

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HELGA K. GEYER and U.S. POSTAL SERVICE,
POST OFFICE, Tacoma, WA

*Docket No. 98-604; Submitted on the Record;
Issued April 26, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record.

On January 3, 1994 appellant, then a 55-year-old general clerk, filed a notice of occupational disease and claim for compensation alleging that she sustained a back condition in the performance of duty.¹ She indicated on her CA-2 form that she first realized her back condition was related to her employment in April 1993. Appellant contends that her back problems began when she was injured at work in September 1979. She stopped work on August 30, 1993 and has not returned.

Appellant has been under the care of Dr. G. Michael Wiese, a Board-certified neurologist, for treatment of residual cervical nerve damage and lumbar disc disease. A lumbar magnetic resonance imaging (MRI) scan dated June 1, 1993 revealed degeneration of L5-S1 intervertebral disc space with foramina herniation, "appearance unchanged from previous MRI scan dated [August 7, 1989]."

In a report dated May 3, 1994, Dr. Douglas L. Attig, a family practitioner, noted that appellant had a long-standing back condition related to her 1979 work injury. He opined that the performance of appellant's work duties had further aggravated her back condition. Although the Office asked Dr. Attig to elaborate on his opinion and provide a rationalized opinion as to whether appellant's employment duties caused or aggravated appellant's herniated disc, he did not respond to the Office's request.

¹ Appellant sustained a neck injury at work on September 19, 1979. The record indicates that the Office accepted her claim for cervical strain. Appellant underwent an anterior cervical fusion of her neck in 1992. She filed a recurrence of disability related to the 1979 work injury on July 7, 1993. That claim, however, was denied.

In a July 11, 1994 decision, the Office denied compensation on the grounds that the evidence of record was insufficient to establish that appellant's back condition was causally related to factors of her federal employment.

Appellant requested a hearing, which was held on February 27, 1995.

On May 11, 1995 an Office hearing representative vacated the Office's decision and remanded the case to be combined with appellant's prior neck injury claim and for further development of the medical record, including a second opinion evaluation by a Board-certified physician.

On remand, the Office referred appellant along with a statement of accepted facts to Dr. Kenneth Sawyer, a Board-certified orthopedist, for a second opinion evaluation. In a June 19, 1995 report, he found that appellant's back condition was not caused by employment activities but was more probably related to preexisting degenerative conditions including arthritis. Dr. Sawyer did not find any evidence of record to indicate that appellant's herniated disc was related to factors of her employment. He suggested instead that appellant's herniated disc was the result of a degenerative aging process.

In a July 11, 1995 decision, the Office determined that the weight of the evidence resided with the Office referral physician and, therefore denied compensation.

Appellant requested a hearing, which was held on March 18, 1996.

In a decision dated July 22, 1996, an Office hearing representative affirmed the Office's July 11, 1995 decision.

By letter dated July 15, 1997, appellant requested a review of the written record.

On September 9, 1997 the Office advised appellant that because she had already received an oral hearing on the issue of whether she discharged her burden on proof in establishing that she sustained a back condition causally related to factors of her federal employment, she was not entitled to further review by the Branch of Hearings and Review as a matter of right. The Office still exercised its discretion and reviewed appellant's request. The Office denied appellant's request since it found that the issue of the case could be equally addressed through the reconsideration process.

The Board only has jurisdiction over final decisions issued within one year of the date of appellant's appeal. Therefore, the only decision properly before the Board in the instant appeal is the Office's September 9, 1997 decision denying appellant's request for a written review of the record.²

The Board finds that the Office properly denied appellant's request for a review of the written record.

² 20 C.F.R. § 501.3(d)(2). The Board does not have jurisdiction to review the Office's hearing representative's July 22, 1996 decision as it was not filed within one year of appellant's appeal on December 9, 1997.

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative, provides that, before review under section 8128 (a), a claimant 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.³ A request for a review of the written record is treated the same as a request for a hearing under section 8124(b)(1).⁴ Once a claimant has had either a review of the written record of a hearing as a matter of right, any further request for a review by the Branch of Hearings and Review is discretionary and not a matter of right.⁵

While the Office has discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office in its September 9, 1997 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved in the case and had denied appellant's request for a review of the written record on the basis that the issue of the case could be addressed by filing a request for reconsideration with the Office. 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 judgement, or actions taken which are contrary to both logic and probable deduction from established facts.⁶ As the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for review of the written record that could be construed as an abuse of discretion, the Board finds that the Office properly denied appellant's request for a written review of the record.

³ 5 U.S.C. § 8124(b)(1).

⁴ Section 10.131 of the Office's regulations, implementing section 8124(b)(1) of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Director. Thus, a claimant has a choice of requesting an oral hearing or a review of the written record pursuant to the Act and its implementing regulations. *Gus N. Rodes*, 43 ECAB 268 (1991).

⁵ *Id.* The Office in its broad discretionary authority in the administration of Act, has the power to hold hearings in certain circumstances where no legal provision was made for such a hearing and the Office must exercise its discretionary authority in deciding whether to grant a hearing. Office procedures, which require the Office to exercise its discretion to grant or deny a hearing request when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent; see *Linda J. Reeves*, 48 ECAB 373 (1997); *Michael J. Welsh*, 40 ECAB 994 (1989).

⁶ See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decision of the Office of Workers' Compensation Programs dated September 9, 1997 is hereby affirmed.

Dated, Washington, D.C.
April 26, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member