

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ESSIE L. BLANTON and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Lexington, KY

*Docket No. 02-1242; Submitted on the Record;
Issued January 21, 2003*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing as untimely; and (2) whether the Office properly refused to reopen appellant's claim for further consideration of the merits on the grounds that the application for review was not timely filed and did not present clear evidence of error.

On October 17, 1998 appellant, then a 46-year-old pharmacy technician, filed a notice of traumatic injury and claim for continuation of pay/compensation, alleging that on October 15, 1998 she sustained injuries when moving several boxes from a cart to a storage shelf.

In support of her claim, appellant submitted medical reports from Dr. Frank A. Burke, a Board-certified orthopedic surgeon, and his partner, Dr. Howard Markowitz, also a Board-certified orthopedic surgeon, dated from January 15 to April 21, 1999. Drs. Burke and Markowitz noted that they were treating appellant for chronic neck pain with chronic left shoulder pain secondary to musculoskeletal strains. At Dr. Burke's request, an electromyograph was performed on February 10, 1999 and was interpreted by Dr. Cary L. Twyman, a Board-certified psychiatrist and neurologist, as showing mild to moderate carpal tunnel syndrome. A magnetic resonance imaging conducted for these physicians showed a problem of "significant central spinal stenosis at C5-6 and C6-7 with foraminal compromise bilaterally, right greater than left. Appellant was also seen by Dr. Christa U. Muckenhausen, an internist, on May 19, 1999, who found a disc bulge at C2-3, broad posterior herniation at C3-4 and C5-6 with mild stenosis, bilateral posterolateral bulge at C4-5 and broad posterior and right posterolateral herniated, central and right stenosis at C6-7. She submitted a May 25, 1999 medical report by Dr. James Templin, a physiatrist, wherein he indicated that appellant suffered from chronic cervical musculoligamentous strain, chronic cervical pain syndrome, degenerative cervical disc disease, central cervical spinal stenosis of C5-6, C6-7 and cervical foraminal compromise bilaterally secondary to spinal stenosis.

The Office, in a decision dated August 3, 1999, denied appellant's claim. By letter dated August 18, 1999, appellant requested a hearing. By decision dated February 7, 2000, an Office

hearing representative determined that the case was not in posture for a hearing. The hearing representative found that the medical evidence was sufficient to support that the work incident resulted in a shoulder strain and set aside the August 3, 1999 decision. The hearing representative also noted that appellant contended that her condition in January 1999 was related to her October 1998 injury, and stated that the Office should arrange for a second opinion examination to address appellant's claim for recurrence.

The Office referred appellant to Dr. Robert L. Keisler, a Board-certified orthopedic surgeon, for a second opinion regarding whether appellant sustained a recurrence of disability, on or after April 9, 1999, causally related to her injury of October 15, 1998. In a medical report dated March 27, 2000, Dr. Keisler gave his clinical impression as "multiple level degenerative disk disease with severe degeneration at C5-6 and C6-7 with mild central and foraminal stenosis changes, though normal neurological examinations throughout the entire history." He opined:

"I find no indication that any of the symptoms, previously or current, are related to any specific activities that might have occurred in October of 1998. There is some suggestion that a psychologic component producing chronic pain syndrome and depression may have evolved during this period of time. This would not be related to any specific event [which] could have occurred in October 1998."

He concluded:

"There is no indication of a recurrence of a relationship of any events after April 9, 1999, that could be related or associated with any events that took place on October 15, 1998. It should be noted that the [statement of accepted facts] is incorrect and the symptoms in the shoulder area are a manifestation of underlying degenerative changes in the cervical spine that were preexisting. There is no history of an injury. Rather lifting boxes may produce a period of symptoms in this underlying problem, but would not be itself an injury. Whereas any and all physical activities can produce a period of symptoms, lifting boxes would merely be one of those activities and not an injury. The true condition was preexisting and progressive long before October 1998. Additional increases of symptoms in this variable condition would be independent of any event that could have occurred in October 1998. I must conclude that there is no relationship to any current problems to any event that could have occurred in October 1998."

By decision dated April 14, 2000, the Office denied appellant's claim for recurrence as the medical evidence demonstrated that appellant's claimed condition or disability was not causally related to the original injury on October 15, 1998.

By letter to the Office dated February 13, 2001, appellant's attorney indicated that they had not received the decision and requested a hearing. By letter to appellant's attorney dated May 7, 2001, the Office sent appellant's attorney a copy of the February 13, 2001 decision. By letter dated June 1, 2001 and mailed on June 4, 2001, appellant's attorney requested a hearing.

By decision dated August 3, 2001, the Office denied appellant's request for a hearing as it was not timely filed. The Office also reviewed appellant's request under its discretionary

authority, and denied the hearing for the reason that the case could equally well be addressed by requesting reconsideration and submitting further evidence.

By letter dated August 28, 2001, appellant's attorney requested reconsideration and indicated that further medical records were being sent to the Office under "separate cover." By decision dated January 2, 2002, the Office denied appellant's request for reconsideration for the reason that she did not demonstrate clear evidence of error in the April 14, 2000 decision.

The Board finds that the Office properly denied appellant's request for an oral hearing as untimely.

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing, states, "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 As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.²

Regulations implementing the Act provide that a claimant is not entitled to an oral 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.³ In computing the time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, Sunday or a legal holiday.⁴ The Board has applied this rule to determine questions of timeliness arising under the Act.⁵

In this case, the Office issued a decision denying appellant's claim for a recurrence on April 14, 2000. Appellant's request for a hearing was mailed on June 4, 2001 -- over one year later. Accordingly, as appellant's request for a hearing was not filed within 30 days of the April 14, 2000 decision, she was not entitled to a hearing as a matter of right. Moreover, the Office considered whether to grant her a discretionary review, and correctly advised appellant that the issue of whether she timely filed her claim for continuation of pay could equally well be addressed by requesting reconsideration. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for an oral hearing.

The Board further finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

¹ 5 U.S.C. § 8124(b) (1).

² *Frederick D. Richardson*, 45 ECAB 454 (1994).

³ 20 C.F.R. § 10.616(a).

⁴ *John B. Montoya*, 43 ECAB 1148 (1992).

⁵ *Id.*

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 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 awarded; or

“(2) award compensation previously refused or discontinued.”

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). One such limitation, 20 C.F.R. § 10.607(a), provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. In the instant case, the first submission to the Office after the April 14, 2000 decision was the February 13, 2001 letter from appellant’s attorney requesting a hearing. Appellant did not officially request reconsideration at that time. Appellant, through her attorney, first requested reconsideration on August 28, 2001. This request was made over 16 months after the decision, and accordingly was not timely filed. However, the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation, if the claimant’s application for review shows clear evidence of error.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must show on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.⁶ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁷ This determination of clear error entails a limited review by the Office of the evidence submitted with the reconsideration request and whether the new evidence demonstrated 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.⁸

In the instant case, in the decision dated April 14, 2000, the Office denied appellant’s request for recurrence as it found that the medical evidence demonstrated that appellant’s claimed condition or disability was not causally related to the original injury of October 15, 1998. In the August 28, 2001 letter requesting reconsideration, appellant’s attorney noted that further medical records were being sent to the Office under “separate cover.” However, no such evidence was received and no medical evidence was submitted to support appellant’s request for reconsideration. Accordingly, appellant has failed to submit “clear evidence of error,” and the decision dated January 2, 2002 denying appellant’s request for reconsideration due to failure to establish clear evidence of error is affirmed.

⁶ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 662, 665 (1997).

⁷ *Id.*

⁸ *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

The decisions of the Office of Workers' Compensation Programs dated January 2, 2002 and August 3, 2001 are hereby affirmed.

Dated, Washington, DC
January 21, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member