U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUCINDA HOGUE and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Chicago, IL

Docket No. 00-1469; Submitted on the Record;
Issued February 14, 2002

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 a hearing under 5 U.S.C. § 8124(b), on the grounds that appellant previously requested reconsideration and (2) whether the Office abused its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

On November 9, 1992 appellant, then a 31-year-old nursing assistant, filed an occupational disease claim alleging that on November 3, 1992 she sustained an injury to her neck and shoulder due to lifting heavy patients. She stopped work on August 26, 1992.

The Office accepted appellant's claim for cervical strain and left shoulder strain. Appellant received appropriate compensation during her employment-related disability.

Appellant was reemployed as a food service worker effective October 10, 1994 for a private employer. By decision dated May 1, 1995, the Office found that her position as a food service worker fairly and reasonably represented her wage-earning capacity.

In an October 10, 1996 decision, the Office terminated appellant's compensation effective October 12, 1996 on the grounds that she no longer had any residuals of her employment-related injury. In a letter postmarked December 11, 1996, appellant requested an oral hearing before an Office representative.

By decision dated January 8, 1997, the Office denied appellant's request for a hearing on the grounds that it was untimely filed. In a January 29, 1997 letter, she requested reconsideration of the Office's decision to terminate her compensation.

In an April 15, 1997 decision, the Office denied appellant's request for modification based on a merit review of the claim. In a letter dated April 13, 1998, appellant, through her counsel, requested reconsideration of the Office's decision.

By decision dated July 9, 1998, the Office again denied appellant's request for modification based on a merit review of the claim. In a July 9, 1999 letter, appellant, through her counsel, requested reconsideration of the Office's decision. Subsequently, in a letter dated August 1, 1999, she requested an oral hearing.

In a decision dated September 20, 1999, the Office denied appellant's request for a hearing. The Office stated that she was not entitled to a hearing as a matter of right because she had previously requested reconsideration. The Office exercised its discretion to conduct a limited review of the case and indicated that appellant's request was also denied on the basis that the issue in this case could be addressed through a reconsideration application. The Office noted that it had received appellant's July 9, 1999 letter requesting reconsideration and that her request would be forwarded to the district Office for proper handling.

By decision dated January 20, 2000, the Office denied appellant's request for reconsideration, without a review of the merits, on the grounds that the evidence submitted was of a repetitious nature and thus, insufficient to warrant further review of the claim.

The Board has duly reviewed the case record and finds that the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b) on the grounds that appellant previously requested reconsideration.

Section 8124(b)(1) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office hearing representative, provides in pertinent part:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... 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]

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.[2] 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,[3] when the request is made after the 30-day period for requesting a hearing[4] and when the request is for a second hearing on the same issue.[5] The Office's procedures, which require

[1] *John T. Horrigan*, 47 ECAB 166 (1995).

[2] *Philip G. Feland*, 47 ECAB 418 (1996).

[3] *Frederick D. Richardson*, 45 ECAB 454 (1994).

[4] *Id.*

[5] *Id.*

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.[6]

In this case, appellant's August 1, 1999 hearing request was made after she had requested reconsideration in connection with her claim and, thus, appellant was not entitled to a hearing as a matter of right. On January 29, 1997 and April 13, 1998 appellant requested reconsideration of the Office's October 10, 1996 decision terminating her compensation. Hence, the Office was correct in stating in its September 20, 1999 decision that appellant was not entitled to a hearing as a matter of right because she made her hearing request after she had requested reconsideration.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its September 20, 1999 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case could be resolved by submitting additional medical evidence to establish that she continued to suffer from her employment-related injury. The Board has held that, 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 deduction from established facts.[7] In this case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request, which could be found to be an abuse of discretion.

For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The Board, however, finds that the Office abused its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[8] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[9] 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.[10] When a claimant fails to meet one of the above

[6] *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

[7] *Frederick D. Richardson*, 45 ECAB 454 (1994); *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[8] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.606(b)(1)-(2).

[10] *Id*. at § 10.607(a).

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.[11]

In support of her July 9, 1999 request for reconsideration, appellant submitted an April 16, 1998 report of Dr. Norman Reynolds, a Board-certified neurologist and her treating physician, who opined:

> "[Appellant] suffers from spasmodic torticollis or torsion dystonia (ICD 9333.83) which she has had since 1992. The problem causes pain and strain in her head and neck with a sideways tremor movement. This makes it difficult for her to sustain attention and hampers her ability to perform daily chores because of her susceptibility to further injury, hence, prohibiting her from lifting or pulling moderately sized objects (greater than 50 pounds). The condition is caused by a deterioration of postural control of the head and neck due to injuries obtained at work. These injuries included cervical strain due to patient's assault on August 19, 1992 and further injury due to aggravation of cervical strain associated with heavy patient lifting and pulling as encountered routinely as a nursing assistant. These factors are not preexisting conditions for an underlying degenerative process, but the actual cause of her syndrome."

The Board finds that Dr. Reynolds' report provided new findings and supported causal relationship between appellant's condition and her employment injury.

An October 12, 1999 report of Dr. P.S. Chhabria, a Board-certified neurologist, revealed a history of appellant's November 3, 1992 employment injury, medical treatments and family and social background. He noted his findings on physical and neurological examination and a diagnosis of torticollis and chronic cervical sprain. Dr. Chhabria opined that "[appellant] is disabled because of Torticollis since 1992. I agree that she has had cognitive problems because of her chronic medication use. Her records will be reviewed for further recommendations regarding permanent medical disability." In an addendum of the same date, Dr. Chhabria indicated a review of magnetic resonance imaging testing of the cervical spine and brain and reassured appellant that all was normal. He opined that "[appellant's] torticollis is disabling, but I have recommended that she should abstain from work and not do work which requires frequent use of neck movements, heavy lifting. Appellant is able to work a light job on a part-time basis not more than 20 hours a week."

The Board finds that Dr. Chhabria's October 12, 1999 reports offer physical findings of a consequential condition and support a causal relationship between appellant's condition and the medical treatment she received for her accepted employment injury.

As appellant submitted relevant new evidence not previously considered by the Office, the Office abused its discretion by refusing to reopen appellant's claim for consideration of the

[11] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

merits of her claim.[12] On remand the Office should review appellant's claim on the merits and undertake any necessary development of the medical evidence.

The January 20, 2000 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further consideration on its merits. The Office's September 20, 1999 decision is hereby affirmed.

Dated, Washington, DC
February 14, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] *Willie H. Walker*, 45 ECAB 126 (1993); *Ethel D. Curry*, 35 ECAB 737, 741-42 (1984) (the Office is required to reopen a case on its merits when a claimant submits evidence not previously considered).