

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STANLEY L. ADAMS and DEPARTMENT OF VETERANS AFFAIRS,
VA MEDICAL CENTER, Waco, TX

*Docket No. 98-1239; Submitted on the Record;
Issued November 12, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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.

On January 10, 1994 appellant, then a 35-year-old food service worker, was delivering food when the brakes on his government vehicle failed, causing him to hit another government vehicle. Appellant sustained an injury to his right forearm, right hand and fingers and his right shin bone, breaking skin. The Office accepted appellant's claim for multiple contusions to the body and an abrasion to the right lower leg.

In a January 10, 1997 decision, the Office denied appellant's claim for compensation and medical benefits for the period on or after March 26, 1994 on the grounds that the evidence of record failed to establish that the claimant was disabled or continued to have residuals of the injury of January 10, 1994.

In a request dated October 1, 1997,¹ forwarded by his congressional representative, appellant requested an oral hearing before an Office hearing representative. In a decision dated October 31, 1997, the Office's Branch of Hearings Review denied appellant's request for a hearing because he requested a hearing on October 1, 1997 which was more than 30 days after the January 10, 1997 decision. The Office considered the matter further in relation to the issue involved and denied the request further because the issue could be equally resolved by requesting reconsideration and submitting medical evidence that established that appellant continued to suffer residuals from the January 10, 1994 injury.

¹ Appellant's request for an oral hearing was received in the Dallas regional office on October 6, 1997.

In a letter dated February 2, 1998, through his congressional representative, appellant requested reconsideration of the January 10, 1997 decision.² By decision dated February 18, 1998, the Office denied appellant's request for reconsideration as untimely filed and lacking in clear evidence of error in the January 10, 1997 decision.

The Board finds that the Office properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office hearing representative, provides in pertinent part: "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."³ 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.⁴

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.⁵ 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,⁶ when the request is made after the 30-day period for requesting a hearing⁷ and when the request is for a second hearing on the same issue.⁸

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated January 10, 1997 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter dated October 1, 1997. Therefore, the Office was correct in finding in its October 31, 1997 decision, that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's January 10, 1997 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its October 31, 1997 decision, properly exercised its discretion by stating that it had considered the matter in relation to the

² Appellant's request for reconsideration was received in the Dallas regional office on February 11, 1998.

³ 5 U.S.C. § 8124(b)(1).

⁴ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

⁵ *Henry Moreno*, 39 ECAB 475, 482 (1988).

⁶ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁷ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

⁸ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

issue involved and had denied appellant's hearing request on the basis that the case could be resolved by submitting additional evidence to establish that he continued to suffer residuals from the January 10, 1994 injury. 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.⁹ 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 hearing request which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The Board further finds that the Office properly found that appellant's February 2, 1998 request for reconsideration was not timely filed. However, the Board finds that the case is not in posture for a decision on the issue of whether the Office properly found that appellant's request for reconsideration 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).¹⁰ As one such limitation, the Office has stated that it 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.¹¹ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).¹²

In this case, appellant requested reconsideration of the January 10, 1997 decision, in a letter dated February 2, 1998. Since the request for reconsideration was filed more than one year after the Office decision, it is clearly untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.¹³ In accordance with this holding, the Office has stated in its procedure manual that it 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.¹⁴

⁹ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

¹⁰ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

¹¹ 20 C.F.R. § 10.138(b)(2).

¹² *See Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹³ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(c) (May 1991). The Office therein states:

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹⁵ The evidence must be positive, precise and explicit and must be manifest on its fact that the Office committed an error.¹⁶ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁸ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in the medical opinion or establish a clear procedural error, but must be of sufficient probative value to prima facie shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.²⁰ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.²¹

The record is incomplete as it does not contain a complete copy of the Office's February 18, 1998 decision. Specifically, any memorandum in which the Office explained how it determined that the evidence submitted failed to present clear evidence of error is not present. As such, the basis on which the Office made such a determination is unknown and the Board cannot address whether the Office properly exercised its discretionary authority under 5 U.S.C. § 81289(a). In view of the above, the case must be remanded for reconstruction of the record.

The decision of the Office of Workers' Compensation Programs dated October 31, 1997 is affirmed. The decision dated February 18, 1998 is affirmed in part and set aside in part. The case is remanded for reconstruction of the record. Thereafter, the case should be returned to the Board for a decision on the issue of clear evidence of error.

"The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office of Workers' Compensation Programs made a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."

¹⁵ See *Dean R. Beets*, 43 ECAB 1153 (1992).

¹⁶ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁷ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁸ See *Leona N. Travis*, *supra* note 16.

¹⁹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

²⁰ *Leon D. Faidley, Jr.*, *supra* note 12.

²¹ *Gregory Griffin*, 41 ECAB 458 (1990).

Dated, Washington, D.C.
November 12, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member