

**United States Department of Labor
Employees' Compensation Appeals Board**

BRENDA L. BURGESS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Charlotte, NC, Employer**

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**Docket No. 03-1729
Issued: January 2, 2004**

Appearances:
Brenda L. Burgess, pro se
Office of Solicitor, for the Director

Case Submitted on the Record,

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 1, 2003 appellant filed an appeal from a December 12, 2002 decision of the Office of Workers' Compensation Programs which denied her request for a hearing before an Office hearing representation. She also appealed an April 2, 2003 decision in which the Office denied her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed since the filing of appellant's appeal on July 1, 2003 and the last merit decision issued by the Office on August 1, 2001, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) 501.3(d)(2). The Board's jurisdiction is limited to review of the December 12, 2002 and April 2, 2003 Office decisions.

ISSUES

The issues on appeal are: (1) whether the Office properly denied appellant's request for a second hearing; (2) whether the Office properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

This is the third appeal in this case. In a November 12, 1999 decision, the Board remanded the case for further development of the issue of whether appellant sustained an injury in the performance of duty.¹ The Board directed the Office to ascertain whether the statements provided by appellant's supervisors established that she was required to bring her car to work and perform errands for the employing establishment. In a January 20, 2000 decision, the Board found that the Office did not abuse its discretion by denying appellant's request for reconsideration.² The law and facts as set forth in the previous Board decisions are incorporated herein by reference.

On remand, following factual development of the record, the Office notified appellant on May 30, 2000 that her claim was accepted.³ However, by decision dated February 7, 2001, the Office rescinded its acceptance of the claim based on a finding that the evidence established that appellant was not in the performance of duty when her accident occurred on January 4, 1993.

Appellant requested a review of the written record. In a decision dated August 1, 2001, an Office hearing representative affirmed the Office's February 7, 2001 decision. By letter faxed on September 26, 2002, appellant filed a second request for a hearing, which was denied by the Office in a December 17, 2002 decision.

On September 25, 2002 appellant faxed to the Office a request for reconsideration, challenging the credibility of certain witness statements regarding whether she was required to bring her vehicle to work. She stated that additional evidence was being submitted by certified mail. In a letter dated February 28, 2003, appellant again requested reconsideration and enclosed a tape recording, along with six hand-written pages of explanation of the testimony enclosed on the tape. In an April 2, 2003 decision, the Office denied her request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

LEGAL PRECEDENT-Issue 1

Section 8124(b) of the Federal Employees' Compensation Act,⁴ concerning a claimant's entitlement to a hearing, states that: "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 issuance of the decision, to a hearing on his claim before a

¹ Docket No. 97-2116 (issued November 12, 1989). Appellant filed a claim on March 2, 1996 for injuries sustained in a motor vehicle accident on January 4, 1993 while on her way home from work.

² Docket No. 97-2461 (issued January 20, 2000). Appellant sustained an injury on August 10, 1988 in a motor vehicle accident. The claim was accepted for a sprained left wrist, a fibrocartilage tear and lunar triquetra tear.

³ In a decision dated February 29, 2000, the Office denied compensation on the grounds that fact of injury was not established. The Office subsequently issued a decision on May 23, 2000, vacating the February 29, 2000 decision and advising appellant that further development was being undertaken to ascertain whether she was injured in the performance of duty.

⁴ 5 U.S.C. § 8124(b).

representative of the Secretary.” Office regulations at section 10.615 provide that “a hearing is a review of an adverse decision by a hearing representative.” A claimant may chose between two formats for a hearing, either an oral hearing or a review of the written record.⁵ Section 10.616(a) states that the hearing request must be sent within 30 days (as determined by the postmark or other carrier’s date marking) of the date of the decision for which a hearing is sought.⁶ The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.⁷

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 the Office must exercise this discretionary authority in deciding whether to grant a hearing. 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 hearing⁸ when the request is made after the 30-day period established for requesting a hearing⁹ or when the request is for a second hearing on the same issue.¹⁰ The Office’s procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.¹¹

ANALYSIS-Issue 1

Appellant received a hearing on the merits of her claim when an Office hearing representative reviewed the written record and issued a decision denying compensation dated August 1, 2001. Although appellant filed a second request for a hearing, specifying that she wanted an oral hearing as opposed to a review of the written record, she was not entitled to a second hearing on her claim as a matter of right. The Office had discretion to deny her second hearing request on the basis that she had already received a review of the merits of her case by an Office hearing representative. Furthermore, the Office properly found that the issue of the case could be equally addressed if appellant filed a request for reconsideration. The Board finds that the Office properly exercised its discretion in denying appellant’s request for a second hearing under section 8124(b).

⁵ 20 C.F.R. § 10.615.

⁶ 20 C.F.R. § 10.616(a).

⁷ *Id.*

⁸ *Rudolph Bermann*, 26 ECAB 354 (1975).

⁹ *Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁰ *Johnny S. Henderson*, 34 ECAB 216 (1982).

¹¹ *Sandra F. Powell*, 45 ECAB 877 (1994).

LEGAL PRECEDENT-Issue 2

The 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).¹² 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's merit decision, for which review is sought.¹³ 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.¹⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹⁵ The evidence must be positive, precise and explicit and must manifested on its face that the Office committed an error.¹⁶ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. 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.¹⁸ 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.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 improperly denied a merit review in the face of such evidence.²⁰

¹² *Diane Matchem*, 48 ECAB 532 (1997), citing *Leon D. Faidley Jr.*, 41 ECAB 104 (1998).

¹³ 20 C.F.R. § 10.607(a).

¹⁴ *Id.*

¹⁵ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

¹⁶ *Id.*

¹⁷ *Richard L. Rhodes*, 50 ECAB 259 (1999).

¹⁸ *Miyarshiro*, *supra* note 15; *Rhodes* *supra* note 17.

¹⁹ *Velletta C. Coleman*, 48 ECAB 367 (1997).

²⁰ *Miyarshiro*, *supra* note 15; *Gregory Griffin*, 41 ECAB 186 (1980), *petition for recon. denied*, 41 ECAB 458 (1990).

ANALYSIS-Issue 2

Appellant's letters requesting reconsideration were dated September 25, 2002 and February 28, 2003, more than one year following the Office's merit decision dated August 1, 2001. Consequently the Board finds that appellant's reconsideration requests were untimely filed under section 10.607(a). Based on the untimely nature of appellant's reconsideration request, the issue becomes whether appellant has established clear evidence of error. The Board has carefully reviewed the evidence submitted by appellant in support of her reconsideration request and finds that it does not on its face demonstrate that the Office's denial of compensation was erroneous. The tape recording and handwritten description of witness testimony provided by appellant does not *prima facie* shift the weight of the evidence in favor of her claim or raise a substantial question as to the correctness of the Office's August 1, 2001 decision. The evidence on reconsideration is insufficient to establish that the Office erred in finding that appellant was not in the performance of duty when her motor vehicle accident occurred on January 4, 1993. The evidence on reconsideration does not establish clear evidence of error with respect to the Office's decision to rescind acceptance of the claim.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing. The Board further finds that the reconsideration requests filed by appellant on September 25, 2002 and February 28, 2003 were untimely filed and failed to establish clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 2, 2003 and December 17, 2002 are affirmed.

Issued: January 2, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member