

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES L. DICKINSON and DEPARTMENT OF THE NAVY,
NAVAL SUPPLY CENTER, Charleston, SC

*Docket No. 00-1764; Submitted on the Record;
Issued April 25, 2001*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's March 2, 1998 request for a hearing; and (2) whether the Office properly denied appellant's October 31, 1998 request for reconsideration.

On September 28, 1991 appellant, then a 49-year-old supervisory management analyst, filed an occupational disease claim asserting that his depression and anxiety were the result of his federal employment.

In a decision dated June 26, 1992, the Office denied appellant's claim. The Office found that appellant had alleged no compensable work factors as the cause of his emotional condition. The Office observed that appellant's dissatisfaction was centered on his perception that the people he dealt with disliked him because of the nature of his work. Other incidents involved a discussion with his supervisor about the conduct of another employee and a fearful attitude toward reporting his supervisor for misconduct. The Office found that none of the incidents that appellant described could be considered as having occurred in the performance of duty.

In a letter postmarked March 2, 1998, appellant requested a hearing before an Office hearing representative.

In a decision dated June 26, 1998, the Office found that appellant was not entitled to a hearing as a matter of right because he made his request more than 30 days after the June 26, 1992 merit decision. The Office considered appellant's request and denied a discretionary hearing on the grounds that he could equally well address the issue in his case by requesting reconsideration and submitting evidence not previously considered establishing that the injury occurred in the performance of duty.

In a letter dated October 31, 1998, appellant requested reconsideration. He argued the timeliness of his claim and submitted six enclosures dealing with time limitations, exceptional

circumstances, mental incompetence, assaults, medical records and the Office's June 26, 1998 decision.

In a decision dated January 19, 1999, the Office found that appellant's request was untimely because he failed to file it within a year of the June 26, 1992 merit decision. The Office considered appellant's request and denied a merit review of his claim because he failed to present clear evidence that the June 26, 1992 decision was in error.

The Board finds that the Office acted within its discretion in denying appellant's March 2, 1998 request for a hearing before an Office hearing representative.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides:

"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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹

A claimant is not entitled to a 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.² The Office has discretion, however, to grant or deny a request that is made after this 30-day period.³ In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.⁴

Because appellant made his March 2, 1998 request for a hearing more than 30 days after the Office's June 26, 1992 merit decision, he is not entitled to a hearing as a matter of right. The Office nonetheless considered the matter and correctly advised appellant that he could address the issue in his case through the reconsideration process. As appellant may address the issue through the reconsideration process, the Board finds that the Office did not abuse its discretion in denying appellant's untimely request for a hearing.⁵

The Board also finds that the Office acted within its discretion in denying appellant's October 31, 1998 request for reconsideration.

Section 10.607 of the Code of Federal Regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought. The Office will consider an untimely application only if the application demonstrates

¹ 5 U.S.C. § 8124(b)(1).

² 20 C.F.R. § 10.131(a)-(b).

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

⁴ *Rudolph Bermann*, 26 ECAB 354 (1975).

⁵ The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.⁶

As part of his request appellant argued the timeliness of his claim. To be accurate, the Office accepted the timeliness of his September 28, 1991 claim but found his October 31, 1998 request for reconsideration to be untimely. With respect to what tolls the one-year period for requesting reconsideration, section 10.607(c) provides as follows:

“The year in which a claimant has to timely request reconsideration shall not include any period subsequent to an [Office] decision, for which the claimant can establish through probative medical evidence that he or she is unable to communicate in any way and that his or her testimony is necessary in order to obtain modification of the decision.”⁷

The Board has conducted a limited review of the medical evidence submitted to support appellant’s October 31, 1998 request for reconsideration for the purpose of determining whether he submitted probative medical evidence establishing that he was unable to communicate in any way following the Office’s June 26, 1992 merit decision and for such a length of time that his October 31, 1998 request should be considered timely filed. Appellant has submitted no such medical evidence.

Accordingly, as appellant sent his October 31, 1998 request for reconsideration more than one year after the Office’s June 26, 1992 merit decision, the Board finds that his request is untimely. To obtain a merit review of his claim, therefore, appellant’s request must demonstrate clear evidence of error in the Office’s June 26, 1992 decision.

The Office denied appellant’s claim for compensation because he attributed his condition to factors of employment that were not compensable, that is, to events or incidents that are, as a matter of law, outside the scope of coverage of the Act.⁸ The Board has conducted a limited review of all the documents submitted in support of appellant’s October 31, 1998 request for reconsideration and can find no evidence establishing on its face that the Office’s decision to deny appellant’s claim for compensation was erroneous. In fact, the evidence that appellant submitted to support his request is irrelevant or immaterial to the legal grounds upon which the Office denied his claim. Because appellant’s untimely request for reconsideration fails to demonstrate clear evidence of error in the Office’s June 26, 1992 decision, the Office acted within its discretion in denying a merit review of his claim.

⁶ 20 C.F.R. § 10.607(b) (effective January 4, 1999).

⁷ *Id.* § 607(c).

⁸ 5 U.S.C. §§ 8101-8193.

The January 19, 1999 and June 26, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.⁹

Dated, Washington, DC
April 25, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

⁹ Appellant filed his appeal to the Board on April 30, 1999, as evidenced by a certified receipt date stamped by the Board. The Board, therefore, has jurisdiction to review Office decisions issued within one year prior to April 30, 1999, including the Office's January 19, 1999 and June 26, 1998 decisions. 20 C.F.R. § 501.3(d). After appellant filed his April 30, 1999 appeal to the Board, the Office issued a nonmerit decision on January 3, 2000 denying a February 22, 1999 request for reconsideration (though the record shows this to be a request for a hearing before an Office hearing representative). Under the principles discussed in *Douglas E. Billings*, 41 ECAB 880 (1990), the Office's January 3, 2000 decision, issued while the Board had jurisdiction over the case, is null and void.