U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CRESENCIANO MARTINEZ and DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, Conchas Dam, NM

Docket No. 98-1743; Submitted on the Record;
Issued February 2, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion in finding that appellant's January 27, 1998 request for reconsideration was untimely and failed to show clear evidence of error.

In a decision dated November 23, 1994, the Office terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that he neglected to work after suitable work was offered to, procured by or secured for him. On January 30, 1995 the Office denied modification of this decision.

On January 31, 1996 the Office received a request for reconsideration, dated January 29, 1996, from Alfonso G. Sanchez, attorney-at-law, on appellant's behalf. Mr. Sanchez signed the motion to reconsider and identified himself as "Attorney for Claimant." Appellant also signed the motion.

On February 8, 1996 the Office advised Mr. Sanchez that it could not communicate with him concerning appellant's file without written authorization, signed by appellant, for him to serve as appellant's representative.

In a decision dated February 14, 1996, the Office reviewed the merits of appellant's claim and issued a decision denying modification of its prior decisions. Noting that appellant's treating physician had signed off on the position that appellant refused, the Office found that none of the medical information submitted by appellant gave any indication that he could not perform the duties of the offered position. The Office mailed a copy of the decision to appellant but not to Mr. Sanchez. In an attached statement of review rights, the Office notified appellant that any request for reconsideration must be made within one year of the date of the decision.

On February 14, 1996 appellant formally appointed Mr. Sanchez to represent his interests before the Office. The Office received this authorization on February 16, 1996.

On July 9, 1996 Mr. Sanchez withdrew as appellant's representative.

On January 29, 1998 the Office received a request for reconsideration, dated January 27, 1998, from Michael S. Liebman, attorney-at-law, on appellant's behalf. Mr. Liebman recognized that the request for reconsideration was untimely but argued that the Office should nonetheless consider the request because appellant only recently became aware of it through no fault of his own. Appellant's attorney argued that the Office mailed its transmittal letter of February 14, 1996 to an old address and that appellant had moved well before that date. Appellant's attorney also argued that the transmittal letter indicated the Office did not mail a copy of the decision to Mr. Sanchez.

On February 4, 1998 appellant appointed Mr. Liebman, attorney-at-law, to represent his interests before the Office.

In a decision dated February 20, 1998, the Office denied appellant's January 27, 1998 request for reconsideration because it was not made within one year of the February 14, 1996 merit decision and because it did not show clear evidence of error. On the issue of authorized representation the Office found that the evidence of record failed to show that Mr. Sanchez was appellant's authorized representative of record at the time the Office issued its February 14, 1996 decision. Accordingly, the Office found that Mr. Sanchez was not entitled to receive a copy of the decision.

The Board finds that the Office properly denied appellant's January 27, 1998 request for reconsideration.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). 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.[1] When an application for review is untimely, the Office undertakes a limited review to determine whether there is clear evidence of error pursuant to the untimely request.[2]

Appellant made his January 27, 1998 request for reconsideration more than one year after the Office's February 14, 1996 decision, the most recent decision on the merits of his claim. His request is therefore untimely. The question for determination is whether the reconsideration request 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.[3] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[4] Evidence that does not raise a

[1] 20 C.F.R. § 10.138(b)(2).

[2] *Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990); *see* 20 C.F.R. §§ 10.130, 10.138(a), 10.144 (1987).

[3] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[4] *See Leona N. Travis*, 43 ECAB 227 (1991).

substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[5] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[6] 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.[7] 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 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.[8] 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.[9]

The Board finds that appellant's January 27, 1998 request for reconsideration fails to establish clear evidence of error in the Office's February 14, 1996 decision. Concerning appellant's argument that he did not receive the Office's February 14, 1996 decision, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.[10] This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.[11] The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.[12]

The record shows that the Office mailed its February 14, 1996 decision to appellant's last known address. There is no evidence that appellant notified the Office of any change in his address. A presumption of receipt therefore arises in this case. The Board finds that the presumption is not rebutted by the representative's argument that appellant had moved prior to the Office's February 14, 1996 decision or by the representation that his records revealed that appellant had informed him of a new address by telephone on September 5, 1995. These contentions do not establish that appellant advised the Office of a change in address.

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[5] *See Jesus D. Sanchez, supra* note 2.

[6] *See Travis, supra* note 4.

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

[8] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[9] *Thankamma Mathews, supra* note 2; *Gregory Griffin*, 41 ECAB 458, 466 (1990).

[10] *George F. Gidicsin*, 36 ECAB 175 (1984) (when the Office sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice).

[11] *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

[12] *See Larry L. Hill*, 42 ECAB 596 (1991); *see generally* Annotation, *Proof of Mailing by Evidence of Business or Office Custom*, 45 A.L.R. 4th 476, 481 (1986).

The record supports the representative's contention that the Office did not mail a copy of its February 14, 1996 decision to Mr. Sanchez. The record reflects, however, that Mr. Sanchez was not authorized to represent appellant when the Office issued its February 14, 1996 decision. He was therefore not entitled to receive a copy of the decision at that time.[13] Moreover, the procedural error alleged in this case is not sufficient to raise a substantial question as to the correctness of the Office's November 23, 1994 decision which terminated appellant's compensation on the grounds that he neglected to work after suitable work was obtained for him.

As appellant's untimely request for reconsideration fails to establish clear evidence of error in the Office's finding that he refused an offer of suitable work, the Board finds that the Office properly denied his request.

The February 20, 1998 decision of the Office of Workers' Compensation Programs is affirmed.[14]

Dated, Washington, D.C.
February 2, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[13] Although appellant's January 29, 1996 request for reconsideration was insufficient to establish Mr. Sanchez as the authorized representative, it was sufficient to establish that appellant's previous attorney, Mr. Chakeres, no longer represented appellant's interests before the Office. For this reason, the Office had no duty to send a copy of its February 14, 1996 decision to Mr. Chakeres.

[14] Page 353 of appellant's case file pertains to the medical evaluation of another injured employee, a postal employee in Dallas, Texas. Upon return of the case record, the Office should associate this evidence with the appropriate case file.