U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENISE Y. WILSON and DEPARTMENT OF COMMERCE, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, Silver Spring, MD

Docket No. 02-1295; Submitted on the Record;
Issued September 20, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

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 properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

Appellant's claim filed on June 10, 1985 after she lifted a box of books and hurt her back was accepted for a soft tissue injury.[1] She returned to work on November 7, 1986. Appellant filed another claim for an April 16, 1992 lifting incident at work, following surgery for a ruptured disc on August 13, 1991 after a nonwork automobile accident on August 17, 1990. The Office accepted the 1992 claim for an exacerbation of chronic lumbar disc disease and paid appropriate compensation.[2]

On October 29, 1993 the Office denied further compensation based on the second opinion evaluation of Dr. Rafael Lopez, a Board-certified orthopedic surgeon, who found that appellant's symptoms were exaggerated and her complaints of pain unsubstantiated. Appellant requested a hearing, but was unable to attend because of previously scheduled physician and court appointments. She twice requested that the Office reschedule her hearing, but then withdrew her request on November 18, 1994.

By letter dated May 22, 2000, appellant again requested a hearing. On August 7, 2001 the Office denied this request as untimely filed. On October 25, 2001 appellant requested reconsideration of the October 29, 1993 decision denying benefits. By decision dated

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[1] A previous claim filed on November 4, 1982 was also accepted after appellant hurt her back and fractured her jaw when her car was rear-ended while she was driving to a training class.

[2] Appellant received intermittent compensation based on the reports of her treating physicians, Dr. Daniel R. Ignacio, a Board-certified neurosurgeon, and Dr. Bruce Ammerman, a Board-certified neurosurgeon, who both indicated return-to-work dates but then rescinded them without medical explanation.

February 5, 2002, the Office denied appellant's request on the grounds that it was untimely filed and failed to establish clear evidence of error.

The Board finds that appellant is not entitled to an oral hearing because her request was not timely filed.

The only Office decisions before the Board on appeal are dated February 5, 2002 and August 7, 2001 denying appellant's requests for reconsideration and a hearing. Because more than one year has elapsed between the Office's last merit decision dated October 29, 1993 and the filing of this appeal on April 14, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.[3]

Section 8124(b)(1) of the Federal Employees' Compensation Act[4] 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."[5]

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.[6] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing request when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[7]

In this case, appellant withdrew her first request for a hearing after twice seeking to have the hearing rescheduled. Her second request for a hearing was dated May 22, 2000, well beyond the 30-day limitation of section 8421(b)(1) and its implementing regulation.[8] Because appellant failed to request an oral hearing within 30 days of the Office's October 29, 1993 decision she is not entitled to an oral hearing as a matter of right.

While the Office 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 August 7, 2001 decision, stated that it had reviewed appellant's request and determined that whether appellant was entitled to

[3] 20 C.F.R. §§ 501.2(c), 501.3(d)(2). *See John Reese*, 49 ECAB 397, 399 (1998).

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8124(b)(1).

[6] *Bonnie Goodman*, 50 ECAB 139, 145 (1998).

[7] *Martha A. McConnell*, 50 ECAB 129, 130 (1998); *Michael J. Welsh*, 40 ECAB 994, 997 (1989).

[8] 5 U.S.C. § 8421(b)(1); 20 C.F.R. § 10.616(a).

compensation could be resolved with a request for reconsideration and evidence demonstrating that the Office's October 29, 1993 decision was wrong at the time it was issued.

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.[9] The record does not indicate that the Office acted in any manner in denying appellant's request for a hearing that could be found to be an abuse of discretion.

Appellant argued on appeal that when she signed the November 18, 1994 letter withdrawing her request for a hearing, she was on medication for depression and stress and did not read the letter. The record contains no evidence that appellant was incompetent when she signed the typewritten, two-sentence letter. Therefore, the Office properly denied appellant's request for a hearing as untimely.

The Board also finds that the Office acted within its discretion in denying appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "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 --
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."[10]

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).[11] This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[12]

In this case, appellant's letter requesting reconsideration was dated October 25, 2001, eight years later than the Office's October 29, 1993 decision, and was, therefore, untimely.

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[9] *Linda J. Reeves*, 48 ECAB 373, 377 (1997).

[10] 5 U.S.C. § 8128(a).

[11] *Diane Matchem*, 48 ECAB 532, 533 (1997), citing *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[12] 20 C.F.R. § 10.607(a).

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[13]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[14] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[15] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[16]

It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.[17]

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but also of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[18]

This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[19] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.[20]

In this case, appellant submitted medical reports dated September 11, December 5 and 21, 2001, January 9, February 14 and 28, March 5, 6 and 21, and April 4, 2002 from Dr. Ignacio, Board-certified in physical medicine and rehabilitation and appellant's long-time treating physician. These reports do not establish clear evidence of error.

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[13] 20 C.F.R. § 10.607(b).

[14] *Nancy Marcano*, 50 ECAB 110, 114 (1998).

[15] *Leona N. Travis*, 43 ECAB 227, 241 (1991).

[16] *Richard L. Rhodes*, 50 ECAB 259, 264 (1999).

[17] *Annie Billingsley*, 50 ECAB 210, 212 (1998); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[18] *Veletta C. Coleman*, 48 ECAB 367, 370 (1997).

[19] *Jimmy L. Day*, 48 ECAB 654, 656 (1997).

[20] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

Dr. Ignacio diagnosed cervical and lumbar disc syndrome with radiculopathy as well as bilateral carpal tunnel syndrome, reflex sympathetic dysfunction and chronic thoracic strain syndrome. In each of his reports, he stated that he was treating appellant for "medical conditions she sustained when she was performing her job on April 16, 1992." Dr. Ignacio opined that the medical conditions were causally related to the 1992 work incident and that appellant was totally disabled. He added that ever since the work incident appellant had experienced pain along her neck and back.

The new reports from Dr. Ignacio merely repeat what he has believed since he began treating appellant. However, these reports are insufficient to establish any error by the Office in determining that the report of the second opinion physician, Dr. Lopez, represented the weight of the medical evidence and established that appellant's back condition caused by the 1992 lifting incident had resolved. The Office explained then that Dr. Ignacio offered no medical rationale for his conclusion that all appellant's back problems were work related and thus his reports were of little probative value. Dr. Ignacio's latest reports do not address how the Office erred in discounting his earlier reports.

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office.[21] Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review.

The February 5, 2002 and August 7, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
September 20, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[21] *See Fidel E. Perez*, 48 ECAB 663, 665 (1997) (finding that medical evidence sufficient to create a conflict of opinion on whether appellant's work-related disc disease had resolved was insufficient to establish clear evidence of error).