

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALYCE LEIBY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Hackensack, NJ

*Docket No. 03-2121; Submitted on the Record;
Issued November 4, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an injury in the performance of her federal duties; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

On December 16, 2002 appellant, then a 51-year-old program support assistant, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that on October 11, 2002 she was exposed to toxic fumes from chemicals used to repair a door in her office. Appellant wrote that the fumes caused severe infection in her lungs and infected her trachea, bronchi and Alveoli. In a December 30, 2002 letter, the Office informed appellant that it would treat her claim as if it were for a traumatic injury and advised her of the evidence she needed to submit.

In an October 14, 2002 progress note, Dr. Elpidio T. Marcelo, an eye, ear and throat specialist, stated that he had examined appellant for pharyngitis and rhinosinusitis that was probably secondary to inhalation of a chemical. In a January 17, 2003 report, Dr. Joel Bludin, a radiologist, wrote that x-rays of appellant's chest revealed no acute process but increased thoracic kyphosis and degenerative changes.

In a March 18, 2003 decision, the Office denied appellant's claim finding the medical evidence insufficient to establish that an injury occurred from the October 11, 2002 incident. In a June 23, 2003 letter, appellant requested review of the written record. In an August 4, 2003 decision, the Branch of Hearings and Review denied appellant's request as untimely also noting that the case could be equally addressed through a reconsideration request.

The Board finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b)(1) of the 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."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 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.³ 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,⁴ when the request is made after the 30-day period for requesting a hearing,⁵ and when the request is for a second hearing on the same issue.⁶

In the present case, appellant's June 23, 2003 hearing request was made more than 30 days after the date of issuance of the Office's March 18, 2003 decision and, thus, appellant was not entitled to a hearing as a matter of right. The Office properly found in its August 4, 2003 decision that appellant was not entitled to a hearing as a matter of right because her hearing request was not made within 30 days of the Office's March 18, 2003 decision.

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 properly exercised its discretion by noting 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 was medical and could be resolved by submitting additional medical evidence on reconsideration to establish that his injury was causally related to factors of employment. 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 judgment, or actions taken which are contrary to both logic and probable deduction from established facts.⁷ 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 constitutes an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

¹ 5 U.S.C. § 8124(b)(1).

² *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

³ *Henry Moreno*, 39 ECAB 475, 482 (1988).

⁴ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁵ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

⁶ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

⁷ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The Board further finds that appellant has not established that she sustained an injury in the performance of her federal duties.

An employee seeking benefits under the Act⁸ has the burden of establishing the essential elements of his or her claim including the fact that, the individual is an “employee of the United States” within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁹ The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician’s rationalized opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁰

In the present case, appellant has not submitted sufficient medical evidence to meet her burden of proof. In an October 14, 2002 progress note, Dr. Marcelo wrote that he had examined appellant for pharyngitis and rhinosinusitis that was probably secondary to inhalation of a chemical. This report is speculative in that it lacks medical certainty as to the cause of appellant’s condition. Moreover, it fails to discuss how exposure to any toxic chemicals would result in appellant’s diagnosed condition. Dr. Bludin noted that x-rays revealed no acute process but increased thoracic kyphosis and degenerative changes. He failed to describe with medical certainty and rationale how these conditions were related to appellant’s employment incident. Absent such medical evidence the Board finds that appellant has not met her burden of proof to establish entitlement to compensation benefits.

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

¹⁰ *See Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

The decisions by the Office of Workers' Compensation Programs dated August 4 and March 18, 2003 are affirmed.

Dated, Washington, DC
November 4, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member