U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD J. HIGGINS and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

Docket No. 99-1049; Submitted on the Record;
Issued December 5, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act; and (2) whether the Office abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

On December 28, 1990 appellant, then a 57-year-old collection and delivery worker, sustained an employment-related lumbar strain and right fifth finger strain. On December 3, 1991 he sustained another lumbar strain at work. Appellant worked in light-duty positions for the employing establishment and received compensation for periods of disability.[1] By decision dated September 22, 1992, the Office terminated appellant's compensation effective May 4, 1992 on the grounds that he had no disability due to his December 28, 1990 and December 3, 1991 employment injuries after that date. The Office based its termination on the April 23 and July 29, 1992 reports of Dr. Noubar Didizian, a Board-certified orthopedic surgeon who had been selected as an impartial medical examiner to resolve a conflict in the medical evidence regarding appellant's disability.[2] By decision dated June 25, 1998, the Office denied appellant's request for a hearing as untimely. By decision dated October 30, 1998, the Office denied appellant's request for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

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[1] Appellant stopped work on May 20, 1992 and did not return. He was separated from the employing establishment effective October 2, 1992.

[2] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

The Board finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[3] 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 with in the requisite 30 days.[4]

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.[5] 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,[6] when the request is made after the 30-day period for requesting a hearing,[7] and when the request is for a second hearing on the same issue.[8]

In the present case, appellant's May 1996 hearing request was made more than 30 days after the date of issuance of the Office's decision of September 22, 1992 and, thus, he was not entitled to a hearing as a matter of right. He requested a hearing before an Office representative in a letter dated May 16, 1996 and postmarked May 17, 1996. Appellant asserted that he had made a prior hearing request but the record does not support this assertion. The record contains a letter dated "October 1992" in which appellant requested a "hearing and/or appeal," but there is no indication that it was sent around that time.[9] The Office was correct in stating in its June 25, 1998 decision that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's September 22, 1992 decision.[10]

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 June 25, 1998 decision, properly

[3] 5 U.S.C. § 8124(b)(1).

[4] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

[5] *Henry Moreno*, 39 ECAB 475, 482 (1988).

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

[7] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

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

[9] The record contains copies of some certificates of mailing but it is unclear whether any of them relate to the "October 1992" letter.

[10] The record also contains an October 28, 1996 Office decision which similarly denied appellant's hearing request.

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 could be resolved by submitting additional evidence and requesting reconsideration. 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.[11] In the present 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 under section 8124 of the Act.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[12] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[13] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[14] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[15]

In its October 30, 1998 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on September 22, 1992 and appellant's request for reconsideration was dated July 28, 1998, more than one year after September 22, 1992. The record contains a letter dated "October 1992" in which appellant requested a "hearing and/or appeal, but there is no indication in the record that it was sent around that time. The record also contains a March 19, 1993 letter in which appellant stated that he was appealing a March 11, 1993 decision, but the record does not contain such a decision and it is

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

[12] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[13] 20 C.F.R. § 10.138(b)(2).

[14] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[15] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

unclear if the letter relates to the present appeal. Moreover, there is no indication the record that it was sent around the time of its date.[16]

The Office, however, may not deny an application for review solely on the ground 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 to determine whether the application establishes "clear evidence of error."[17] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[18]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[19] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[20] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[21] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[22] 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.[23] 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.[24] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

[16] The record contains copies of some certificates of mailing but it is unclear whether any of them relate to the "October 1992" or March 11, 1993 letters.

[17] *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3c (May 1996). The Office therein states, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

[19] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[20] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[21] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

[22] *See Leona N. Travis*, *supra* note 20.

[23] *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

[24] *Leon D. Faidley, Jr.*, *supra* note 15.

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[25]

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of his application. The Office stated that it had reviewed the evidence submitted by appellant in support of his application for review, but found that it did not clearly show that the Office's prior decision was in error.

The Board finds that the evidence submitted by appellant in support of his application for review does not raise a substantial question as to the correctness of the Office's decision and is insufficient to demonstrate clear evidence of error. Appellant argued that Dr. Didizian, a Board-certified orthopedic surgeon who served as an impartial medical examiner, did not have adequate diagnostic testing on which to base his opinion. Although Dr. Didizian indicated in his April 23, 1992 report that he would like to view any results of electromyogram or magnetic resonance imaging testing, he later clearly indicated that such testing was not necessary for him to reach a reasoned opinion on appellant's condition. Appellant has not clearly shown that the Office improperly relied on the opinion of Dr. Didizian in terminating his compensation.

The decisions of the Office of Workers' Compensation Programs dated October 30 and June 25, 1998 are affirmed.

Dated, Washington, DC
December 5, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[25] *Gregory Griffin*, 41 ECAB 458, 466 (1990).