U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGARET M. CARMACK and DEPARTMENT OF THE AIR FORCE, STRATEGIC AIR COMMAND, OFFUTT AIR FORCE BASE, Nebr.

Docket No. 97-1136; Submitted on the Record;
Issued December 23, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a discretionary second hearing under section 8124 of the Federal Employees' Compensation Act.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly denied appellant's request for a hearing pursuant to section 8124(b) of the Act.

On August 25, 1992 appellant filed a claim for an occupational disease alleging that she developed major depression as a result of factors of her federal employment.[1] Appellant submitted factual and medical evidence to establish her claim.

In a decision dated November 15, 1993, the Office denied appellant's claim on the grounds that appellant had not met her burden of proof to establish that her claimed condition occurred in the performance of duty.

By letter dated December 14, 1993, appellant requested an oral hearing before an Office hearing representative which was held on June 20, 1995.

In a decision dated September 28, 1995, the Office hearing representative affirmed the Office's November 15, 1993 decision, stating that appellant had failed to meet her burden to

[1] On February 19, 1987 appellant filed a notice of occupational disease alleging that she sustained an anxiety attack and developed depression as a result of factors of her federal employment. The Office accepted appellant's claim for temporary situational stress reaction, depression and temporary aggravation of cervical disc disease and appropriate compensation benefits were paid. On July 22, 1991 appellant filed a notice of recurrence of disability, indicating that on March 19, 1991 she suffered a recurrence of disability due to her previously accepted stress condition. By letter dated October 4, 1991, the Office advised appellant that her claim would be developed as a new occupational disease claim.

establish a causal relationship between her development of a psychiatric condition and factors of her federal employment.

By letter dated September 19, 1996 and received September 24, 1996, appellant, through counsel, stated that she wished to "appeal" the prior decision and in support of her "appeal and request for further review" was enclosing a September 19, 1996 medical report and a July 31, 1996 statement from a coworker.[2]

In a decision dated October 17, 1996, the Branch of Hearings and Review denied appellant's request for "an oral hearing." The Office stated that because appellant had already received an oral hearing by the Branch of Hearings and Review on the issue of whether she had developed a stress or psychiatric condition in any way causally related to factors of her federal employment, she was not, as a matter of right, entitled to another review by the same branch, whether it was an oral hearing or a review of the written record, on the same issue. The Office additionally stated that appellant's request for an oral hearing was further denied for the reason that the issue in the case could equally well be addressed through the submission of additional written evidence together with a request for reconsideration under section 8128(a) of the Act.[3] Appellant's rights of appeal were included in the letter.

On January 15, 1997 appellant filed an appeal with the Board.

The only decision on appeal before the Board is the October 17, 1996 decision which denied appellant's request for a second hearing. The Board has no jurisdiction to review the other Office decisions since they were issued more than one year before the appeal was filed.[4]

The Board finds that the refusal of the Office to grant appellant a second hearing did not constitute an abuse of discretion.

The Board has held that section 8124(b) of the Act provides that a claimant not satisfied with a decision on his or her claim is entitled, upon timely request, to a hearing before a representative of the Office. There is no provision in the Act entitling a claimant to more than one hearing. If a claimant has received a hearing on an issue or set of issues and the hearing representative affirms the Office decision, a claimant is not entitled to another hearing on that issue or set of issues even if he or she proffers new evidence. He or she may receive a hearing only if the Office, in its discretion, grants the claimant a hearing.[5]

In this case, the Office concluded that the issues in appellant's claim could equally well be addressed by the submission of additional evidence or argument together with a request for reconsideration pursuant to section 8128 of the Act. Under these circumstances, the Office was not required to provide appellant a second hearing.

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[2] This letter was addressed to the Department of Labor, Employment Standards Administration.

[3] *See* 5 U.S.C. § 8128.

[4] 20 C.F.R. § 501.3(d)(2).

[5] *Charles D. Watson,* 35 ECAB 1068 (1984); *Fred Tripo,* 34 ECAB 290 (1982).

An abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, action of a kind that no conscientious person acting intelligently would reasonably have taken, prejudice, partiality, intentional wrong or action against logic.[6] The Board finds no evidence contained in the case record to establish that the Office abused its discretion in refusing to grant appellant a second hearing.

However, the Board finds that the record does not support the Office's interpretation on appeal that appellant's September 19, 1996 letter referencing her "appeal and request for further review" was solely a request for a second hearing. The Board notes that appellant's September 19, 1996 letter containing her "appeal and request for further review" was accompanied by new medical and factual evidence consistent with the requirements contemplated under section 8128 of the Act for granting a request for reconsideration of the case on its merits.

To require the Office to reopen a case for reconsideration, a claimant must show that the Office erroneously applied or interpreted a point of law, advance a point of law or fact not previously considered by the Office, or submit relevant and pertinent evidence not previously considered by the Office.[7]

In this case, the Board finds that appellant's simultaneous "appeal and request for further review," which was accompanied by new medical evidence was intended as a request for a review of the merits of the case, whether conducted under section 8124(b)(1) of the Act as a hearing or under section 8128 of the Act.[8] The Board notes that if the Office had granted appellant's hearing request, a review of the merits of the case would have been forthcoming. However, because the Office denied appellant's request for a hearing, appellant was foreclosed that opportunity for a review of the merits of the case. Thereafter, no further decision from the Office on appellant's concomitant request for review on the merits of the case was rendered.

Appellant is entitled to a timely requested hearing under section 8124(b)(1) of the Act only before reconsideration is granted under section 8128.[9] When a request for a hearing under section 8124(b)(1) and for reconsideration under 8128 of the Act is simultaneously made, the Office must properly consider a claimant's request for a hearing first to avoid creating a conflict with the requirements of section 8124(b)(1) that a hearing may be granted only before review under section 8128(a). However, the Office's denial of a request for a hearing under section 8124(b)(1) does not address appellant's apparent request for review under section 8128. Appellant's request for a hearing was denied on the basis that it was a request for a second hearing, and was not on the basis of the merits of the case.

[6] *James W. Croake*, 37 ECAB 219 (1985).

[7] 20 C.F.R. § 10.138(b)(2)*; Jimmy O. Gilmore*, 37 ECAB 257 (1985).

[8] *See Mary G. Allen*, 40 ECAB 190 (1988).

[9] *See* 5 U.S.C. § 8124(b)(1).

The Board, therefore, finds that appellant's request for merit reconsideration of the September 28, 1995 Office hearing representative decision is still before the Office awaiting a final decision. Accordingly, the case must be remanded for a proper final decision on appellant's request for reconsideration by the Office under section 8128 of the Act.

The decision of the Office of Workers' Compensation Programs dated October 17, 1996 denying appellant's request for a second hearing is hereby affirmed, and the case is remanded to the Office for a proper final decision on the issue still before it of appellant's request for reconsideration of the September 28, 1995 Office decision.

Dated, Washington, D.C.
December 23, 1998

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member