

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JULIET S. FONBUENA and U.S. POSTAL SERVICE,
POST OFFICE, Missouri City, TX

*Docket No. 00-1270; Submitted on the Record;
Issued March 16, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing; and (2) whether the Office abused its discretion in refusing to reopen appellant's case for merit review on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board finds that the Office properly denied appellant's request for a hearing.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ Inasmuch as appellant filed her appeal with the Board on February 17, 2000, the only decisions properly before the Board are the Office's February 22, 1999 decision, denying appellant's request for an oral hearing and the February 9, 2000 decision, denying appellant's request for reconsideration of the November 25, 1998 decision.

Section 8124(b)(1) of the Federal Employees' Compensation Act² provides that "a claimant ... 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." Section 10.615 of the Office's federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.³ Thus, a claimant has a choice of requesting an oral hearing or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulations.

¹ 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

² 5 U.S.C. §§ 8101; § 8124(b)(1).

³ 20 C.F.R. § 10.615 (1999).

Section 10.616(a) of the Office's regulations⁴ provides in pertinent part that "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 a 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 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 to 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 this case, appellant's January 16, 1999 hearing request, which was postmarked January 18, 1999, was made more than 30 days after the date of the issuance of the Office's October 20, 1998 decision denying her request for continuation of pay. Therefore, appellant was not entitled to an oral hearing as a matter of right. The Office then exercised its discretionary power in denying appellant's request for a hearing by finding that the issue of fact of injury could be equally well addressed by requesting reconsideration and submitting evidence not previously considered, which established that appellant sustained an injury while in the performance of duty.

The Board further finds that the Office acted within its discretion in refusing to reopen appellant's case for merit review.

Under section 8128(a) of the Act,⁹ the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.607 of the implementing federal regulations,¹⁰ which provides guidelines for the Office in determining whether an application for reconsideration is sufficient to warrant a merit review; that section also provides that "an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought."¹¹ In *Leon D. Faidley, Jr.*,¹² the Board held that the imposition of the

⁴ 20 C.F.R. § 10.616(a) (1999).

⁵ *Henry Moreno*, 39 ECAB 475, 482 (1988).

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

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

⁸ *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

⁹ 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.607 (1999).

¹¹ 20 C.F.R. § 10.607(a) (1999).

¹² 41 ECAB 104 (1989).

one-year time limitation period for filing an application for review was not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.

The Office's its last merit decision, issued on November 28, 1998, denied appellant's claim on the basis that she failed to establish fact of injury. As the Office did not receive her application for reconsideration until January 3, 2000, the application was not timely filed. The Office properly found that appellant had failed to file her request within 30 days.

However, the Office may not deny an application for review based solely on the grounds that it was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application presents clear evidence that the Office's final merit decision was erroneous.¹³

Appellant submitted copies of letters from the Office to appellant and appellant's requests for an oral hearing, a December 9, 1999 equal employment opportunity letter regarding appellant's notice of removal from the employing establishment, a statement from appellant's spouse, a November 25, 1997 report, by Dr. Robert A. Wascher, an undated certificate for the Family and Medical Leave Act of 1993, a duplicate copy of the August 8, 1997 accident report and a September 14, 1999 letter from the employing establishment advising her that her claim had been denied.

In his November 25, 1997 report, Dr. Wascher stated that appellant "underwent major abdominal surgery on [November 16, 1997]" and that appellant would be totally disabled from performing her usual employment "until the end of December." Dr. Wascher does not provide an opinion regarding a causal relationship between appellant's disability and her alleged employment injury.

The Office denied appellant's continuation of pay request by decision dated October 20, 1998, as she did not file her traumatic injury claim within 30 days of the claimed event. On November 25, 1998 the Office denied appellant's claim on the basis that she failed to establish fact of injury as no medical evidence supporting a causal relationship between her alleged injuries and the August 8, 1997 accident was submitted.

Appellant also argues that the employing establishment failed to provide her any assistance in completing her claim forms or follow-up service and that the denial of her claim was due to the lack of assistance from the employing establishment. She stated that she had filed an Equal Employment Opportunity claim for the employing establishment's failure to assist her in completing the claim forms. Appellant's arguments are not sufficient to resolve the defect in her claim.

¹³ *Charles Prudencio*, 41 ECAB 499 (1990); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *see, e.g.*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) which states: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error."

As appellant has not raised a substantial issue as to the correctness of the November 28, 1998 decision, she has failed to establish clear evidence of error and, therefore, the Office did not abuse its discretion in denying a merit review of her claim.

The decisions of the Office of Workers' Compensation Programs dated February 9, 2000 and February 22, 1999 are hereby affirmed.

Dated, Washington, DC
March 16, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member