

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARVEY D. HOLMES and DEPARTMENT OF THE ARMY,
ARMY CORPS OF ENGINEERS, Vicksburg, MI

*Docket No. 98-2192; Submitted on the Record;
Issued June 8, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the refusals of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion; and (2) whether the Office abused its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

The Board has duly reviewed the case record in the present appeal and finds that the refusals of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute abuses of discretion.

The only decisions before the Board on this appeal are the Office's June 5, 1998 and December 2, 1997 decisions denying appellant's application for a review on the merits of its March 28, 1997 decision, and the August 11, 1997 decision denying appellant's request for a hearing.¹ Because more than one year has elapsed between the issuance of the Office's March 28, 1997 merit decision and July 9, 1998, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the March 28, 1997 decision.²

To require the Office to reopen a case for merit review under section 8128(a) of the Act,³ the Office's regulations provide that a claimant must: (1) show that the Office erroneously

¹ By decision dated March 28, 1997, the Office terminated appellant's compensation entitlement finding that 5 U.S.C. § 8148 mandated that an individual convicted of a violation relating to fraud in the application for or receipt of benefits under the Federal Employees' Compensation Act shall forfeit entitlement to such benefit. Appellant failed to report third-party award monies paid him for the accident causing his injuries; he also was convicted of possession of cocaine and was incarcerated. Thereafter his applications for review of his case on its merits was denied on December 2, 1997 and on June 5, 1998.

² See 20 C.F.R. § 501.3(d)(2).

³ 5 U.S.C. §§ 8101-8193.

applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁶ Evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not constitute a basis for reopening a case.⁷ Evidence that does not address the particular issue involved also constitutes no basis for reopening a case.⁸

By letter dated May 7, 1997, appellant requested reconsideration of the April 18, 1996 and March 28, 1997 decisions. In support of the request appellant submitted a medical report dated March 14, 1997 from Dr. Edward H. Saer, III, a Board-certified orthopedic surgeon, which reported on appellant's back condition. This report does not bear on whether appellant's admission of guilt, signed on February 12, 1997, to a violation of 18 U.S.C. § 1920 for submitting false statements to obtain federal workers' compensation benefits, was in error. Consequently, it is irrelevant to the issue at hand and does not warrant a reopening of appellant's case for a further review on its merits.

Appellant also submitted personal statements dated July 7 and August 25, 1997 arguing that he had been advised that he did not need to report his third-party settlement since he was totally disabled. He further argued that he was not himself due to his psychiatric difficulties when he made that guilty plea, citing his diagnosed post-traumatic stress disorder, his bipolar disorder, his schizoid personality disorder, his paranoid personality disorder, his major depression and suicidal and homicidal ideation, his seizure disorder and his interpersonal problems. However, since appellant failed to present medical evidence attesting to appellant's incompetency at the time he signed his guilty plea, his lay opinions are not probative.

In the present case, appellant, therefore has not established that the Office abused its discretion in its December 2, 1997 decision by denying his request for a review on the merits of its March 28, 1996 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, failed to advanced a point of law or a fact not previously considered by the Office or failed to submitted relevant and pertinent evidence not previously considered by the Office.

Appellant again requested reconsideration on March 24, 1998 and claimed that his medications and psychiatric diagnoses affected his ability to make a knowing determination on

⁴ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ *Joseph W. Baxter*, 36 ECAB 228 (1984).

⁷ *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984).

⁸ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

whether he should have pled guilty on February 12, 1997 to a violation of 18 U.S.C. § 1920 for submitting false statements to obtain federal workers' compensation benefits. The Office performed a limited review of this argument and correctly determined on June 5, 1998 that it did not provide a basis for reopening appellant's claim for further review on its merits.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only 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 established facts.⁹ Appellant has made no such showing here. Again, as appellant failed to show that the Office erroneously applied or interpreted a point of law, failed to advance a point of law or a fact not previously considered or failed to submit relevant and pertinent evidence not previously considered, the Office properly denied merit review on June 5, 1998.

On May 16, 1997 appellant had requested an oral hearing on the March 28, 1997 decision. He argued that no one would hire him because he was still disabled.

By decision dated August 11, 1997, the Branch of Hearings and Review denied appellant's request noting that it was untimely filed and found that the issue could equally well be addressed by requesting reconsideration by the Office and by submitting evidence not previously considered.

Further, the Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing under section 8124(b)(1).

Section 8124(b)(1) of the Act provides in pertinent part as follows:

"Before review under § 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."¹⁰

The Office's procedures implementing this section of the Act are found in the Code of Federal regulations at 20 C.F.R. § 10.131(a). This paragraph, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing states in pertinent part as follows:

"A claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and § 10.138(b) of this subpart prior to requesting a hearing,

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

¹⁰ 5 U.S.C. § 8124(b)(1).

or if review of the written record as provided by paragraph (b) of the section has been obtained.”¹¹

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 of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹² 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,¹³ when the request is made after the 30-day period for requesting a hearing¹⁴ and when the request is for a second hearing on the same issue.¹⁵ In these instances the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.¹⁶ The Office’s procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.¹⁷

In the present case, the Office issued its most recent merit decision denying appellant’s claim on the issue in question on March 28, 1997. Appellant requested a hearing in a letter dated May 16, 1997. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.¹⁸ Since appellant did not request a hearing within 30 days of the Office’s March 28, 1997 decision, he was not entitled to a hearing under section 8124 as a matter of right.

The Office, in its discretion, considered appellant’s hearing request in its August 11, 1997 decision and denied the request on the basis that appellant could pursue his claim by requesting reconsideration and submitting additional evidence supporting why his guilty plea was in error.

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 deductions from known facts.¹⁹

¹¹ 20 C.F.R. § 10.131(a).

¹² *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

¹³ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

¹⁴ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

¹⁵ *Johnny S. Henderson*, *supra* note 12.

¹⁶ *Id.*; *Rudolph Bermann*, *supra* note 13.

¹⁷ *See Herbert C. Holley*, *supra* note 14.

¹⁸ 20 C.F.R. § 10.131(a).

¹⁹ *Daniel J. Perea*, 42 ECAB 214 (1990).

There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

Consequently, the decisions of the Office of Workers' Compensation Programs dated December 2 and August 11, 1997 and June 5, 1998 are hereby affirmed.

Dated, Washington, D.C.
June 8, 2000

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member