U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS G. McNAB and U.S. POSTAL SERVICE,
POST OFFICE, Reno, NV

Docket No. 98-797; Submitted on the Record;
Issued September 27, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's July 16, 1997 request for hearing before an Office hearing representative; (2) whether the Office properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

On January 5, 1994 appellant, a 36-year-old custodian, filed a Form CA-1 claim for benefits, alleging that he injured his left knee on November 26, 1993 when he bumped it while operating a street sweeper machine.

By decision dated April 20, 1994, the Office denied appellant's claim, finding that the evidence submitted was not sufficient to establish that he sustained an injury in the performance of duty.

By letters dated June 16, 1994 and May 12, 1995, appellant requested an oral hearing, which was held on July 16, 1996. By decision dated August 19, 1996, an Office hearing representative affirmed the April 20, 1994 decision.

Appellant submitted a letter to the Office dated July 16, 1997 in which he requested another hearing. By decision dated August 11, 1997, the Office denied appellant's request for a hearing because he was not entitled as a matter of right to a second hearing on the issue of whether he sustained an injury to his left knee in the performance of duty on November 26, 1993. The Office stated that it had exercised its discretion to grant a hearing and that his request was further denied because the issue in the case could be equally addressed by requesting reconsideration from the district office. The Office emphasized that appellant had until August 19, 1997, or one year from the date of its hearing decision, to submit a request for reconsideration of the decision.

By letter dated August 16, 1997, appellant requested review of his claim. In response, the Office, by letter dated October 10, 1997, asked appellant to clarify whether or not he was requesting reconsideration of a prior Office decision. Appellant subsequently submitted a letter dated October 11, 1997, in which he requested a hearing. By letter dated October 16, 1997, the Office advised appellant that he had five claims on file and requested that he specify which one of these claims for which he was requesting a hearing. Appellant submitted to the Office letters dated October 21 and October 25, 1997, which indicated that he was requesting reconsideration of the claim pertaining to his left knee. Accompanying his request was a narrative statement, in addition to a list of statutory and regulatory citations and numerous documents which purported to support his claim that his supervisors had falsely accused him of inappropriate behavior and had engaged in a conspiracy to "cover-up" his employment injury in order to protect a coworker.

By decision dated November 18, 1997, the Office denied reconsideration without a merit review, finding appellant had not timely requested reconsideration and that the evidence submitted did not present clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error. The Office therefore denied appellant's request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.138(b)(2).

The Board finds that the Office did not abuse its discretion in denying appellant's July 16, 1997 request for a hearing before an Office hearing representative.

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.[1] 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 for a hearing,[2] when the request is made after the 30-day period for requesting a hearing,[3] when the request is for a second hearing on the same issue.[4] In these instances the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[5]

In the present case, appellant on June 16, 1994 and May 12, 1995 requested an oral hearing which was held on July 16, 1996. An Office hearing representative on August 19, 1996 issued his decision affirming the Office's April 20, 1994 decision denying compensation on the grounds that appellant did not sustain an injury in the performance of duty. On July 16, 1997,

---

[1] *Johnny S. Henderson,* 34 ECAB 216 (1982).

[2] *Rudolph Bermann,* 26 ECAB 354 (1975).

[3] *Herbert C. Holley,* 33 ECAB 140 (1981).

[4] *Johnny Henderson, supra,* note 1.

[5] *Rudolph Bermann, supra,* note 2.

appellant requested a second hearing before an Office hearing representative. By decision dated August 11, 1997, the Office denied appellant's request for a hearing because he was not as a matter of right entitled to a second hearing on the same issue. The Office exercised its discretion in considering appellant's request, noting that it had considered the mater and determined that the issue in the case could be resolved through the reconsideration process by submitting evidence not previously considered which could establish that an injury was sustained as alleged.

An abuse of discretion can be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[6] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's haring request. The Office exercised its discretionary powers in denying appellant's request for a hearing, and in so doing did not act improperly.[7] The Board therefore affirms the Office's August 11, 1997 decision denying appellant's request for a hearing.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act[8] does not entitle an employee to a review of an Office decision as a matter of right.[9] This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

The Office, through its 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

[6] *See Janice Kirby,* 47 ECAB 220 (1995).

[7] *Stephen C. Belcher,* 42 ECAB 696 (1991).

[8] 5 U.S.C. § 8128(a).

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

[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 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).

review is filed within one year of the date of that decision.[11] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office granted under 5 U.S.C. § 8128(a).[12]

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on August 19, 1996. Appellant requested reconsideration on October 21, 1997;[13] thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.[14]

In those cases where a request for reconsideration is not timely filed, the Board had held 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.[15] Office procedures state that the Office will reopen appellant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if appellant's application for review shows "clear evidence of error" on the part of the Office.[16]

To establish clear evidence of error, appellant must submit evidence relevant to the issue which was decided by the Office.[17] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[18] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[19] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[20] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of

---

[11] 20 C.F.R. § 10.138(b)(2).

[12] *See* cases cited *supra* note 3.

[13] The request for review of the written record is a proceeding under section 8124 of the Act as set forth at 20 C.F.R. § 10.131. It should not be confused with a "reconsideration" request made under section 8128 of the Act. These are separate appellate procedures. Further, the Office provided appellant with additional notice, in its August 11, 1997 letter, that he had until August 19, 1997 to timely request reconsideration of the August 19, 1996 decision.

[14] The Board notes that the Office stated in its November 25, 1997 decision denying reconsideration that appellant requested reconsideration on October 11, 1997. This statement is erroneous, as appellant did not specify that he was requesting reconsideration of the Office's August 19, 1996 decision until his October 21, 1997 letter. This error is harmless, however, as either date indicates that appellant did not request reconsideration within a year of the Office's previous merit decision.

[15] *Rex L. Weaver,* 44 ECAB 535 (1993).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations,* Chapter 2.1602.3(b) (May 1991).

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

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

[19] *See Jesus D. Sanchez, supra* note 3.

[20] *See Leona N. Travis, supra* note 12.

record and whether the new evidence demonstrates a clear error on the part of the Office.[21] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in 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's decision.[22] The Board makes an independent determination of whether an appellant 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.[23]

The Board finds that appellant's October 21, 1997 request for reconsideration fails to show clear evidence of error. The Office reviewed the evidence appellant submitted and properly found it to be insufficient; thus, the evidence submitted by appellant on reconsideration is insufficient to *prima facie* shift the weight of the evidence in favor of appellant. In addition, appellant did not present any evidence of error on the part of the Office in his request letter. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that it abused its discretion in denying a merit review.

---

[21] *See Nelson T. Thompson,* 43 ECAB 919 (1992).

[22] *Leon D. Faidley supra* note 3.

[23] *Gregory Griffin,* 41 ECAB 458 (1990).

The August 11 and November 18, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
September 27, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member