U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WARREN LIPPS and U.S. POSTAL SERVICE,
POST OFFICE, New Orleans, LA

Docket No. 03-1217; Submitted on the Record;
Issued July 25, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing; and (2) whether the Office properly found that appellant's request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

On June 20, 2001 appellant, then a 52-year-old motor vehicle operator, filed a claim for a traumatic injury sustained on August 28, 2000: an aggravation of his post-traumatic stress disorder due to an angry verbal confrontation about use of a dock for loading mail.

Appellant submitted medical reports from Dr. Janet E. Johnson, a Board-certified psychiatrist. In a September 14, 2000 report, Dr. Johnson noted a "recent verbal altercation at work," and diagnosed prolonged post-traumatic stress disorder, and major depressive episode in partial remission. In a May 10, 2001 report, Dr. Johnson repeated these diagnoses, and stated: "It is my professional opinion that stress in the workplace served to aggravate and exacerbate [appellant's] psychiatric conditions. In particular, an incident that occurred on August 28, 2000 was especially stressful to [appellant] and created an exacerbation of his symptoms such that a new medication had to be instituted."

By letter dated July 17, 2001, the Office of Workers' Compensation Programs advised appellant of the further factual and medical evidence it needed to make a determination on his claim, and allotted him 30 days to submit such evidence.

By decision dated August 17, 2001, the Office found that there was no evidence to establish that the August 28, 2000 incident occurred as alleged, and no medical evidence explaining how he sustained an injury.

By letter dated July 23, 2002, appellant requested a hearing. Appellant stated that he first received the Office's July 17, 2001 request for information and its August 17, 2001 decision in July 2002. By decision dated September 13, 2002, the Office denied appellant's request for a

hearing on the basis that it was not timely requested and that the issue in his case could equally well be addressed by requesting reconsideration and submitting evidence that he sustained an injury as alleged.

By letter to the Office's Branch of Hearings and Review dated October 28, 2002, appellant stated that he requested a hearing at the time he did because of incompetence in delivering the August 17, 2001 decision. With this letter appellant submitted copies of envelopes from the Office, his July 23, 2002 request for a hearing and an Office August 16, 2002 letter addressing his request for a hearing.

By another letter dated October 28, 2002, appellant stated that he "would like to formally request reconsideration in [his] case," as suggested by the Office's letter denying his request for a hearing. Appellant stated that he would produce new evidence as requested. Appellant subsequently submitted an October 23, 2002 report from Dr. Johnson, which, other than the changed date, was identical to her May 10, 2001 report and a November 15, 2002 report from Dr. Elizabeth D. Schwarz, a Board-certified psychiatrist, who stated that appellant was involved in a stressful situation on August 28, 2000 and had continued to have depressed mood and anxiety since that time. These reports were received by the Office on November 29, 2002.

By decision dated January 13, 2003, the Office found that appellant's request for reconsideration was not filed within the one-year time limit and did not present clear evidence of error. The Office decision stated: "The basis for this decision is that the evidence that you submitted consisted of your reconsideration request, a copy of your July 23, 2000 letter, a copy of an envelope, and a copy [of] a letter dated August 16, 2002 from the Branch of Hearings and Review. However, an evaluation of this evidence does not show clear evidence of error in the prior decision."

The only Office decisions before the Board on this appeal are the Office's January 13, 2003 decision denying appellant's request for reconsideration on the basis that it was not filed within the one-year time limit set forth by 20 C.F.R. § 10.607(a), and that it did not present clear evidence of error, and the Office's September 13, 2002 decision denying appellant's request for a hearing. Since more than one year elapsed between the date of the Office's most recent merit decision on August 17, 2001 and the filing of appellant's appeal on April 11, 2003, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

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

Section 8124(b)(1) of the Federal Employees' Compensation Act,[2] concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "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

[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

[2] 5 U.S.C. § 8124(b)(1).

30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.[3]

In the present case, the Office's decision was issued on August 17, 2001. As appellant's request for a hearing was dated July 23, 2002, it was not timely filed so as to entitle appellant to a hearing.

Appellant contends that he did not receive the Office's August 17, 2001 decision until July 2002. However, under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.[4] The Office's August 17, 2001 decision contains appellant's correct address, and there is no evidence rebutting the presumption that he received it. The Office also exercised its discretion by advising appellant that the issue in his case could be addressed by submitting additional evidence on reconsideration.

The Board finds that appellant's request for reconsideration was not timely filed.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that "An application for reconsideration must be sent within one year of the date of the OWCP decision for which review is sought." The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[5]

In the present case, the most recent merit decision by the Office was issued on August 17, 2001. Appellant had one year from the date of this decision to request reconsideration, and did not do so until October 28, 2002. The Office properly determined that

[3] *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

[4] *Clara T. Norga*, 46 ECAB 473 (1995).

[5] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[6] 20 C.F.R. § 10.607(b) provides: "OWCP will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous."

Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[8] 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.[9] 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.[10] 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.[11]

The Board finds that the case is not in posture for a decision on the issue of whether appellant's request for reconsideration presented clear evidence of error.

There is no indication that the Office conducted a limited review of the evidence appellant submitted in support of his request for reconsideration. Appellant submitted a new medical report from a Board-certified psychiatrist not previously associated with the case. However, the Office's January 13, 2003 decision stated that the evidence received in support of appellant's request for reconsideration of its August 17, 2001 merit decision consisted of his reconsideration request, a copy of his July 23, 2000 letter, a copy of an envelope and a copy of a letter dated August 16, 2002 from the Branch of Hearings and Review. The Board finds that the Office did not consider the medical report.

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[6] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

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

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

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

[10] *Leon D. Faidley, Jr.*, *supra* note 5.

[11] *Gregory Griffin*, *supra* note 6.

In *William A. Couch*,[12] the Board stated:

> "The Federal Employees' Compensation Act provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim. Since the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision, it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed, it is critical that all evidence relevant to that subject matter which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office."

As appellant submitted medical evidence to support his request for reconsideration, this medical evidence must be reviewed and evaluated by the Office under the appropriate "clear evidence of error" standard.[13] The case will be remanded to the Office so that it may review this evidence to determine whether it demonstrates clear evidence of error that would warrant reopening appellant's case for merit review under section 8128 of the Act.

The September 13, 2002 decision of the Office of Workers' Compensation Programs is affirmed. The Office's January 13, 2003 decision is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, DC
July 25, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[12] 41 ECAB 548 (1990).

[13] *See Jeanette Butler*, 47 ECAB 128 (1995).