U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN V. TIBBS and U.S. POSTAL SERVICE,
POST OFFICE, Rochester, N.Y.

Docket No. 96-1701; Submitted on the Record;
Issued April 24, 1998

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for an oral hearing; and (2) whether the Office properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing.

Appellant filed a compensation claim on October 16, 1989 alleging that she was unable to continue working because of occupational harassment, death threats and cruel treatment she encountered in the course of her federal employment.[1] The Office, in a September 11, 1990 decision, denied the claim finding that appellant had not established that she sustained an injury as alleged. The Office specifically found that appellant had neither submitted sufficient factual information to allow the Office to determine the exact factors that were alleged to have caused the claimed condition, nor medical opinion evidence explaining how and in what manner those employment factors inflicted the injury. Thereafter, by letter postmarked May 30, 1995, appellant requested an oral hearing.

In a decision dated July 15, 1995, the Office denied appellant's request for a hearing on the grounds that it was untimely. The Office further informed appellant that it had determined that the issue in her claim could be equally well resolved by submitting new evidence on reconsideration.

[1] In several letters to the postmaster contained in the record appellant requested the removal of "E.S.P. men" who were "scanning" her mind, and inflicting severe pain in various parts of her body, as well as talking for her and affecting her thinking. Appellant also alleged that her fellow employees had verbally led her to believe that her son was in danger, and had threatened her son, and herself, with rape and murder.

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

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.[3]

In this case, the Office issued its decision denying appellant's claim for compensation benefits on September 11, 1990. Appellant's letter requesting a hearing was postmarked May 30, 1995 which was beyond 30 days from the date that the September 11, 1990 decision was issued.[4] Because appellant did not request a hearing within 30 days of the Office's September 11, 1990 decision, she was not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request, and must exercise that discretion.[5] In this case, the Office advised appellant that it considered her request in relation to the issue involved and the hearing was denied on the basis that the issues in her claim could be equally well resolved by a request for reconsideration. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[6] There is no evidence of an abuse of discretion in the denial of the hearing request in this case.

Following the Office's July 15, 1995 decision, on March 9, 1996, appellant requested reconsideration of the Office's September 11, 1990 decision. In a decision dated March 19,

[2] 5 U.S.C. § 8124(b)(1).

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

[4] Under the Office's regulations implementing 5 U.S.C. § 8124(b), the date the request is filed is determined by the postmark of the request; *see* 20 C.F.R. § 10.131(a).

[5] *William F. Osborne*, 46 ECAB 198 (1994); *Herbert C. Holley*, 33 ECAB 140 (1981).

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

1996, the Office denied appellant's request on the grounds that her request was untimely and failed to present clear evidence of error.

The Board finds that the Office properly determined that appellant's application for review was not timely filed and failed to present clear evidence of error.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[7] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[8]

Since more than one year elapsed from the September 11, 1990 merit decision of the Office to appellant's March 9, 1996 reconsideration request, the request for reconsideration is untimely. In addition, the evidence submitted by appellant in support of her reconsideration request does not establish clear evidence of error, as it does not raise a substantial question as to the correctness of the Office's most recent merit decision, and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In support of her March 9, 1996 reconsideration request, appellant submitted two letters from Dr. Angela Hodge, her treating psychiatrist. In her letter dated June 12, 1995, Dr. Hodge stated that she had been treating appellant since August 1992, that appellant felt she had received death threats and harassment at the employing establishment in 1989, and that the resulting stress caused her to resign. In a January 22, 1996 addendum to her earlier letter, Dr. Hodge stated that, in her opinion, "stress on the job" played a large part in the timing and development of appellant's illness. In a letter dated September 6, 1988, Dr. John P. Frazer, a Board-certified otolaryngologist, stated that appellant had presented in the summer 1988 complaining that stress in her job and criticism by other employees had caused her to lose her voice. A letter from Betty Zillman, a registered nurse, stated that appellant expressed on several occasions that she was being harassed by her coworkers which caused her to suffer stress and fear, and an April 24, 1995 treatment note from Dr. John R. Devanny, a Board-certified orthopedic surgeon, discussed appellant's treatment for knee pain after suffering a fall in a parking lot. Dr. Devanny noted that appellant stated that she had to quit her job because it required too much walking. Appellant did not submit any factual evidence in support of her claims of harassment and mistreatment.[9] Furthermore, the medical evidence submitted did not explain how specific established employment factors caused appellant's stress, but related the stress only to general stress and harassment, as

[7] 20 C.F.R. § 10.138(b)(2). *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

[8] *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

[9] To support a claim based on harassment, there must be some evidence that the harassment did, in fact, occur. Mere perceptions alone of harassment are not compensable. *Sharon R. Bowman*, 45 ECAB 187 (1993).

related by appellant.[10] Consequently, the evidence submitted is insufficient to establish clear evidence of error.

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.[11]

The March 19, 1996 and July 15, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
April 24, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[10] A medical report supporting an emotional condition claim must be rationalized and must establish that the emotional condition is causally related to identified compensable employment factors; *see Mary A. Sisneros*, 46 ECAB 155 (1994). Medical evidence which addresses the issue of causal relationship is of no probative value where occurrence of injury has not been established as factual. *Laura Hoexter*, 44 ECAB 987 (1993).

[11] Appellant submitted additional evidence following issuance of the Office's March 19, 1996 decision. However, the Board cannot consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).