U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELIZABETH L. BOOZER and DEPARTMENT OF DEFENSE, LAKENHEATH MIDDLE SCHOOL, Thetford, UK

Docket No. 00-764; Submitted on the Record;
Issued January 18, 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 continuation of pay on the basis that written notice of injury was not filed within 30 days of the date of injury; (2) whether the Office abused its discretion in denying appellant's request for merit review under 5 U.S.C. § 8128; and (3) whether the Office properly denied appellant's request for a written review of the record as untimely.

On January 22, 1998 appellant, then a 55-year-old teacher, filed a notice of traumatic injury alleging that on December 9, 1997 she injured her foot when she slipped and fell in the parking lot. Appellant's supervisor took appellant to the hospital for treatment and noted that appellant lost half a day of work. On December 23, 1998 the Office accepted the claim for contusion of the right foot.

By decision dated December 23, 1998, the Office denied appellant continuation of pay on the grounds that she did not file a CA-1 form within 30 days of the injury.

In a letter dated February 3, 1999,[1] appellant requested a written review of the record, on the issue of the denial of continuation of pay. Appellant argued that she reported the injury to her supervisor, but was not informed of further requirements for filing a claim for workers' compensation.

By decision dated February 25, 1999, the Office denied appellant's request for a written review of the record on the basis that her request was untimely and that the issue would be better addressed by requesting reconsideration and submitting additional evidence.

[1] The attached envelope had a postmark of February 5, 1999.

In a letter dated March 25, 1999, appellant requested reconsideration, detailed the medical treatment she had received since the incident and her out-of-pocket costs and she requested payment for the time she had been out of work due to her foot injury.

By nonmerit decision dated April 30, 1999, the Office denied appellant's request for reconsideration.

By letter dated July 7, 1999, appellant requested reconsideration of the denial of her continuation of pay.

By nonmerit decision dated September 17, 1999, the Office denied appellant's request for reconsideration.

The Board finds that the Office properly denied appellant continuation of pay.

Section 8118 of the Federal Employees' Compensation Act[2] provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury with [her] immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title."[3] Section 8122 provides that written notice of the injury shall be given with 30 days as specified in section 8119.[4] Section 8119[5] requires, in pertinent part, that written notice of the injury shall be given to the employee's immediate superior within 30 days after the injury.

The record shows that appellant's foot injury occurred on December 9, 1997, but she did not file a written notice of traumatic injury until January 22, 1998. As this claim was filed more than 30 days after the December 9, 1997 employment injury, appellant's claim for continuation of pay is barred by statute.

Appellant argues that she gave notice to her supervisor, who drove her to the hospital within the 30-day limit and thus timely filed her claim. While section 8122(a)(1) provides for filing an original claim for compensation for disability or death within three years, section 8118 is the relevant statute as it provides for payment of continuation of pay within the time specified in section 8122(a)(2), which states that written notice of injury or death, as specified in section 8119, be given within 30 days. In this case, there is a clear distinction between filing a claim for compensation and claiming continuation of pay. Actual notice or knowledge of the injury has no bearing on the 30-day filing requirement for continuation of pay.[6] Accordingly, the Office properly denied appellant continuation of pay.

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8118(a); *see* 20 C.F.R. § 10.201(a)(3) (1998).

[4] 5 U.S.C. § 8122(a)(2).

[5] 5 U.S.C. § 8119.

[6] *Loretta R. Celi*, 51 ECAB ___ (Docket No., 99-1353, issued June 26, 2000).

Next, the Board finds that the Office acted within its discretion in denying appellant's requests for merit review.

Section 10.606 of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[7] Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[8]

Section 10.616(a) of the Office's regulations[9] provides in pertinent part that "the hearing request must be sent within 30 days as determined by postmark or other carrier's date of marking of the date of the decision for which a hearing is sought."

In both her letters requesting reconsideration, appellant did not submit any relevant evidence and did not argue that the Office erroneously applied or interpreted a point of law. Nor did she advance a relevant legal argument not previously considered by the Office. Appellant merely requested reconsideration of the denial of her claim. Therefore, the Office properly denied her requests for reconsideration by decisions dated April 30 and September 17, 1999.

The Board also finds that the Office properly denied appellant's request for a written review of the record as untimely.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant … is entitled, on request made within 30 days after the date of the issue of the decision, to a hearing on his claim before a representative of the Secretary."[10] Section 10.615 of the Office's federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.[11] Thus, a claimant has a choice of requesting an oral argument or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulation.

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.[12] Specifically, the Office has the discretion to

[7] 20 C.F.R. § 10.606(b)(2) (1999).

[8] 20 C.F.R. § 10.608(b) (1999).

[9] 20 C.F.R. § 10.616(a) (1999).

[10] 20 C.F.R. § 8124(b)(1).

[11] 20 C.F.R. § 10.615 (1999).

[12] *Samuel R. Johnson*, 51 ECAB ___ (Docket No. 99-1228 August 1, 2000).

grant or deny a hearing request on a claim involving an injury sustained prior to the prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[13] when the request is made after the 30-day period for requesting a hearing[14] and when the request is for a second hearing on the same issue.[15] 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.[16]

In this case, appellant's February 3, 1999 request for a review of the written record, which was postmarked February 5, 1999, was made more than 30 days after the date of issuance of the Office's December 23, 1998 decision. Therefore, the Office was correct in stating in its February 25, 1999 decision, that appellant was not entitled to a review of the written record. 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 February 25, 1999 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case could be resolved by the submission of additional evidence.

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.[17] In this case, the evidence of record does not indicate that 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.

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

[14] *Herbert C. Holley*, 33 ECAB 140-42 (1981).

[15] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

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

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

The decisions of the Office of Workers' Compensation Programs dated September 17 and April 30, 1999 and December 23, 1998 are hereby affirmed.[18]

Dated, Washington, DC
January 18, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

[18] The Board notes that appellant is also contesting the Office's February 11, 1999 letter informing her that surgery on her right foot had not been approved. As no final decision has been issued on this matter, the Board does not have jurisdiction. *See Roger W. Griffith*, 51 ECAB ___ (Docket No. 98-1080, issued May 2, 2000); 20 C.F.R. § 501.2(c) (the Board has jurisdiction to consider and decide appeals from final decisions).