U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EMMITT TAYLOR and DEPARTMENT OF THE AIR FORCE, McCONNELL AIR FORCE BASE, KS

Docket No. 98-1830; Submitted on the Record;
Issued July 6, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration; and (2) whether the Office properly denied appellant's request for a hearing.

This is the fifth appeal in the case. Pursuant to the most recent appeal, the Board issued a decision dated August 17, 1997, finding that the Office properly determined that appellant's request for reconsideration was untimely and failed to show clear evidence of error. The history of the case is contained in the prior Board decisions and is incorporated herein by reference.

In a letter dated December 16, 1997, appellant requested reconsideration of his claim. By decision dated March 13, 1998, the Office denied merit review.

In a letter dated April 1, 1998, appellant requested an oral hearing on his claim. By decision dated April 24, 1998, the Office's Branch of Hearings and Review determined that he was not entitled to a hearing as a matter of right because he had previously requested reconsideration. The Office further denied the request on the grounds that the issue of total disability between February 5, 1976 to July 25, 1977 and May 28, 1980 to November 28, 1985, could equally well be addressed through the reconsideration process.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.[1] As appellant filed his appeal on May 27, 1998, the only decisions over which the Board has jurisdiction on this appeal are the March 13, 1998 decision denying his request for reconsideration and the April 24, 1998 decision denying his request for an oral hearing.

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[1] *See* 20 C.F.R. § 501.3(d).

The Board has reviewed the record and finds that the Office properly denied appellant's request for reconsideration.

The underlying merit issue in the case concerns the Office's determination on December 18, 1986 that the position of telephone solicitor represented appellant's wage-earning capacity. Although appellant's December 16, 1997 request for reconsideration was untimely,[2] the Office reviewed the case under the standard for a timely request. To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant may obtain review of the merits of the 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.[4] Section 10.138(b)(2) states that any application for review that does not meet at least one of the requirements listed in section 10.138(b)(1) will be denied by the Office without review of the merits of the claim.[5]

The new evidence submitted by appellant consists of a February 11, 1998 report from attending physician Dr. Neonilo A. Tejano, an orthopedic surgeon. He does not discuss the telephone solicitor position or otherwise provide new and relevant evidence on the issue presented. The remainder of the evidence was previously of record and does not constitute new evidence. The Board finds that appellant did not meet any of the requirements of section 10.138(b)(1) and therefore the Office properly denied his request for reconsideration without reopening the claim for merit review.

The Board further finds that the April 24, 1998 decision from the Office's Branch of Hearings and Review must be affirmed.

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of the Office. Section 8124(b)(1) provides as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary…."

In the present case, the Office issued a decision dated January 25, 1980, finding that the position of telephone solicitor represented appellant's wage-earning capacity. The April 1, 1998 request for a hearing is clearly beyond the 30-day limitation set forth in section 8124(b)(1). Moreover, appellant had previously requested and received an oral hearing and by decision dated

[2] The last decision on the merits of the claim was the Board's August 31, 1987 decision; the Board's August 18, 1997 decision was not a review of the merits and did not provide an additional one year to request reconsideration.

[3] 5 U.S.C. § 8128(a)(providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

[4] 20 C.F.R. § 10.138(b)(1).

[5] 20 C.F.R. § 10.138(b)(2); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

June 18, 1984, an Office hearing representative affirmed the January 25, 1980 decision. There is no provision in the Act for more than one hearing on the same issue.[6]

Although there are circumstances where the Office must exercise its discretion even if appellant is not entitled to a hearing as a matter of right,[7] the Board has also indicated that the Office's Branch of Hearing and Review does not have discretionary authority in every instance where a request for a hearing is made. In *Eileen A. Nelson*, the Board found that the Branch may not assume jurisdiction in the claims process absent a final adverse decision by the Office that has not been reviewed by the Board.[8] In this case, following the Board's August 18, 1997 decision, appellant first requested reconsideration from the Office, which was denied in a nonmerit decision dated March 13, 1998. A nonmerit decision does not renew the Branch's discretionary authority to grant a hearing.[9] The principle set forth in *Nelson* remains in effect; there is no adverse final merit decision that has not been reviewed by the Board and therefore no basis for the exercise of discretionary authority in granting a hearing. Accordingly, the Branch of Hearings and Review was required to deny appellant's request for a hearing dated April 1, 1998.

The decisions of the Office of Workers' Compensation Programs dated April 24 and March 13, 1998 are affirmed.

Dated, Washington, D.C.
July 6, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] *John S. Baldwin*, 35 ECAB 1161 (1984).

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

[8] 46 ECAB 377 (1994).

[9] *See Jimmie Mason*, Docket No. 98-1665 (issued September 7, 1999); *Cf. Shirley A. Jackson*, 39 ECAB 540 (1988) (an Office merit decision issued after a Board decision did require the Office to exercise discretionary authority with respect to granting a hearing request).