

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLAUDIO VAZQUEZ and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, REGIONAL PERSONNEL OFFICE, Jamaica, NY

*Docket No. 01-416; Submitted on the Record;
Issued August 30, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained an emotional condition in the performance of duty, causally related to compensable factors of his federal employment; (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record under 5 U.S.C. § 8124(b)(1); and (3) whether the Office abused its discretion in denying appellant's request for further review of his case on its merits under 5 U.S.C. § 8128(a).

On October 26, 1999 appellant, then a 53-year-old system coordinator, filed a claim alleging that he sustained depression and insomnia, causally related to a district manager's alleged disrespectful treatment of him in front of others on October 20, 1999. A coworker provided a witness statement indicating that she was present at that scene and saw and heard the district manager yelling at appellant in an offensive and disrespectful manner. The witness noted that the district manager yelled at appellant twice to shut up and then the situation got out of control.

By letter dated November 2, 1999, the employing establishment controverted appellant's claim indicating that the manager was conducting a proper administrative function of correcting work performance, but in an attached statement the district manager, Miguel A. Negron, acknowledged the confrontation.

By letter dated November 12, 1999, the Office requested further information to establish appellant's claim.

In response appellant submitted a November 9, 1999 medical certificate in Spanish from Dr. Isis M. Sanchez-Longo, a Board-certified psychiatrist, and a November 1, 1999 statement from Dr. Victoria Lopez. Dr. Sanchez-Longo's statement was translated and stated "After evaluating the patient today I recommend that he rest while on treatment until December 9, 1999." Dr. Lopez's statement said, "[Appellant] has received psychological

services at this office on October 25 and November 1, 1999.” The statement noted depression test results and recommended a referral for pharmacotherapy.

Appellant also submitted a November 28, 1999 statement, contending that Mr. Negron was not his supervisor charged with correcting his conduct and was not his work performance rating officer.

By decision dated December 15, 1999, the Office accepted as compensable appellant’s October 20, 1999 confrontation with Mr. Negron. The Office denied appellant’s claim, however, finding that he had not submitted medical evidence which showed that a medical condition was diagnosed in connection with the accepted employment factor.

By letter dated January 13, 2000, but postmarked January 15, 2000, appellant requested an examination of the written record by a hearing representative and in support he submitted new medical evidence.¹ Appellant requested that the Office make a decision based on the totality of the evidence in his case including the newly submitted evidence.

By decision dated March 13, 2000, the Office denied appellant’s request for a hearing noting that it was not timely requested within 30 days after the decision and finding that the issue could equally well be addressed by requesting reconsideration from the Office and submitting evidence not previously considered.

Thereafter, by letter dated July 13, 2000, appellant requested reconsideration of the denial of his claim and noted that new “evidence was originally sent with the hearing request.” Appellant also submitted an additional medical certificate from Dr. Sanchez-Longo in Spanish.

By decision dated October 6, 2000, the Office denied appellant’s request for a merit review of his case finding that appellant did not provide his reason for requesting reconsideration and that, therefore, the evidence submitted in support, even if translated, would have no bearing on the case. The Office concluded that the information submitted was cumulative, repetitious or irrelevant and immaterial to the issue and, therefore, did not warrant review.

The Board finds that appellant failed to establish that he sustained an emotional condition in the performance of duty, causally related to compensable factors of his federal employment.

To establish appellant’s occupational disease claim that he has sustained an emotional condition in the performance of duty, appellant must submit the following: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to his condition; (2) rationalized medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.² Rationalized medical opinion evidence is medical evidence that includes a physician’s

¹ The new evidence consisted of a December 27, 1999 narrative report in English from Dr. Lopez and a complete psychiatric evaluation from Dr. Sanchez-Longo in Spanish. The Office did not obtain a translation of the report in Spanish.

² See *Donna Faye Cardwell*, 41 ECAB 730 (1990).

rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.³

In this case, the Office accepted as compensable that the incident of confrontation with Mr. Negron occurred on October 20, 1999 as alleged. However, at that time appellant had submitted no rationalized medical evidence providing a definite diagnosis or discussing causal relation with the accepted compensable factor. The only medical evidence of record were disability certificates from Drs. Lopez and Sanchez-Longo stating that appellant was treated. No diagnoses were presented and no discussion of causal relation were included. Consequently, the medical evidence of record at that time did not support appellant's claim.

The Board also finds that the Office did not abuse its discretion in denying appellant's request for a review of the written record under 5 U.S.C. § 8124(b)(1).

Section 8124(b)(1) of the Federal Employees' Compensation Act provides in pertinent part 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.”⁴

The Office's procedures implementing this section of the Act are found in the Code of Federal regulations at 20 C.F.R. §§ 10.615-10.618.

Title 20 of the Code of Federal Regulations § 10.615 states “A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record.” In this case, appellant chose a review of the written record, however, the requirements are the same for either choice.

Title 20 of the Code of Federal Regulations § 10.616(a) states that a claimant injured on or after July 4, 1966 who had received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which hearing is sought.

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

³ *Id.*

⁴ 5 U.S.C. § 8124(b)(1)

authority in deciding whether to grant a hearing.⁵ 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,⁶ when the request is made after the 30-day period for requesting a hearing⁷ and when the request is for a second hearing on the same issue.⁸ In these instances the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.⁹ 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.¹⁰

In the present case, the Office issued its most recent merit decision denying appellant's claim on December 15, 1999. Appellant formally requested an oral hearing in a letter dated January 13, 2000, but postmarked January 15, 2000. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.¹¹ Since appellant did not request a hearing within 30 days of the Office's December 15, 1999 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 March 13, 2000 decision and denied the request on the basis that appellant could equally well pursue his claim by requesting reconsideration and submitting additional evidence supporting that he developed an emotional condition, causally related to the accepted employment factor.

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.¹² There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

The Board, however, further finds that the Office abused its discretion in denying appellant a further review of his case on its merits.

Section 8128(a) of the Act¹³ does not give a claimant the right upon request or impose a requirement upon the Office to review a final decision of the Office awarding or denying

⁵ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

⁶ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁷ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

⁸ *Johnny S. Henderson*, *supra* note 5.

⁹ *Id.*; *Rudolph Bermann*, *supra* note 6.

¹⁰ *See Herbert C. Holley*, *supra* note 7.

¹¹ 20 C.F.R. § 10.131(a).

¹² *Daniel J. Perea*, 42 ECAB 214 (1990).

¹³ 5 U.S.C. § 8101 *et seq*; *see* 5 U.S.C. § 8128(a).

compensation.¹⁴ Section 8128(a) of the Act, which pertains to review, vests the Office with the discretionary authority to determine whether it will review a claim following issuance of a final Office decision. Section 8128(a) of the Act states:

“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, decrease, or increase the compensation previously awarded; or
- (2) award compensation previously refused or discontinued.”¹⁵

Although it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128,¹⁶ the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant’s request for reconsideration. By these regulations the Office has stated that it will reopen a claimant’s case and review the case on the merits under 5 U.S.C. § 8128(a) upon request by the claimant whenever the claimant’s application for review meets the specific requirements set forth in §§ 10.606 through 10.609 of Chapter 20 of the Code of Federal Regulations revised as of April 1, 1999.

The current Office regulations pertaining to the requirements for obtaining a review of a case on its merits under 5 U.S.C. 8128(a), state as follows:

“(b) The application for reconsideration, including all supporting documents, must --

- (1) Be submitted in writing;
- (2) Set forth arguments and contain evidence that either:
 - (i) Shows that [the Office] erroneously applied or interpreted a specific point of law;
 - (ii) Advances a relevant legal argument not previously considered by [the Office]; or
 - (iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”¹⁷

¹⁴ Compare 5 U.S.C. § 8124(b)(1) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

¹⁵ 5 U.S.C. § 8128(a).

¹⁶ See *Charles E. White*, 24 ECAB 85, 86 (1972).

¹⁷ 20 C.F.R. § 10.606(b)(1),(2).

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁸ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.¹⁹ 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.²⁰

Appellant requested reconsideration and review of the new, evidence submitted with his request for a hearing which had not been previously considered.²¹ This evidence consists of Dr. Sanchez-Longo's reports in Spanish and Dr. Lopez's report in English. In the December 27, 1999 report, Dr. Lopez discussed the impact upon appellant of the events of October 20, 1999 and provided a diagnosis, which is relevant to the issue in this case. Dr. Sanchez-Longo also provided a new report, consisting of a psychiatric evaluation and a medical certificate.

The Office declined reconsideration on the basis that Dr. Lopez's new report was cumulative, repetitious or irrelevant and immaterial to the issue and declined to review Dr. Sanchez-Longo's report on the basis that it was not translated. The Board notes that in *Armando Colon*,²² the Board found that it was an abuse of discretion for the Office to deny the employee's request for reconsideration without first attempting to ascertain whether the physician's report presented relevant or pertinent evidence not previously considered by the Office. The Board found that the Office did not attempt to secure an accurate translation of the reports before denying appellant's request. The Board found that the Office should have sought clarification of the physician's opinion under the circumstances of that case.

The Board finds that, in accordance with 20 C.F.R. § 10.606(b)(2)(iii), these new reports from Drs. Lopez and Sanchez-Longo are sufficient to require reopening appellant's case for further review on its merits.²³ As the Office failed to review these new reports, which address the compensable factor found in this case and provide opinions on causal relation and failed to secure a translation of Dr. Sanchez-Longo's reports before ruling on their contents, it abused its discretion in denying appellant's request for further merit review.

¹⁸ 20 C.F.R. § 10.607(a).

¹⁹ *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

²⁰ *See Mohamed Yunis*, *supra* note 19; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

²¹ Therefore, appellant met the requirements for requesting reconsideration under 20 C.F.R. § 10.606(b)(1) and (2)(iii).

²² 41 ECAB 563 (1990).

²³ Proceedings under the Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done. *William J. Cantrell*, 34 ECAB 1223 (1983).

The March 13, 2000 and December 15, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed. The decision dated October 6, 2000 is set aside and the case remanded for action in conformance with this decision.

Dated, Washington, DC
August 30, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member