U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHYLLIS S. JONES, widow of REUBEN S. JONES and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, HOLLYWOOD-BURBANK AIRPORT, Burbank, Calif.

Docket No. 97-1924; Submitted on the Record;
Issued March 17, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing before an Office hearing representative.

On September 5, 1970 the employee filed a claim for a brain stem hemorrhage secondary to hypertension sustained by the employee on December 6, 1969. The employee did not work after December 6, 1969.

By decision dated February 3, 1971, the Office determined that the employee's aggravation of arterial hypertension and his brain stem hemorrhage with right facial paralysis and left hemiparesis was due to conditions of his employment prior to December 6, 1969.

On December 22, 1972 the Office issued the employee a schedule award for 100 percent loss of vision in both eyes. The award was paid from January 24, 1972 to March 12, 1978. On November 20, 1979 the Office issued the employee a schedule award for a 100 percent loss of use of the left arm and of the left leg, paid from March 13, 1978 to September 10, 1989. During both these periods, the employee was entitled to and received his annuity under the Civil Service Retirement Act.

In a letter dated July 12, 1989, appellant (the wife of the employee) inquired whether she could receive a schedule award for loss of consortium, and in an April 30, 1990 letter, inquired whether the employee could receive a schedule award for loss or loss of use of his throat, balance mechanism, teeth, and potency under section 8107(22) of the Federal Employees' Compensation Act, which provides for schedule awards for loss of use of an "important external or internal organ."

By letter dated June 4, 1990, the Office advised appellant that, of the conditions listed, only loss of use of the penis would be covered under section 8107, the schedule award provision

of the Act, and that she "must submit medical evidence documenting this condition and establishing its relationship to the accepted coronary-vascular conditions." Appellant submitted medical evidence on two occasions, and the Office advised her both times that these reports were insufficient to establish the claim for loss of use of the penis. Appellant then submitted a third medical report on the relationship of the employee's stroke and his impotence.

The employee died on February 6, 1992.

By decision dated January 14, 1994, the Office found that the employee was not entitled to a schedule award for loss of use of the penis on this basis: "The Act does not provide for a schedule award for loss of use of any 'important external or internal organ' when the date of injury was prior to September 7, 1974."

Appellant subsequently appealed to the Board.

The Board held, in a decision issued March 18, 1996, that appellant was not entitled to a schedule award for the employee's loss of the penis.[1] In reaching this determination, the Board indicated that a schedule award is only payable for the loss or loss of use of a function or member of the body that is specifically enumerated in section 8107 of the Act.[2] The Board noted that the Act was amended effective September 7, 1974, authorizing a schedule award for loss or loss of use of "any other important external or internal organ of the body as determined by the Secretary [of Labor]."[3] The Board further noted that the Office promulgated a regulation providing for a schedule award for loss or loss of use of the penis.[4] The Board then indicated that the 1974 amendments specifically state that the provision authorizing schedule awards for organs is applicable only to an injury occurring on or after the date of enactment of the amendments, September 7, 1974.[5] Accordingly, since the employee's injury was sustained on December 6, 1969, the Board found that he was not eligible to receive a schedule award for any loss of use of his penis.

On November 25, 1996 appellant requested an appeal of the Board's March 18, 1996 decision or, in the alternative, a hearing.

By letter dated December 3, 1996, the Board informed appellant that it had no jurisdiction over the case inasmuch as her request for reconsideration, received by the Board on November 25, 1996, was not received within 30 days of its decision.

In a letter received by the Office on January 27, 1997, appellant requested a hearing.

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[1] *See Phyllis S. Jones (Reuben S. Jones),* Docket No. 94-1178 (issued March, 18, 1996).

[2] 5 U.S.C. § 8107.

[3] Act of September 7, 1974, 88 Stat. 1145.

[4] 20 C.F.R. § 10.304(b).

[5] Act of September 7, 1974, 88 Stat. 1151.

By decision dated March 13, 1997, the Office found that appellant was not entitled to a hearing by right, but it exercised its discretionary authority and found that the issues in the case could be addressed on reconsideration.

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides that "a claimant not satisfied with a decision of the Secretary … is entitled, on request made within 30 days after the date of the issuance of a decision, to a hearing on his claim before a representative of the Secretary." 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. Moreover, 20 C.F.R. § 10.131(b) affords appellant, in lieu of a hearing, an opportunity for a review of the written record by an Office representative if such a request is made within 30 days after the date of the issuance of a decision.[6]

In the present case, the Office issued a decision dated January 14, 1994, but appellant's request for a hearing was not received until January 27, 1997, more than 30 days after the decision.[7] Since appellant's request for a hearing was not postmarked within 30 days of the Office's January 14, 1994 decision, she is not entitled to a review of the hearing as a matter of right.[8]

Even when the request for a hearing is not timely, the Office has discretion to grant the request, and must exercise that discretion. In this case, the Office advised appellant that it considered his request in relation to the issue involved and that it was denied because the issues presented could be resolved upon reconsideration.[9] 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.[10] There is no evidence of abuse of discretion in the Office's denial of appellant's request for a hearing.

[6] *See* 20 C.F.R. § 10.131(b).

[7] Because the decision of the Board dated March 18, 1996 is final and conclusive, appellant cannot request an appeal or a hearing from that decision.

[8] 20 C.F.R. § 10.131(a).

[9] Although the Office indicated that appellant could submit medical evidence on reconsideration in support of the schedule award for the penis, the Board's prior decision properly indicated that such evidence is not relevant to this claim for a schedule award for an injury occurring prior to September 7, 1974. *See* 20 C.F.R. § 10.304(b). The Office, however, properly exercised its discretion in finding that new legal arguments could be considered on reconsideration.

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

The decision of the Office of Workers' Compensation Program dated March 13, 1997 is affirmed.

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

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member