

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSE VERGARA and U.S. POSTAL SERVICE,
POST OFFICE, Los Altos, CA

*Docket No. 01-865; Submitted on the Record;
Issued November 28, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error; and (2) whether the Office properly denied appellant's request for a hearing.

On July 27, 1999 appellant, then a 40-year-old mail carrier, filed a traumatic injury claim alleging that a preexisting calf injury sustained while playing basketball on July 4, 1999 was reinjured while loading a postal truck on July 9, 1999. Appellant stopped work on July 12, 1999 and returned on August 13, 1999.

In a letter dated August 17, 1999, the Office advised appellant that the information submitted with his claim was insufficient and that further medical documentation was required within 30 days. Appellant submitted additional evidence.

By decision dated September 22, 1999, the Office denied appellant's claim on the grounds that the evidence failed to establish that his left leg condition was caused by factors of his federal employment.

In a letter received by the Office on February 16, 2000, appellant requested an oral hearing. In a subsequent letter dated May 10, 2000, appellant again requested an oral hearing.

By decision dated June 28, 2000, the Office denied appellant's request for an oral hearing on the grounds that it was untimely filed pursuant to section 8124 of the Federal Employees' Compensation Act.¹

¹ 5 U.S.C. §§ 8101-8193.; 5 U.S.C. § 8124.

In a facsimile dated October 5, 2000, appellant requested reconsideration of the September 22, 1999 decision. Appellant indicated that he was enclosing further medical evidence, but no additional evidence was submitted. In a separate facsimile dated October 11, 2000, appellant also requested an oral hearing. Appellant argued that his request was delayed because his primary physician had failed to provide sufficient evidence and that he now had evidence that he wished to present.

By decision dated October 11, 2000, the Office denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

By decision dated December 18, 2000, the Office further denied appellant's October 11, 2000 request for an oral hearing on the grounds that it was untimely.

Consequently, appellant has appealed the case to the Board and submitted additional evidence.²

The Board finds that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

It is well established that an appeal must be filed no later than one year from the date of the Office's final decision.³ As appellant filed his appeal on February 12, 2001, the only decisions over which the Board has jurisdiction on this appeal are those dated October 11, 2000 denying his request for and June 28 and December 18, 2001 denying his request for an oral hearing.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁴ the Office's regulations provide that a claimant's application for reconsideration must set forth arguments and contain evidence that either: (1) shows 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) constitutes relevant and pertinent new evidence not previously considered by the Office." To be entitled to a merit review of an Office decision denying or terminating a benefit, an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁵ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the

² The Board cannot consider the evidence submitted by appellant in response to the Office's December 18, 2000 decision, inasmuch as the evidence was not before the Office at the time of the final decision; see *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1).

³ See 20 C.F.R. § 501.3(d).

⁴ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(a).

part of the Office in its most recent merit decision. The application must establish on its face that such decision was erroneous.⁶

In its October 11, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. Appellant was issued appeal rights with the September 22, 1999 decision, which stated that, if he requested reconsideration of the decision, such request must be made in writing to the Office within one year of the date of the decision. Appellant's October 11, 2000, reconsideration request was outside the one-year time limit, which began the day after September 22, 1999 and, therefore, was untimely.

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 of the case to determine whether the application establishes "clear evidence of error." 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.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁸ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ 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.¹²

To 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.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence

⁶ 20 C.F.R. § 10.607(b).

⁷ 20 C.F.R. § 10.607(a).

⁸ See *Dean D. Beets*, 43 ECAB 1153 (1992).

⁹ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹³ See *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

of error by the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁴

The critical issue in the case when the Office issued its September 22, 1999 decision was whether appellant had established that the medical condition alleged in the claim was caused by factors of his federal employment. Appellant submitted no evidence in support of his October 11, 2000 request for reconsideration. Because appellant has not raised a substantial question as to the correctness of the merit decision or presented evidence that on its face shows that the Office made an error, appellant has failed to establish clear evidence of error.

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

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."¹⁵ 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.¹⁶

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.¹⁷

In this case, appellant first requested an oral hearing of the September 22, 1999 decision on February 16, 2000. The Board finds that the hearing request was made more than 30 days after the Office's decision and thus was untimely. Consequently, appellant was not entitled to a hearing under section 8124 of the Act as a matter of right.

The Office 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

¹⁴ See *Gregory Griffin*, 41 ECAB 458 (1990).

¹⁵ 5 U.S.C. § 8124(b)(1).

¹⁶ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

¹⁷ *Henry Moreno*, 39 ECAB 475 (1988).

submitting relevant evidence not previously considered by the Office. Consequently, the Office properly denied appellant's hearing request.

Immediately following appellant's October 11, 2000 facsimile request for reconsideration, appellant requested an oral hearing of the prior decision by facsimile on October 11, 2000. In denying the oral hearing request, the Office found that reconsideration had previously been requested under section 8128 and that it had issued its reconsideration decision denying review of the merit decision. Because appellant had previously requested reconsideration, he was not entitled to a hearing under section 8124 of the Act as a matter of right.

Again, the Office 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 not previously considered by the Office or by appeal to the Board. Consequently, the Office properly denied appellant's hearing request.

The December 18, October 11 and June 28, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 28, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member