

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN ACOSTA and DEPARTMENT OF JUSTICE,
U.S. MARSHALS SERVICE, Arlington, VA

*Docket No. 02-661; Submitted on the Record;
Issued January 8, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's untimely 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 under 5 U.S.C. § 8124(b).

On December 27, 1994 appellant submitted a claim for compensation by widow, Form CA-5, alleging that her husband's death on December 11, 1994 was caused by acute hepatitis B, which she claimed he contracted during the performance of his duties as Deputy U.S. Marshal for the employing establishment.

By decision dated March 30, 1995, the Office rejected appellant's claim on the basis that she failed to establish that her husband's claimed employment exposure to hepatitis B resulted in his death. In a letter dated March 12, 1999 received by the Office by certified mail on March 16, 1999, appellant requested an oral hearing.¹

By decision dated June 8, 1999, the Office denied appellant's request for an oral hearing as untimely.

In a letter postmarked November 8, 2000, appellant requested a waiver of the time requirements and an extension for filing her request for a hearing. On May 16, 2001

¹ The Board notes that the date upon which appellant requested an oral hearing was initially in question. In her March 12, 1999 letter, appellant alleged that she had made two previous hearing requests on or about May 8, 1995 and September 1998. The record reflects that appellant submitted with the March 12, 1999 letter, a photocopy of a letter dated May 8, 1995, in which she requested an oral hearing, 39 days after the March 30, 1995 decision. The Office noted in a May 30, 2001 letter, to appellant's representative that the original May 8, 1995 letter was not of record. The Board notes that the Office provided appeal rights with the March 30, 1995 decision, which advised that a request for an oral hearing must be made to the Branch of Hearings and Review in Washington, D.C. within 30 days of the prior decision as determined by postmark. The earlier request for an oral hearing dated May 8, 1995, allegedly submitted was dated 9 days after the 30-day time limit for oral hearing requests.

Congressman Silvestre Reyes argued that appellant's previous requests for an oral hearing had never been granted. Congressman Reyes requested review of appellant's case again through hearing. On May 30, 2001 the Office notified Congressman Reyes that appellant had made a request for an oral hearing on March 16, 1999 but that the request was determined untimely by decision dated June 8, 1999.

On June 6, 2001 appellant made an additional request for an oral hearing. In a June 19, 2001 memorandum, an Office claims examiner indicated that appellant's representative was advised that since the Branch of Hearings and Review had ruled on the claim, appellant would either have to request review of the decision by the Board or request reconsideration. The Office treated appellant's June 6, 2001 request for an oral hearing to a request for reconsideration.

By decision dated June 20, 2001, the Office denied appellant's request for reconsideration on the grounds that the request was untimely and failed to present clear evidence of error. In an undated decision of record, the Office denied appellant's November 8, 2000 request for an oral hearing as untimely.²

Appellant through her attorney, Mike Milligan, Esq., submitted a brief in support of the appeal arguing that the Office improperly denied appellant an oral hearing, contending that appellant first requested an oral hearing following a March 30, 1995 decision, on May 8, 1995, however, the Office ignored her request until November 2000.

The Board finds that the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error.

The only decisions before the Board in this appeal are the June 20, 2001 decision, in which the Office denied appellant's request for reconsideration under 5 U.S.C. § 8128 and the undated decision, in which the Office denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124. Since more than one year has elapsed between the date of the Office's merit decision dated March 30, 1995 and the filing of appellant's appeal on February 5, 2002 the Board lacks jurisdiction to review the merits of appellant's claim.³

Section 10.607 of the code of federal regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁴

In its June 20, 2001 decision, the Office properly determined that appellant failed to file a timely application for review. Appellant was issued appeal rights with the March 30, 1995 decision, which stated that, if she requested reconsideration of the decision, such request must be

² Appellant appealed to the Board in this case on February 5, 2002 and made reference to the undated decision. Appellant's counsel noted that appellant received the undated decision on October 9, 2001.

³ 20 C.F.R. § 501.3(d)(2).

⁴ 20 C.F.R. § 10.607.

made in writing to the Office within one year of the date of the decision. Appellant initially made requests for a hearing following the merit decision, however, the Office determined that the first request was untimely on June 8, 1999. Appellant further requested oral hearings, however, the Office informed appellant through her representative that such an appeal was no longer available following the denial of an oral hearing on June 8, 1999. The Office thereafter treated appellant's June 6, 2001 oral hearing request as a request for reconsideration. However, the Office found that the request was outside the one-year time limit, which began the day after March 30, 1995. Therefore, appellant's application for review 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 Federal Employees' Compensation 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.⁵

The question, therefore, is whether appellant's request establishes that the Office's March 30, 1995 decision was erroneous. The Board has reviewed the material submitted on behalf of appellant in support of her request and finds that she has not established clear evidence of error. The factual information includes an unsigned "request for assistance" from Congressman Reyes, which discussed the federal service of the deceased and his subsequent diagnosis of hepatitis B. The request addresses appellant's attempts to request an oral hearing following the March 30, 1995 decision. Appellant submitted new medical evidence, including consultation reports dated August 18 and 29, 1994 from Dr. Victor Diaz, an attending physician, who reported that the decedent had been diagnosed with lymphoma and noted potential treatment. The medical reports submitted with the request did not mention the diagnosis of hepatitis B claimed to have caused death to appellant's husband.

The submitted medical evidence is not sufficient to establish clear evidence of error as it fails to address the relevant issue in this case. Appellant's untimely request for reconsideration does not cure these deficiencies and fails to establish that the Office's March 30, 1995 decision was clearly erroneous.

The Board further finds that the Office did not abuse its discretion in denying appellant's untimely request for an oral 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."⁶ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing,

⁵ 20 C.F.R. § 10.607(a).

⁶ 5 U.S.C. § 8124(b)(1).

a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁷

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.⁸

In this case, the Office issued its decision denying appellant's claim for compensation on the grounds that she failed to establish that the decedent's death arose out of factors of his federal employment on March 30, 1995. The record reflects that appellant subsequently requested an oral hearing by letter postmarked November 8, 2000. The Board finds that the hearing request was made more than 30 days after the Office's decision and thus, it was untimely. Appellant was not entitled to a hearing under section 8124 of the Act based on the November 8, 2000 oral hearing request as a matter of right.

Appellant through counsel argues on appeal that she had in fact requested an oral hearing of the March 30, 1995 decision on May 8, 1995. He indicated that the Office ignored the request for over five years, although it was only nine days late. The Board notes that had the Office received the May 8, 1995 hearing request discussed by appellant on appeal following the March 30, 1995 decision it too would have been subject to the 30-day time limitation provided in the Act and, therefore, untimely.

The Board notes that, although the Office properly found that appellant's November 8, 2000 hearing request to be untimely filed, the Office considered the matter in relation to the issue involved and properly advised appellant that she could pursue her claim through the reconsideration process. Consequently, the Office properly denied appellant's hearing request.

⁷ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

⁸ *Henry Moreno*, 39 ECAB 475 (1988).

The June 20, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed. The undated decision of the Office following the November 8, 2000 request for an oral hearing is also affirmed.

Dated, Washington, DC
January 8, 2003

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member