U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of LINDA ANTHONY and U.S. POSTAL SERVICE,
POST OFFICE, Little Rock, Ark.

*Docket No. 97-1825; Submitted on the Record;*
*Issued February 17, 1999*

---

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b); and (2) whether the Office abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

On August 10, 1995 appellant, then a city carrier, filed a claim for an occupational disease (Form CA-2) alleging that she first realized that her emotional condition and hypertension were caused or aggravated by her employment on July 17, 1995. Appellant's claim was accompanied by factual and medical evidence.

By decision dated January 8, 1996, the Office found the evidence of record insufficient to establish that appellant sustained an injury while in the performance of duty. In an undated letter, which was postmarked February 20, 1996 and received by the Office on February 23, 1996, appellant requested an oral hearing before an Office representative.

By decision dated August 20, 1996, the Office denied appellant's request for an oral hearing as untimely under section 8124 of the Federal Employees' Compensation Act. In a February 6, 1997 letter, appellant requested reconsideration of the Office's decision accompanied by medical and factual evidence.

By decision dated March 4, 1997, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and that it did not establish clear evidence of error.

The Board finds that the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] Inasmuch as appellant filed her appeal with the Board on May 7, 1997, the only decisions properly before the Board are the Office's August 20, 1996 decision, denying appellant's request for an oral hearing and the March 4, 1997 decision, denying appellant's request for reconsideration of the Office's January 8, 1996 decision.

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."[2] 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 within the requisite 30 days.[3]

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.[4]

In this case, the Office issued its decision finding that appellant had failed to establish that she sustained an injury while in the performance of duty on January 8, 1996. Subsequently, appellant requested an oral hearing in an undated letter which was postmarked February 20, 1996 and received by the Office on February 23, 1996. Inasmuch as appellant did not request a hearing within 30 days of the Office's January 8, 1996 decision, she is not entitled to a hearing under section 8124 as a matter of right. The Office also exercised its discretion but decided not to grant appellant a discretionary hearing on the grounds that she could have her case further considered on reconsideration by submitting relevant medical evidence. Consequently, the Office properly denied appellant's hearing request.

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

---

[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

[2] 5 U.S.C. § 8124(b)(1).

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

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

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[5] 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.[6] 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.[7] 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.[8]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. 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.[9] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).[10]

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[11] The Office issued its last merit decision in this case on January 8, 1996 wherein appellant's claim was denied on the grounds that the evidence of record was insufficient to establish that she sustained an injury while in the performance of duty. Inasmuch as appellant's February 6, 1997 request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[12] Office procedures state 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.[13]

---

[5] 5 U.S.C. §§ 8101-8193.

[6] 20 C.F.R. § 101.38(b)(1)-(2); *Thankamma Mathews*, 44 ECAB 788 (1993).

[7] 20 C.F.R. § 10.138(b)(2).

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

[9] 20 C.F.R. § 10.138(b)(2); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

[10] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[11] *Larry L. Lilton*, 44 ECAB 243 (1992).

[12] *Gregory Griffin*, *supra* note 9.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3b (January 1990)

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[14] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[15] Evidence which 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]

In support of her claim, appellant submitted an August 5, 1996 report from Dr. Stephen A. Douglas, a clinical psychologist, revealing that appellant was under considerable stress at her job. Specifically, he noted that appellant indicated that she was frequently being watched on her route and that on one occasion a lady tried to detain her while she was being timed. Dr. Douglas further noted that appellant indicated that she experienced some level of ongoing harassment. He also noted that appellant stated that government cars kept following her and that when she got the license from one of the cars, she told her supervisor she was going to give it to the police. Additionally, Dr. Douglas noted that appellant stated that her telephones were tapped. He then noted his treatment of appellant and stated that she was no longer upset as she was in the past, but rather, she experienced considerable anger at the way she was being treated. Dr. Douglas' report regarding appellant's allegation that she was harassed in that she was watched and timed and that her telephones were tapped describes an administrative or personnel matter. It is an administrative function to supervise employees and see that they are tending to their tasks during work hours.[18] The record fails to indicate that the employing establishment committed error or abuse in handling these matters. Therefore, appellant has failed to establish a compensable factor of employment.[19]

In further support of her claim, appellant submitted a July 19, 1996 narrative statement of Cedric L. Brown, an employing establishment employee, revealing that he never worked with appellant and that he worked in a different department than Isaiah Anthony, appellant's husband. Mr. Brown stated that when he signed a statement presented by Bonnie Wilson, appellant's supervisor, he did not know the Anthonys or any problems that were going on with them. Mr. Brown further stated that Mrs. Wilson presented the prepared statement and that he signed it because she was his supervisor and he wanted to get along with her. Mr. Brown also stated that at the time, he was a "P.T.F." wanting to keep his job. Additionally, Mr. Brown stated that the

---

(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); *Thankamma Mathews*, *supra* note 6; *Jesus D. Sanchez*, *supra* note 10.

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

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

[16] *Jesus D. Sanchez*, *supra* note 10.

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

[18] *See Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Michael Thomas Plante*, 44 ECAB 510, 516 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[19] *Mildred D. Thomas*, 42 ECAB 888 (1991).

stare Mr. Anthony was doing on the day Mrs. Wilson brought it to my attention may have been initiated by Mrs. Wilson. Appellant also submitted a July 29, 1996 narrative statement of Jeffrey Paul Wilkerson, an employing establishment employee, regarding a statement he signed while working for Mrs. Wilson. In this statement, Mr. Wilkerson reiterated Mr. Brown's comments about not knowing Mr. Anthony and the problems he had with Mrs. Wilson, the statement being presented to him by Mrs. Wilson and his desire to comply with Mrs. Wilson's request to sign the statement. The statements of Mr. Wilkerson and Mr. Brown failed to establish a compensable factor of employment inasmuch as they merely addressed the method used by the employing establishment to gather evidence rather than specific acts of harassment committed by the employing establishment as alleged by appellant. Further, Mr. Brown's statement that Mrs. Wilson "may have" initiated Mr. Anthony's stare is not sufficient to establish appellant's allegation with regard to harassment due to its vague and equivocal nature.

Inasmuch as the evidence submitted by appellant in support of her request for reconsideration does not manifest on its face that the Office committed error in the January 8, 1996 decision, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) of the Act on the grounds that her application for review was not timely filed and failed to present clear evidence of error.[20]

The March 4, 1997 and August 20, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
February 17, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[20] On appeal appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision; *see* 20 C.F.R. § 501.2(c)(1).