

On June 16, 2005 appellant, then a 56-year-old mail handler, filed a traumatic injury claim alleging that on May 20, 2005 he sustained a left shoulder injury while loading a heavy basket at work. The Office accepted appellant's condition for sprain and strain of the left rotator cuff and authorized arthroscopic surgery which was performed on July 13, 2005. Appellant stopped work on June 14, 2005 and returned to a limited-duty position on June 16, 2005. On

April 11, 2006 appellant filed a claim for a schedule award and submitted additional medical evidence.

On November 7, 2006 the Office denied appellant's claim for a schedule award. In an appeal form dated December 10, 2006 and received by the Office on December 22, 2006, appellant requested a review of the written record by an Office hearing representative. He submitted additional medical reports in support of his schedule award claim.

In a letter dated May 6, 2008, appellant requested the status of his schedule award claim. He indicated that he had not received any information since he sent his paperwork in on December 10, 2006. Appellant attached duplicate copies of Dr. Bowen's reports dated December 1 and 8, 2006.

Almost 18 months after receiving appellant's request for a review of the written record, the Office, in a decision dated June 6, 2008, the Office denied the request as untimely filed pursuant to 5 U.S.C. § 8124. The Office informed appellant that his 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 district Office and submitting evidence not previously considered.

LEGAL PRECEDENT

Section 8124(b) of the Federal Employees' Compensation Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary.¹ As section 8124(b)(1) is unequivocal in setting forth the time 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.²

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,³ when the request is made after the 30-day period established for requesting a hearing⁴ or when the request is for a second hearing on the same issue.⁵ 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

¹ See 5 U.S.C. § 8124(b)(1).

² See 5 U.S.C. § 8124(b)(1). See 20 C.F.R. § 10.616(a) (1999); *Charles J. Prudencio*, 41 ECAB 499, 501 (1990).

³ *Rudolph Bermann*, 26 ECAB 354 (1975).

⁴ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁵ *Johnny S. Henderson*, 34 ECAB 216 (1982).

reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.⁶

ANALYSIS

The Office denied appellant's claim for a schedule award on November 7, 2006. Because appellant made his request for a review of the written record on December 10, 2006, more than 30 days after the Office's November 7, 2006 decision, he is not entitled to a hearing or a review of the written record as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that his 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 district Office and submitting evidence not previously considered.

However, the Office neglected to consider that, by failing to issue a decision on appellant's request for review of the written record in a timely fashion, it had effectively exhausted appellant's opportunity to obtain a merit review of the November 7, 2006 decision before the Board. Appellant's December 10, 2006 request for review of the written record went unanswered for more than 18 months. By the time the Office issued its June 6, 2008 decision denying the requested review of the written record, appellant did not have the opportunity to timely request reconsideration before the Office or appeal the merits of the Office's November 7, 2006 decision denying his schedule award claim. This delay prevented appellant from obtaining further timely review on the merits of his claim pursuant to section 8128 of the Act by the Office and the Board. The Board finds that the Office abused its discretion by waiting 18 months. As such, the Office should issue a *de novo* decision on the claim.⁷

CONCLUSION

The Board finds that the Office abused its discretion by delaying its decision.

⁶ *Sandra F. Powell*, 45 ECAB 877 (1994).

⁷ *Marilyn F. Wilson*, 51 ECAB 234, 235 (1999); 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Brian R. Leonard*, 43 ECAB 255, 259-60 (1991) (the Board held that the Office's delay in processing appellant's request for a hearing effectively denied appellant the opportunity to obtain merit review of his claim and thus, constituted an abuse of discretion).

ORDER

IT IS HEREBY ORDERED THAT the June 6, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: January 16, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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