

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)
LEONA B. JACOBS, Appellant)

and)

_____)
DEPARTMENT OF TRANSPORTATION,)
FEDERAL AVIATION ADMINISTRATION,)
OFFICE OF AVIATION MEDICINE,)
Washington, DC, Employer)

**Docket No. 04-1429
Issued: September 30, 2004**

Appearances:
Leona B. Jacobs, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On May 5, 2004 appellant filed a timely appeal from a February 5, 2004 decision of the Office of Workers' Compensation Programs that denied her request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision, but does not have jurisdiction to review the merits of her case because she filed her appeal more than one year after the Office's most recent merit decision,¹ an April 8, 2003 decision denying authorization for decompressive thoracic spinal surgery.

ISSUE

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

¹ 20 C.F.R. § 501.3(d)(2). This regulation provides that an appeal must be filed no later than one year from the date of issuance of the Office's decision.

FACTUAL HISTORY

On November 9, 1993 appellant, a 36-year-old secretary, filed a traumatic injury claim alleging that she sustained injuries to her upper and lower back on October 22, 1993 by moving office supplies. The Office accepted that she sustained an acute lumbosacral strain, a posterior disc protrusion at L4-5 (for which it approved two surgeries), and a dorsal thoracic strain. The Office has been paying appellant compensation for temporary total disability since December 7, 1993.

In a January 17, 2001 report, Dr. Ross R. Moquin, a Board-certified neurosurgeon, recommended an anterior decompression and fusion at T6-7. The Office referred appellant to Dr. Roger L. Raiford, a Board-certified orthopedic surgeon, for a second opinion on the necessity of this surgery and its causal relation to her October 22, 1993 employment injury. In an October 25, 2001 report, Dr. Raiford concluded that the recommended surgery was not necessitated by the accepted work conditions, but was recommended.

By decision dated January 11, 2002, the Office refused to authorize a decompression and fusion at T6-7 on the basis that it was not medically necessary due to the accepted injury. Appellant requested a review of the written record on February 8, 2002 and an Office hearing representative, by decision dated November 14, 2002, found a conflict of medical opinion regarding the need for surgery and its relationship to appellant's employment injury. To resolve this conflict, the Office referred appellant to Dr. Robert S. Viener, a Board-certified orthopedic surgeon, who concluded, in a December 27, 2002 report, that the recommended surgery to the thoracic spine was not warranted.

By decision dated April 8, 2003, the Office denied authorization for decompression and fusion at T6-7 on the basis that the weight of the medical evidence did not establish that such treatment was medically necessary for appellant's accepted employment injury. In a letter to appellant dated June 2, 2003, the Office stated:

“You are hereby authorized an extension for appeal, in connection with the April 14, 2003 [sic] decision issued from this Office. The 30-day period to pursue your appeal rights begin the date of this letter.

“I apologize for the inconvenience this delay in mailing has caused you.”

By letter to the Office's Branch of Hearings and Review dated June 27, 2003, appellant requested “a written hearing and review of my written records.” By decision dated February 5, 2004, the Office found that appellant was not entitled to a review of the written record as a matter of right because her request that was postmarked June 27, 2003 was not made within 30 days of the Office's April 8, 2003 decision. This decision further stated that the Office had “in its discretion, carefully considered your appellate request, and has determined that this request is further denied for the reason that the issue in this case can equally well be addressed by requesting reconsideration from the district office and submitting evidence not previously considered which establishes that the thoracic anterior decompression and fusion are medically necessary for the accepted work injury.”

LEGAL PRECEDENT

Section 8124(b)(1) of the Federal Employees' Compensation Act,² concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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."

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.³ When the Office revised its regulations effective January 4, 1999, the new regulations provided that a hearing was "a review of an adverse decision by a hearing representative" and that a claimant could choose between two formats: an oral hearing or a review of the written record.⁴ These regulations also provide that the request for either type of hearing "must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."⁵

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, including when the request is made after the 30-day period for requesting a hearing, and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁶ In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.⁷

ANALYSIS

Appellant's request for a review of the written record was made no earlier than June 27, 2003, which is more than 30 days after the date the Office issued its April 8, 2003 decision. Appellant thus is not entitled to a review of the written record as a matter of right. The Office has no authority to override the statute⁸ and regulations to extend the 30-day period, as it purported to do in its June 2, 2003 letter to appellant. The Office did not advise appellant that this letter constituted a reissuance of the April 8, 2003 decision, which would have the effect of renewing the 30-day period for which she could request a review of the written record.

² 5 U.S.C. § 8124(b)(1).

³ *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

⁴ 20 C.F.R. § 10.615.

⁵ 20 C.F.R. § 10.616.

⁶ *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994).

⁷ *Claudio Vasquez*, 52 ECAB 496 (2001); *Johnny S. Henderson*, 34 ECAB 216 (1982).

⁸ Neither the Office nor the Board has the authority to enlarge the terms of the Act. See, e.g., *Alonzo R. Witherspoon*, 43 ECAB 1120 (1992).

The Board finds that the Office, however, did not properly exercise its discretion in denying appellant a discretionary review of the written record. Although the Office properly exercised its discretion by finding that, the issue in appellant's case could equally well be addressed by requesting reconsideration and submitting medical evidence,⁹ the Office's February 5, 2004 decision did not address the effect of its June 2, 2003 letter to appellant and her apparent reliance upon this letter. While appellant was not entitled to a hearing as a matter of right and the Office could not grant appellant a hearing as a matter of right, a proper exercise of the Office's discretion would include reasons why appellant was not given a discretionary hearing (in the form of a review of the written record) where she was advised on June 2, 2003 that she had 30 days to request one and where she did so within the 30 days of June 2, 2003.

CONCLUSION

The Office properly found that appellant was not entitled to a hearing (in the form of a review of the written record) as a matter of right. The Office did not properly exercise its discretion in denying appellant a discretionary hearing, and the case will be remanded to the Office for a proper exercise of its discretionary authority to grant a hearing where one is not required as a matter of right.¹⁰

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2004 decision is affirmed in part and set aside and remanded in part as set forth in this decision of the Board.

Issued: September 30, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁹ See *Marilyn F. Wilson*, 52 ECAB 347 (2002).

¹⁰ Appellant submitted additional evidence to the Board; however, the jurisdiction of the Board is limited to the evidence that was before the Office at the time it issued its final decision; see 20 C.F.R. § 501.2(c). This decision does not preclude appellant from submitting additional evidence to the Office along with a request for reconsideration.