U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONNIE M. MORRIS and U.S. POSTAL SERVICE,
POST OFFICE, Flushing, NY

Docket No. 99-1958; Submitted on the Record;
Issued September 1, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1); and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The only decisions before the Board on this appeal are the Office's May 7 and June 11, 1999 nonmerit decisions denying, respectively, appellant's untimely request for an oral hearing under 5 U.S.C. § 8124(b)(1) and her untimely application for a review on the merits under 5 U.S.C. § 8128(a) of its October 2, 1995 decision.[1] Because more than one year has elapsed between the issuance of the Office's October 2, 1995 merit decision and June 21, 1999, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the October 2, 1995 merit decision.[2]

The Board finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

Section 8124(b)(1) of the Federal Employees' Compensation Act provides in pertinent part as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is

[1] By decision dated October 2, 1995, the Office denied appellant's claimed July 11, 1995 recurrence of disability causally related to her December 22, 1993 generalized anxiety disorder.

[2] *See* 20 C.F.R. § 501.3(d)(2).

> entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[3]

The Office's procedures implementing this section of the Act are found in the Code of Federal regulations at 20 C.F.R. § 10.616(a). This paragraph notes as follows:

> "A claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by the postmark or other carrier's date marking) of the date of the decision for which a hearing is sought. The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision."

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 of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[4] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request when the request is made after the 30-day period for requesting a hearing.[5] In this instance, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[6] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely, are a proper interpretation of the Act and Board precedent.[7]

In the present case, the Office issued its most recent merit decision denying appellant's claim on October 2, 1995. Appellant requested a hearing in an undated letter received by the Office on April 6, 1999. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.[8] Since appellant did not request a hearing within 30 days of the Office's October 2, 1995 decision, she was not entitled to a hearing under section 8124 as a matter of right.

The Office, in its discretion, considered appellant's hearing request in its May 7, 1999 decision and denied the request on the basis that appellant could pursue her claim by requesting reconsideration by the Office and by submitting additional evidence supporting that she sustained a recurrence of disability commencing July 11, 1995.

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[3] 5 U.S.C. § 8124(b)(1)

[4] *Rebel L. Cantrell*, 44 ECAB 660 (1993) (untimely); *Mary B. Moss*, 40 ECAB 640 (1989) (untimely); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982) (request for a second hearing).

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

[6] *See supra* note 4.

[7] *See Linda J. Reeves*, 48 ECAB 373 (1997); *William E. Seare*, 47 ECAB 663 (1996); *Herbert C. Holley, supra* note 5; *Rudolph Bermann*, 26 ECAB 354 (1975).

[8] 20 C.F.R. § 10.616(a).

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 deductions from known facts.[9] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim on June 11, 1999, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[10] the Office's regulations provide that a claimant must: (1) submit such application for reconsideration in writing; and (2) set forth arguments and contain evidence that either (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[11]

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.[12] 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.[13] When a claimant fails to meet one of the above-mentioned 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.[14] However, the Office, through its implementing regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). When an application for review is untimely, the Office undertakes a limited review to determine whether there is clear evidence of error pursuant to the untimely request.[15] Evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not

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

[10] 5 U.S.C. §§ 8101-8193.

[11] 20 C.F.R. § 10.606(b)(1), (2)

[12] 20 C.F.R. § 10.607(a)

[13] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[14] *See Mohamed Yunis, supra* note 13; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[15] *Cresenciano Martinez*, 51 ECAB __(Docket No. 98-1743, issued February 2, 2000); *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

constitute a basis for reopening a case.[16] Evidence that does not address the particular issue involved also constitutes no basis for reopening a case.[17]

In its June 11, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on the issue appealed on October 2, 1995 and appellant's request for reconsideration was dated May 17, 1999, which was more than one year after October 2, 1995. Therefore, appellant's request for reconsideration of her 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."[18] 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. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[19]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[20] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[21] Evidence, which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[22] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[23] 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.[24] To show clear evidence of error, the evidence submitted must not only be of sufficient probative

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[16] *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984).

[17] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

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

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996). The Office therein states: The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office 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.

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

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

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

[23] *See Leona N. Travis, supra* note 21.

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

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.[25] 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.[26]

By letter dated May 17, 1999, appellant requested reconsideration of the Office's October 2, 1995 decision. In support of the request, appellant submitted an undated statement from Dr. Gary K. Arthur, a Board-certified psychiatrist, in connection with her civil service disability retirement application, which noted an affect of severe depression and psychomotor retardation, indicated the diagnoses of major depressive illness, recurrent type, post-traumatic stress disorder -- severe, paranoid personality disorder, lumbosacral disc disease and right shoulder strain. This report recommended continued psychotherapy and mediation regulation; it did not identify or address a claimed recurrence of disability on July 11, 1995. As this report does not address the particular issue involved, it failed to demonstrate clear evidence of error on its face and constitutes no basis for reopening a case.

Also submitted was a second undated psychiatric report from Dr. Arthur, which noted a June 14, 1998 injury and repeated the previously indicated diagnoses and which failed to identify or address a claimed recurrence of disability on July 11, 1995. As this report does not address the particular issue involved, it also failed to demonstrate clear evidence of error on its face and constitutes no basis for reopening a case.

As these pieces of evidence did not address the subject of the October 2, 1995 decision, they are irrelevant, such that they do not constitute the submission of new and relevant evidence not previously considered and they do not demonstrate any clear evidence of error on its face on the part of the Office in its October 2, 1995 decision, or *prima facie* shift the weight of the evidence in her favor, as the Office properly ascertained. Consequently, the Board now finds that appellant's untimely request and her irrelevant submissions do not raise a substantial question as to the correctness of the prior October 2, 1995 Office decision and do not, therefore, constitute grounds for reopening appellant's case for a merit review.

Therefore, the Office did not abuse its discretion by denying appellant's request for a further review of her case on its merits on June 11, 1999.

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of appellant's request 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.

[25] *Leon D. Faidley, Jr., supra* note 13.

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

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 her application for review was not timely filed and failed to present clear evidence of error.

In the present case, appellant has not established that the Office abused its discretion in its June 11, 1999 decision by denying her request for a review on the merits of its October 2, 1995 decision under section 8128(a) of the Act, on the grounds that it was untimely requested and presented no 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 judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[27] Appellant has made no such showing here.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated June 11 and May 7, 1999 are hereby affirmed.

Dated, Washington, D.C.
September 1, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

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