United States Department of Labor
Employees' Compensation Appeals Board

A.N., Appellant	)	
and	)	**Docket No. 06-1476**
	)	**Issued: March 2, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Jamestown, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 12, 2006 appellant filed a timely appeal from nonmerit decisions of the Office of Workers' Compensation Programs dated March 15, 2006 denying her request for a hearing and May 9, 2006 denying her request for reconsideration as it was untimely and did not establish clear evidence of error. As the most recent merit decision of record is dated August 4, 2003, more than one year from the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the March 15 and May 9, 2006 nonmerit decisions.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for a hearing as untimely under 5 U.S.C. § 8124; and (2) whether the Office properly refused to reopen her case for further review of the merits of her claim on the grounds that her request for reconsideration was not timely filed and did not demonstrate clear evidence of error.

[1] 20 C.F.R. §§ 501.2(c), 501.3.

FACTUAL HISTORY

On December 5, 2000 appellant, then a 41-year-old flat sorter, filed an occupational disease claim alleging that she sustained bursitis due to extensive standing and repetitive motion while performing her employment duties. The Office accepted her claim for an exacerbation of degenerative arthritis of the right hip and placed her on the periodic rolls beginning December 29, 2001.[2]

In a decision dated August 4, 2003, the Office terminated appellant's compensation effective that date on the grounds that she refused an offer of suitable employment.

On November 28, 2005 appellant filed a claim for a schedule award. By letter dated February 3, 2006, the Office informed her that she was not entitled to a schedule award based on its August 4, 2003 termination of her compensation for refusal of suitable work.[3]

In a letter dated February 7, 2006, appellant requested an oral hearing. In a decision dated March 15, 2006, the Office denied the hearing request as untimely under section 8124. The Office found that the issue could be equally well addressed through the submission of new and relevant evidence accompanying a valid request for reconsideration.

By letter received May 2, 2006, appellant requested reconsideration of the termination of her compensation for refusing suitable work. She noted that she had obtained private employment in 2000. Appellant submitted additional medical evidence with her reconsideration request.

In a decision dated May 9, 2006, the Office denied appellant's request for reconsideration on the grounds that it was untimely and did not show 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: "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 [her] claim before a representative of the Secretary."[5] As section 8124(b)(1) is unequivocal in setting forth the time

[2] By decision dated July 30, 2002, the Office denied appellant's claim for a schedule award as the evidence did not establish that she was at maximum medical improvement. On May 7, 2003 the Office reduced appellant's compensation as she had actual earnings as a motel clerk and receptionist.

[3] The Office's February 3, 2006 correspondence to appellant is not a final decision. Section 10.126 of the Office's regulations provides that a decision "shall contain findings of fact and a statement of reasons." 20 C.F.R. § 10.126. The letter did not identify itself as a final decision and the Office attached no appeal right for appellant to pursue. Further, the content of the letter was informational in nature as a response to appellant's November 28, 2005 request for a schedule award.

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8124(b)(1).

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.[6]

Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."[7]

Section 10.616(a) further provides, "A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. 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."[8]

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. 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, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue.[9] 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.[10]

ANALYSIS -- ISSUE 1

The Office issued a decision on August 4, 2003 terminating appellant's compensation on the grounds that she refused an offer of suitable work. Appellant sought an oral hearing on the termination decision by letter dated February 7, 2006. The Office denied her hearing request as untimely by decision dated March 15, 2006. As appellant's request for a hearing was dated February 7, 2006, more than 30 days after the Office issued its August 4, 2003 decision, she was not entitled to a hearing as a matter of right.

The Office 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 or right.[11] The Office properly exercised its discretion by considering whether to grant a discretionary review and finding that the issue could be equally well resolved by appellant submitting additional evidence to the Office

[6] *Leona B. Jacobs*, 55 ECAB 753 (2004).

[7] 20 C.F.R. § 10.615.

[8] 20 C.F.R. § 10.616(a).

[9] *See André Thyratron*, 54 ECAB 257 (2002).

[10] *Sandra F. Powell*, 45 ECAB 877 (1994).

[11] *Afegalai L. Boone*, 53 ECAB 533 (2002).

in a reconsideration request. The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An 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.[12] In this case, the evidence of record does not establish that the Office committed any action in connection with its denial of appellant's request for an oral 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 as untimely under section 8124 of the Act.

LEGAL PRECEDENT -- ISSUE 2

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.[13] The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[14] When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.[15] The Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[16] In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.[17]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest 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.[18] 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. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient

[12] *See André Thyratron*, *supra* note 9.

[13] 5 U.S.C. §§ 8101-8193.

[14] 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

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

[16] *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: "[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent decision. The application must establish, on its face, that such decision was erroneous." 20 C.F.R. § 10.607(b).

[17] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[18] *Dorletha Coleman*, 55 ECAB 143 (2003).

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.[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 merit review in the face of such evidence.[20]

5 U.S.C. § 8124(a) provides: "The [Office] shall determine and make a finding of facts and make an award for or against payment of compensation." The Office's regulations provide that an Office decision "shall contain findings of fact and a statement of reasons."[21] The Office decision should contain a discussion of the issues, requirements for entitlement, a background framework so that the reader can understand the issues at hand, a discussion of the relevant evidence, a basis for the decision and a conclusion.[22] Office procedures further specify that a final decision must provide clear reasoning which allows the claimant to "understand the precise defect of the claim and the kind of evidence which would overcome it."[23] Thus, a final decision must include findings of fact and a description of the basis for the findings so that the parties of interest will have a clear understanding of the reasoning behind the decision.[24]

ANALYSIS -- ISSUE 2

The Office properly determined that appellant failed to file a timely application for review. The Office's procedures provide that the one-year time limitation period for requesting reconsideration begins the date following an original Office decision.[25] A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.[26] On May 2, 2006 appellant requested reconsideration of the August 4, 2003 termination of her compensation based on her refusal of suitable work. As the reconsideration request was submitted more than one year after the last merit decision of record, it was untimely under section 10.607(a). Consequently, appellant must establish clear evidence of error by the Office in its termination of her compensation.

The Office, in its May 9, 2006 decision, concluded that appellant failed to establish clear evidence of error without providing any findings of fact or conclusions of law. The Office did not discuss the factual or medical evidence submitted by appellant in support of the request for reconsideration in its decision. The Office is required to make findings of fact and a statement of

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[19] *Id*.

[20] *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

[21] 20 C.F.R. § 10.126.

[22] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (March 1997).

[23] *Id*.

[24] *Paul M. Colosi*, 56 ECAB ___ (Docket No. 04-1042, issued February 3, 2005).

[25] 20 C.F.R. § 10.607(a).

[26] *Robert F. Stone*, 57 ECAB ___ (Docket No. 04-1451, issued December 22, 2005).

reasons regarding the material facts of the case.[27] The Office's findings should be sufficiently detailed so that the claimant can understand the reasoning behind the decision.[28] The Office's failure to provide factual findings and explain the basis for its conclusion that appellant did not establish clear evidence of error precludes the Board's review of this decision. The case is, therefore, remanded to the Office for an appropriate decision that properly considers the evidence submitted in this claim on the issue of clear evidence of error.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing as untimely under 5 U.S.C. § 8124. The Board further finds that the Office failed to properly adjudicate the issue of whether appellant established clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 9, 2006 is set aside and the case is remanded to the Office for further proceedings consistent with this decision of the Board. The decision dated March 15, 2006 is affirmed.

Issued: March 2, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[27] 20 C.F.R. § 10.126; *Beverly Dukes*, 46 ECAB 1014 (1995).

[28] *See Paul M. Colosi*, *supra* note 24.