

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNARD SMALLCANYON and DEPARTMENT OF HEALTH & HUMAN SERVICES, CHINLE COMPREHENSIVE HEALTH CARE FACILITY, Window Rock, AZ

*Docket No. 99-1861; Submitted on the Record;
Issued October 26, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's requests for reconsideration; and (2) whether the Office abused its discretion in denying appellant's request for an oral hearing.

On August 7, 1995 appellant, then a 26-year-old biomedical engineering technician, sustained a left knee strain in the performance of duty.

By decision dated December 9, 1997, the Office terminated appellant's compensation benefits effective January 4, 1998 on the grounds that he had failed to accept an offer of suitable work as an office automation clerk.

By letter dated March 19, 1998, appellant requested reconsideration and indicated that he was not qualified to perform the duties of an office automation clerk. By decision dated April 10, 1998, the Office denied appellant's request for reconsideration.

By letter dated May 1, 1998, appellant requested an oral hearing before an Office hearing representative and submitted additional medical evidence. The record shows that the medical evidence submitted was previously submitted and considered by the Office prior to its December 9, 1997 decision terminating appellant's compensation benefits.

By decision dated June 17, 1998, the Office denied appellant's request for an oral hearing on the grounds that he was not entitled to a hearing as a matter of right and on the grounds that the issue in the case could be equally well addressed by the submission of evidence not previously considered by the Office and a request for reconsideration.

By letter dated December 2, 1998, appellant requested reconsideration and argued that the factual evidence of record did not establish that he was qualified for the position of office automation clerk. He argued that he could not perform the tasks requiring operation of a

computer and typewriter. With his request for reconsideration, he submitted a copy of the job description of the office automation clerk position.

By decision dated February 12, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was not sufficient to warrant further merit review.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed his appeal with the Board on April 1, 1999,² the only decisions properly before the Board are the Office's June 17, 1998 decision denying appellant's request for an oral hearing and its April 10, 1998 and February 12, 1999 decisions denying his requests for reconsideration. The Board has no jurisdiction to consider the Office's December 9, 1997 merit decision terminating appellant's compensation on the grounds that he refused an offer of suitable work.³

The Board finds that the Office did not abuse its discretion, in its February 12, 1999 and April 10, 1998 decisions, in denying appellant's requests for reconsideration.

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁴ When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.⁵

In support of his March 19, 1998 request for reconsideration, appellant argued that he was not qualified to perform the duties of an office automation clerk which required operation of a computer and typewriter. In support of his December 2, 1998 request for reconsideration, appellant argued that he was not qualified to perform the tasks of an office automation clerk and he submitted a copy of the job description for the position. However, a copy of the job description for the office automation clerk position was previously of record and was considered by the Office prior to issuance of its December 9, 1997 merit decision terminating appellant's compensation benefits. Therefore, this job description does not constitute relevant and pertinent evidence not previously considered by the Office. Regarding appellant's argument that he was not qualified to perform the tasks requiring use of a computer and typewriter, the record shows that this argument had been made previously by appellant and was considered by the Office, along with evidence concerning his typing and computer experience and skills, prior to the

¹ 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

² The postmark date of the letter filed in appellant's appeal to the Board is April 1, 1999.

³ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁴ *See* 20 C.F.R. §§ 10.606(b)(2) (1999) and 10.138.

⁵ *See* 20 C.F.R. §§ 10.608(b) (1999) and 10.138.

issuance of its December 9, 1997 merit decision. Therefore, this argument does not show that the Office erroneously applied or interpreted a specific point of law and does not advance a relevant legal argument not previously considered by the Office. As appellant failed to meet the criteria for obtaining further merit review of his claim, the Office did not abuse its discretion in denying his requests for reconsideration.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "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."⁶

The Board has held that 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 that the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁷ 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,⁸ when the request is made after the 30-day period for requesting a hearing⁹ and 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 the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.¹¹

In the present case, appellant's hearing request was made after he had requested reconsideration in connection with his claim and, thus, appellant was not entitled to a hearing as a matter of right. On March 19, 1998 appellant had requested reconsideration of the Office's December 9, 1997 decision. Hence he was not entitled to a hearing as a matter of right because he made his hearing request after he had requested reconsideration.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case could be resolved by

⁶ 5 U.S.C. § 8124(b)(1).

⁷ *Henry Moreno*, 39 ECAB 475 (1988).

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

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

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

¹¹ *Stephen C. Belcher*, 42 ECAB 696 (1991).

submitting evidence not previously considered by the Office to establish that he was not medically or vocationally qualified to perform the duties of the office automation clerk position. 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 hearing request which could be found to be an abuse of discretion. The record shows that the medical evidence submitted in support of his May 1, 1998 request for an oral hearing was not new evidence but evidence previously submitted by appellant and considered by the Office prior to its December 9, 1997 decision terminating appellant's compensation benefits. Therefore, the Office did not abuse its discretion in denying appellant's request for an oral hearing on the grounds that the issue in the case could be equally well addressed by a request for reconsideration and the submission of new evidence on the issue of suitable work.

For these reasons, the Office properly denied appellant's request for an oral hearing.

The decisions of the Office of Workers' Compensation Programs dated February 12, 1999, June 17 and April 10, 1998 are affirmed.

Dated, Washington, DC
October 26, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member