U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON I. SMITH and U.S. POSTAL SERVICE,
POST OFFICE, Miami, FL

Docket No. 00-2469; Submitted on the Record;
Issued December 12, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing; and (2) whether the Office properly denied appellant's May 1, 2000 request for reconsideration.

On April 26, 1988 appellant, then a 32-year-old letter carrier, filed a claim for traumatic injury alleging that on April 25, 1988 she hurt her back and elbow when she slipped and fell while delivering mail. The Office accepted appellant's claim for lumbosacral strain.

On March 18 and October 20, 1998 appellant filed claims alleging that on March 6, 1998 she sustained a recurrence of disability, causally related to her April 25, 1988, employment injury.[1] In a decision dated November 16, 1998, the Office denied appellant's claim for a March 6, 1998 recurrence on the grounds that none of the medical reports of record supported a finding that appellant's diagnosed conditions were causally related to her April 25, 1988 accepted employment injury.[2]

By letter postmarked December 24, 1999, appellant contacted the Office stating that on November 30, 1998 she had requested an oral hearing, but that she had recently been informed that the Office did not have a copy of this request. Appellant stated that she had been advised that it took 12 to 18 months to process a hearing request, so she did not initially realize that her request had not been received. Appellant enclosed a handwritten letter dated November 30,

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[1] Previously, on May 18, 1990, appellant filed a claim alleging that she sustained a recurrence of disability on May 8, 1990. However, appellant returned to work on May 14, 1990 and did not submit any further documentation in support of her claim.

[2] Because appellant filed her July 28, 2000 appeal to the Board more than one year after the Office's November 16, 1998 decision, the Board has no jurisdiction to review that decision. *See* 20 C.F.R. §§ 501.3(d) (time for filing); 501.10(d)(2) (computation of time).

1998, requesting an oral hearing. By letter postmarked January 27, 2000, appellant reiterated her request for an oral hearing.

In a decision dated February 8, 2000, the Office found that appellant was not entitled to a hearing as a matter of right because her request was untimely. Exercising its discretion, the Office denied appellant's request "for the reason that the issue in this case can equally well be addressed by requesting reconsideration from the district office and submitting evidence which establishes that the claimed recurrence is causally related to the injury of April 25, 1988."

By letter received by the Office on May 4, 2000, appellant requested reconsideration. Subsequently, appellant submitted several additional medical reports in support of her claim.

In a decision dated May 25, 2000, the Office denied a merit review of appellant's claim on the grounds that her request for reconsideration was untimely and failed to present clear evidence of error in the Office's November 16, 1998 decision.

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides:

> "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 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]

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.[4] The Office has discretion to grant or deny a request that is made after the 30-day period specified in section 8124(b)(1) of the Act.[5] In such cases, the Office will determine whether to grant a discretionary hearing and, if it denies a hearing, the Office will so advise the claimant with reasons.[6]

Because appellant made her December 24, 1999 request for a hearing more than 30 days after the Office's November 16, 1998 decision, she is not entitled to a hearing as a matter of right under the Act. Although appellant asserted that she had previously requested an oral hearing by letter dated November 30, 1998 and enclosed a copy of a letter dated November 30, 1998, there is no envelope or postmark associated with this letter, or any other evidence that a prior timely request was ever sent to, or received by, the Office. The Office exercised its discretion in the matter and decided not to grant a discretionary hearing "because the issue in this case could be equally well addressed by requesting reconsideration from the district office and submitting evidence which establishes that the claimed recurrence of disability was causally related to the

[3] 5 U.S.C. § 8124(b)(1).

[4] 20 C.F.R. § 10.616(a).

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

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

1988 injury." The Board finds no abuse of discretion in the Office's February 8, 2000 decision denying a hearing.

The Board also finds that the Office properly denied appellant's May 4, 2000 request for reconsideration.

Section 10.607 of the Code of Federal Regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.[7]

Because appellant did not make her request for reconsideration within one year of the Office's November 16, 1998 decision, the Office will not review the merits of his claim without clear evidence of error in that decision. In support of her request, appellant submitted an x-ray report dated April 6, 1998, noting that appellant's spine is within normal limits, and several reports from her treating chiropractors, Drs. Ronald W. Scott and David W. Ferguson.

In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician under 5 U.S.C. § 8101(2). A chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation of the spine as demonstrated by x-ray to exist.[8] The record contains no x-ray evidence of spinal subluxation, or medical reports diagnosing spinal subluxation as shown by x-ray to exist. Thus, the reports of Drs. Scott and Ferguson cannot be considered medical evidence under the Act. Therefore, appellant has failed to submit any evidence sufficient to show that the Office's November 16, 1998 decision denying her claim for a recurrence of disabilty was erroneous.

[7] 20 C.F.R. § 10.607.

[8] *Thomas R. Horsfall*, 48 ECAB 180 (1996).

The May 25 and February 8, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.[9]

Dated, Washington, DC
December 12, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

[9] The Board notes that, at appellant's request, the Board scheduled an oral argument to be held on October 16, 2000. However, appellant did not appear.