

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

DEOLA M. CHATMAN, Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, SERVICE
CENTER, Memphis, TN, Employer**

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**Docket No. 04-1499
Issued: October 28, 2004**

Appearances:
Deola M. Chatman, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 19, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decision dated April 28, 2004, which denied her reconsideration request without conducting a merit review. The Board also has jurisdiction over a February 20, 2004 Office decision denying appellant's request for an oral hearing. Because more than one year has elapsed between the last merit decision dated May 20, 1994 and the filing of this appeal on May 19, 2004 the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues on appeal are: (1) whether Office properly denied appellant's request for an oral hearing; and (2) whether the Office properly determined that appellant's request for reconsideration dated March 15, 2004 was not timely filed and failed to present clear evidence of error.

FACTUAL HISTORY

On June 26, 1991 appellant, then a 45-year-old scheduling clerk, filed a claim for a traumatic injury alleging that she sustained multiple injuries to her face and head on that day when she fainted while in the performance of duty.

The Office accepted appellant's claim for a fractured skull. She then filed a claim alleging recurrences of her June 26, 1991 head injury in the form of seizures on December 28, 1992 and February 6, 1994.

In a decision dated May 20, 1994, the Office denied appellant's recurrence claims on the grounds that the medical evidence was insufficient to establish that her seizure disorder condition or a recurrence of disability was related to her June 26, 1991 work-related injury. The Office also indicated that any authorization for medical treatment was terminated.

On October 6, 2003 appellant requested an oral hearing of its May 20, 1994 decision denying her notice of recurrence of disability.¹

By decision dated February 20, 2004, the Office denied appellant's request for an oral hearing because it was not timely filed. The Office further informed her that her case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the Office and submitting evidence not previously considered.

In a letter dated February 24, 2004, appellant responded to the Office's January 22, 2004 form letter and requested that if she was granted a hearing she be allowed to subpoena a witness to testify regarding the working conditions at their employing establishment in June 1991. On March 15, 2004 appellant requested reconsideration of the Office's decision denying her claim. She noted the history of her claim and asserted that she did not receive sufficient compensation.

On April 28, 2004 the Office denied review of appellant's March 15, 2004 request for reconsideration on the grounds that the request was untimely and that appellant failed to establish clear evidence of error in the Office's most recent merit decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of the Federal Employees Compensation Act provides that "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 her claim before a representative of the Secretary."² Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide that, a claimant shall be afforded a choice of an oral

¹ Appellant stated that she wanted an oral hearing to reopen her case because she was not well enough to do so in 1994.

² 5 U.S.C. § 8124(b)(1).

hearing or a review of the written record by a representative of the Secretary.³ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.⁴ The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

“If the claimant is not entitled to a hearing or review (*i.e.*, the request was untimely, the claim was previously reconsidered, etc.), H&R [Hearings and Review] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons.”⁵

ANALYSIS -- ISSUE 1

In the present case, appellant requested an oral hearing by an Office hearing representative on October 6, 2003. Section 10.616 of the Office's regulation provides: “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.”⁶ As the postmark date of appellant's request October 6, 2003, was more than 30 days after issuance of the May 20, 1994 Office decision, appellant's request for an oral hearing was untimely filed. Therefore, the Office was correct in finding in its February 20, 2004 decision that appellant was not entitled to an oral hearing as a matter of right because her request was not made within 30 days of the Office's May 20, 1994 decision.

While the Office also has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right, the Office, in its April 11, 2003 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for an oral hearing on the basis that the case could be resolved by the submission of additional evidence to establish that a diagnosed condition was causally related to her employment.

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 the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for an oral

³ 20 C.F.R. §§ 10.616, 10.617.

⁴ *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (June 1997).

⁶ 20 C.F.R. § 10.616.

⁷ *Samuel R. Johnson*, 51 ECAB 612 (2000).

hearing, which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for an oral hearing under section 8124.

LEGAL PRECEDENT -- ISSUE 2

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 -- end, decrease or increase the compensation awarded; or award compensation previously refused or discontinued.”⁸

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As 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.⁹ 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 on the part of the Office in its most recent merit decision. 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 be manifest on its face that the Office committed an error.¹⁰

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be 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's decision.¹¹ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁴ The Board makes an independent

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.607(a); *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹⁰ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹¹ *Annie L. Billingsley*, *supra* note 9.

¹² *Jimmy L. Day*, 48 ECAB 652 (1997).

¹³ *Id.*

¹⁴ *Id.*

determination as to whether a claimant has submitted clear evidence of error on the part of the Office.¹⁵

ANALYSIS-ISSUE 2

In its April 28, 2004 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on May 20, 1994 and appellant's request for reconsideration was dated March 15, 2004, more than one year after the May 20, 1994 decision. Accordingly, appellant's petition for reconsideration was not timely filed.

The Board has reviewed appellant's recent reconsideration request and concludes that she has not established clear evidence of error in this case. Her reconsideration request noted her contentions about the claim and asserted that her condition continued. However, she did not submit any medical evidence relevant to the issue of causal relationship and she did not otherwise submit any evidence or argument that was positive, precise and explicit in establishing that the Office erred in its 1994 merit decision. The record contains no evidence which would *prima facie* shift the weight of the evidence regarding the relationship of her seizure disorder and headaches to the work-related skull fracture. A review of the record and appellant's assertions on reconsideration fails to raise a substantial question as to the correctness of the Office's decision. Consequently, appellant failed to show clear evidence of error in the Office's May 20, 1994 decision.

CONCLUSION

The Board, therefore, finds that the Office properly denied appellant's request for an oral hearing as untimely. The Board further finds that the Office properly determined that appellant's request for reconsideration dated March 15, 2004 was untimely filed and did not demonstrate clear evidence of error.

¹⁵ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

ORDER

IT IS HEREBY ORDERED THAT the April 28 and February 20, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 28, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member