that appellant continued to suffer from right bicipital tendinitis and right lateral epicondylitis. Because Dr. Tucker failed to provide any medical rationale for his conclusions, his opinion is also entitled to little weight and fails to establish clear error.[24] Moreover, Dr. Tucker did not address whether the diagnosed conditions were disabling. Finally, appellant resubmitted the December 9, 1994 opinion of Dr. Bruce R. Beavers, a Board-certified orthopedic surgeon. Inasmuch as Dr. Beavers opined that all of appellant's accepted conditions had resolved, this opinion fails to establish clear evidence of error. Accordingly, the Office properly found that appellant failed to establish clear evidence of error.

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

[22] *Gregory Griffin, supra* note 14.

[23] *Thomas L. Hogan*, 47 ECAB 323 (1996); *Carolyn F. Allen*, 47 ECAB 240 (1995).

[24] *Id.*

The decisions of the Office of Workers' Compensation Programs dated April 1, 1998 and October 31, 1997 are affirmed.

Dated, Washington, D.C.
January 5, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member