U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRIAN T. PORTER and U.S. POSTAL SERVICE,
POST OFFICE, Jamaica, NY

Docket No. 03-2072; Submitted on the Record;
Issued November 6, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a second oral hearing; and (2) whether the Office properly found that appellant's March 1, 2003 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

On January 23, 1997 appellant, then a 39-year-old postal clerk, filed a claim for a traumatic injury alleging that on January 22, 1997 he sustained high blood pressure, heart palpitations and anxiety as a result of being escorted by armed, employing establishment police officers to attend a fitness-for-duty medical evaluation. Appellant stated that, at the time, he was in nonpay status due to a suspension and asserted that his armed escorts stayed with him for 75 minutes in an effort to intimidate and harass him. Appellant further stated that during this time, he was denied representation, his representatives were denied access to his files and the physician refused to examine him.

In a decision dated March 28, 1997, the Office denied appellant's claim on the grounds that the evidence was not sufficient to establish that appellant sustained an injury in the performance of duty. The Office specifically noted that at the time he was escorted to the examination, appellant was on "emergency placement in off duty status," and that it was standard employing establishment administrative procedure to escort individuals to their examinations under these circumstances. Therefore, as the Office decided that there was no evidence of error or abuse on the part of the employing establishment, appellant's reaction to this administrative action was not compensable.[1]

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[1] Generally, actions of the employing establishment in administrative or personnel matters unrelated to the employee's regular or specially assigned-work duties, do not fall within coverage of the Federal Employees' Compensation Act. However, if the evidence demonstrates that the employing establishment erred or acted abusively in the administration of a personnel matter, a physical or emotional condition arising in reaction to such error or abuse may be covered. *Reco Roncaglione*, 52 ECAB 454 (2001).

Appellant requested an oral hearing, which was held on April 30, 1999. In a decision dated June 30, 1999 and finalized July 1, 1999, an Office hearing representative affirmed the Office's prior decision.

By letter dated March 1, 2003, appellant requested reconsideration of the Office's prior decision and submitted additional evidence in support of his request.

In a decision dated April 28, 2003, the Office stated that appellant had again requested an oral hearing.[2] The Office denied appellant's request, finding that appellant was not entitled to a second hearing on the same issue and that the issue could be equally well addressed by requesting reconsideration.

By decision dated July 22, 2003, the Office found that appellant's March 1, 2003 request for reconsideration was untimely as it was made more than one year from the last merit decision and that the evidence did not establish clear evidence of error.

The only decisions before the Board on this appeal are the Office's April 28, 2003 decision denying appellant's request for a second oral hearing and the July 22, 2003 decision, which denied appellant's March 1, 2003 request for reconsideration. Because more than one year has elapsed between the issuance of the Office's June 30, 1999 merit decision and August 16, 2003, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the June 30, 1999 Office decision.[3]

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

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states that "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is 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."[4] The Board has held that this section does not afford a claimant the right to a second hearing on the same issue before the Office.[5] However, the Office has discretionary authority to hold a second hearing on the same issue.[6]

In this case, at appellant's request, an oral hearing was held on April 30, 1999 on the same issue presented here. Appellant was present at the hearing and testified on his own behalf. While the Board notes that the record before it on appeal does not appear to contain a copy of appellant's request for a second oral hearing, assuming *arguendo*, that he did in fact make such a

[2] The Board notes that the record on appeal does not contain a copy of appellant's second request for an oral hearing.

[3] *See* 20 C.F.R. § 501.3(d)(2).

[4] 5 U.S.C. § 8124(b)(1).

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

[6] *Id.*

request, the Office was correct in stating in its April 28, 2003 decision, that appellant was not entitled to a second hearing as a matter of right. In addition, the Office, in its April 28, 2003 decision, properly exercised its discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, 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 case could be resolved by appellant requesting reconsideration and submitting additional evidence to establish that his condition was sustained in the performance of duty.

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.[7] 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 second hearing.

The Board also finds that the Office properly determined that appellant's March 1, 2003 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Act does not entitle a claimant to a review of an Office decision as a matter of right.[8] This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.[9] The Office through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[10] One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.[11]

The last merit decision in the instant case was the hearing representative's June 30, 1999 decision, which affirmed the Office's prior decision denying compensation. Appellant's request for reconsideration was dated March 1, 2003, which is more than one year after the June 30, 1999 decision. In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of error" on the part of the Office.[12] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[13]

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

[8] 5 U.S.C. § 8128(a); *see Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[9] 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 on application." 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.607 (1999).

[11] 20 C.F.R. § 10.607(a) (1999).

[12] 20 C.F.R. § 10.607(b) (1999).

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

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[14] The evidence must be positive, precise and explicit and it must be apparent on its face that the Office committed an error.[15] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[16] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[17] 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.[18]

The evidence submitted by appellant does not establish clear evidence of error. In support of his request for reconsideration, appellant submitted: a February 22, 1996 letter from the employing establishment directing him to appear for a fitness-for-duty examination; a memorandum dated September 26, 1989 from the employing establishment's human resources office discussing the fitness-for-duty examination policy; and notes from an April 2, 1991 meeting between labor and management regarding, among other things, the fitness-for-duty policy. While the documents indicate that the employing establishment's fitness-for-duty policy has long been a source of contention between labor and management, the documents themselves do not demonstrate that the employing establishment committed error or abuse in directing appellant to attend his January 22, 1997 examination so as to *prima facie* shift the weight of the evidence in favor of appellant's claim.

In addition, appellant submitted copies of a March 27, 1996 form signed by Dr. Hilton O. Hosannah, indicating that appellant was not fit for duty pending further medical evaluation. Appellant also submitted a June 14, 1996 letter from Dr. Calvin O. Browne to Dr. Hosannah, asking why appellant had been referred to him and a letter of response dated June 27, 1996, from Marilyn Williams, an employing establishment labor relations specialist, explaining to Dr. Browne that appellant had not been referred to him by the employing establishment. These letters do not contain any information regarding the January 22, 1997 incident, which is the basis of this claim and, therefore, are of little probative value.

Appellant also submitted an undated Equal Employment Opportunity Commission (EEOC) decision regarding events which occurred between January 24 and May 17, 1996. The decision affirms in part and vacates in part, the decision below, in which the administrative judge found no discrimination to have occurred. However, the decision does not pertain to the events on the dates in question and, in addition, does not contain any findings of error or abuse, but rather remands the vacated issues for further development. Thus, the EEOC decision is

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

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

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

[17] *See Leona N. Travis*, *supra* note 15.

[18] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

insufficient to establish that the employing establishment committed error or abuse with respect to the events surrounding the January 22, 1997 fitness-for-duty examination.[19]

The record also contains a copy of a May 14, 1996 letter of removal from the employing establishment. As this document duplicates a document previously contained in the record, does not constitute a basis for reopening the case.[20] Finally, appellant submitted copies of several email messages sent from Ms. Williams to Robert P. Lubrano, informing him that appellant was irritable, uncooperative and disruptive when he appeared for his January 22, 1997 fitness-for-duty evaluation, refused to fill out certain forms as requested by the physician and subsequently left the physician's office without being examined. Ms. Williams also asked what procedures were in place to compel appellant to reschedule his examination and fill out all necessary related paperwork. While this correspondence does pertain to the events of January 22, 1997 and while Ms. Williams does state in her email that appellant is "being a pain in the neck," appellant has not shown how this simple recitation of events and inquiry as to how to proceed, even containing as it does a negative comment regarding appellant, rose to the level of verbal abuse.[21] As the evidence submitted by appellant in support of his March 1, 2003 reconsideration request does not manifest on its face that the Office committed an error in its June 30, 1999 decision, the Office properly refused to reopen appellant's case for merit review under section 8128(a) of the Act.

The decisions of the Office of Workers' Compensation Programs dated July 22 and April 28, 2003 are hereby affirmed.

Dated, Washington, DC
November 6, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[19] *Compare Jimmy L. Day*, 48 ECAB 654 (1997) (holding that an EEOC decision favorable to appellant, while not binding in its result, was of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant as it offered significant support to appellant's allegations of error or abuse and raised a substantial question as to whether the employer committed error or abuse in personnel matters).

[20] *Linda I. Sprague*, 48 ECAB 386 (1997).

[21] *See Harriet J. Landry*, 47 ECAB 543 (1996).