U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SALLY W. WILSON and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Houston, TX

Docket No. 99-2374; Submitted on the Record;
Issued January 2, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the refusal of the Office of Workers' Compensation Programs, in its February 25 and April 21, 1999 decisions, to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion; and (2) whether the Office properly denied appellant's request for a review of the written record as untimely.

In January 1998 appellant, then a 55-year-old administrative officer, filed an occupational disease claim alleging that she sustained an emotional condition due to various incidents and conditions at work. By decision dated June 16, 1998, the Office denied appellant's claim on the grounds that she did not establish any compensable employment factors. By decision dated September 14, 1998, the Office denied appellant's request for a review of the written record and, by decisions dated February 25 and April 21, 1999, the Office denied appellant's requests for merit review.

The Board finds that the refusal of the Office, in its February 25 and April 21, 1999 decisions, to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[1] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[2] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her

[1] 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 her own motion or on application." 5 U.S.C. § 8128(a).

[2] 20 C.F.R. §§ 10.606(b)(2).

application for review within one year of the date of that decision.[3] 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.[4]

The only decisions before the Board on this appeal are the Office's September 14, 1998, February 25 and April 21, 1999 nonmerit decisions. Because more than one year has elapsed between the issuance of the Office's June 16, 1998 decision and June 25, 1999, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the June 16, 1998 decision.[5]

In support of the September 1998 reconsideration request, appellant submitted an undated statement in which she asserted that Uma Monga, a supervisor and several coworkers subjected her to repeated incidents of harassment. She also claimed in the statement that Ms. Monga did not provide her with adequate support. The submission of this statement, which was not accompanied by supporting documents, would not be sufficient to require reopening of appellant's case in that it is not relevant to the main issue of the present case, *i.e.*, whether appellant submitted sufficient evidence to establish her claims regarding the existence of compensable employment factors. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[6] Moreover, the allegations presented in appellant's undated statement were similar to those already considered and rejected by the Office. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[7] Appellant also submitted other evidence in support of her claim, but these were duplicates of documents which had already been submitted and considered by the Office.

In support of her March 1999 reconsideration request, appellant submitted statements in which was again asserted that Ms. Monga harassed her and did not provide her adequate support. However, these statements also are not relevant to the main issue of the present case, *i.e.*, whether appellant submitted sufficient evidence to establish her claims regarding the existence of compensable employment factors. Appellant also submitted statements in which family members and coworkers described her deteriorating emotional condition, but these statements would not be relevant to the main issue of the present case noted above. She submitted a copy of a document relating to a grievance, but this document had been previously considered by the Office.

In the present case, appellant has not established that the Office abused its discretion in its February 25 and April 21, 1999 decisions by denying her requests for a review on the merits

[3] 20 C.F.R. § 10.607(a).

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

[5] *See* 20 C.F.R. § 501.3(d)(2).

[6] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[7] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

of its June 16, 1998 decision under section 8128(a) of the Act, because she did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

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

The Board notes that effective June 1, 1987 the Office's regulations implementing the Act were revised. Several revisions were made which affect the appellate rights of employees who seek review of Office final decisions. Section 8124 provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office's final decision. The Office's new regulations have expanded section 8124 to provide the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing." The Office has provided that such review of the written record is also subject to the same requirement that the request be made within 30 days of the Office's final decision.[8]

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.[9] The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[10]

In the present case, appellant's August 10, 1998 request for a review of the written record was made more than 30 days after the date of issuance of the Office's prior decision dated June 16, 1998 and, thus, appellant was not entitled to a review of the written record as a matter of right. Hence, the Office was correct in stating in its September 14, 1998 decision that appellant was not entitled to a review of the written record as a matter of right because her August 10, 1998 request for a review of the written record was not made within 30 days of the Office's decision.

While the Office also has the discretionary power to grant a review of the written record when a claimant is not entitled to a review of the written record as a matter of right, the Office, in its September 14, 1998 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for a review of the written record on the basis that the issue of the present case could be addressed

[8] 20 C.F.R. § 10.131(b); *see Michael J. Welsh*, 40 ECAB 994, 996 (1989).

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

[10] *See Welsh, supra* note 8 at 996-97.

through a reconsideration application. 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 request for a review of the written record which could be found to be an abuse of discretion.

The decisions of the Office of Workers' Compensation Programs dated April 21 and February 25, 1999 and September 14, 1998 are affirmed.

Dated, Washington, DC
January 2, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

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