

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY G. HARTMAN and FEDERAL JUDICIARY, U.S. DISTRICT COURT,
EASTERN DISTRICT OF TENNESSEE, Knoxville, TN

*Docket No. 99-595; Submitted on the Record;
Issued April 20, 2000*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for review on the merits pursuant to 5 U.S.C § 8128(a) of the Federal Employees' Compensation Act.

On November 25, 1996 appellant filed a notice of traumatic injury and notice of occupational disease and claim for compensation alleging that she sustained a stress-related emotional condition. By decision dated May 23, 1997, appellant's claim was denied because medical evidence necessary to establish that an injury occurred as claimed, was not submitted.

On June 6, 1997 appellant submitted a request for reconsideration. In support of appellant's request, she submitted a statement dated May 12, 1997 by Roses W. Taylor, an employee assistance counselor, that evaluated appellant's condition. By decision dated June 30, 1997, the Office denied modification of the May 23, 1997 decision, based upon insufficient medical opinion evidence that related appellant's condition to factors of her employment. The Office determined that the evidence submitted by appellant on reconsideration was not that of a licensed physician as defined by the Act and could not be considered probative. Notwithstanding this fact, the Office addressed the counselor's opinion that appellant's present condition was a result of an administrative action taken by appellant's employer to terminate her employment but concluded that an administrative action is not a factor of appellant's employment, thus not sustained in the performance of duty. Modification of the May 23, 1997 decision was, therefore, denied.

By an undated letter received by the Office on June 22, 1998, appellant made a request for reconsideration of the decisions dated May 23, 1997 and June 30, 1997.¹ Appellant submitted no additional medical evidence to support her request; however, she contended that there was new evidence to be considered. Appellant alleged as new evidence that “[t]he withholding of pay was not an administrative action with legal basis, but an aggressive act of a federal employee in the workplace. It has been recently established that the employer was not apprised of the act, with the word being circulated that I had retired.” Further, appellant raised three issues in the letter request that she felt needed to be determined by the Office: (1) whether a claimant could be denied the right to use an evaluation of a counselor in her claim for workers’ compensation if the evaluation was required by the employer; (2) whether *ex parte* communication is allowed between the Office and the employer or its administrative personnel; and (3) whether there was a discrepancy in the date indicated as the “date of injury” in the prior decisions dated May 23 and June 30, 1997. By decision dated September 16, 1998, the Office found the information submitted by appellant irrelevant and immaterial to warrant a merit review of the June 30, 1997 decision. The Office addressed the three issues raised by appellant in the September 16, 1998 decision, but opined that none of them have any bearing on the deficiency in her case. First, the Office, in addressing appellant’s first issue, referred to statements in the case file from appellant’s employer that noted the suggestion made to appellant to have a “mental competency evaluation” and that it was not required by the employer. Second, the Office pointed out that the date of injury under consideration has always been October 30 1991, the date claimed on the CA-1 form filed on November 25, 1996. Finally, regarding appellant’s concern of *ex parte* communications, the Office indicated that its only communication with appellant’s employing establishment was its March 18, 1997 development letter, requesting information for consideration of appellant’s claim. The Office concluded that because appellant’s latest request for reconsideration lacked a rationalized medical diagnosis made by a “physician” as defined by the Act, a merit review of the June 30, 1997 decision, would not be conducted. A decision denying appellant’s application for review was issued on September 16, 1998.

The only decision before the Board on appeal is the Office’s September 16, 1998 decision in which the Office denied appellant’s application for review on the grounds that the evidence submitted was insufficient to warrant review and, as that is not a merit decision, the only issue before the Board is whether the Office abused its discretion in refusing to reopen her case for merit review under 5 U.S.C. § 8128(a).²

The Board finds that the Office did not abuse its discretion in denying appellant’s request for reconsideration under 5 U.S.C. § 8128.

¹ The Office informed appellant of her appeal rights when it denied modification of the May 23, 1997 ruling in its June 30, 1997 decision in that it would only entertain a request for reconsideration of the June 30, 1997 decision if timely made.

² See 20 C.F.R. § 501.3(d) (because more than one year has elapsed between the issuance of the Office’s June 30, 1997 decision and December 21, 1998, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the June 30, 1997 and prior decisions).

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Act.³ 20 C.F.R. § 10.138(b)(1) states in relevant part:

“The claimant may obtain review of the merits of the claim by --

- (i) Showing that the Office erroneously applied or interpreted a point of law, or
- (ii) Advancing a point of law or a fact not previously considered by the Office, or
- (iii) Submitting relevant and pertinent evidence not previously considered by the Office.”

Section 10.138(b) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in paragraph (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁴

In the instant case, the Office had denied appellant’s claim on the grounds that the termination of appellant’s employment was not established as a compensable factor of employment and that appellant had not submitted any medical evidence supporting her emotional condition claim. The arguments advanced by appellant in support of her request for reconsideration were not relevant or pertinent to evidence previously considered by the Office. Although appellant offered three issues to be determined in her request, none of them raised a concern that the Office had erroneously applied or interpreted a point of law in her case. Appellant’s allegations regarding the withholding of pay by her employer, the injustice of an employee assistance counselor’s report, not constituting medical evidence and the Office’s request for information from the employing establishment constituting an *ex parte* communication, simply do not address the relevant issues in this case. Appellant’s reconsideration request did not provide new factual or legal evidence that her termination of employment occurred in the performance of duty and that medically she sustained an emotional condition arising from compensable factors of employment. Generally, an abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken, which are contrary to both logic and probable deductions from established facts.⁵ The Office did not abuse its discretion in denying a merit review in this case.

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *Daniel J. Perea*, 42 ECAB 214 (1990).

The decision of the Office of Workers' Compensation Programs dated September 16, 1998 is affirmed.

Dated, Washington, D.C.
April 20, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member