

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of SAMUEL R. ROMERO and DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE, Fresno, Calif.

*Docket No. 96-246; Submitted on the Record;  
Issued February 20, 1998*

---

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

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

On November 8, 1985 appellant, then a 45-year-old laborer, filed a notice of traumatic injury alleging that on October 17, 1985 he suffered face cuts, chest pains and a knee injury when he had an automobile accident in the course of his federal employment. The Office accepted appellant's claim for torn ligaments of the right knee, a chest contusion, and facial lacerations and compensation benefits were awarded. On December 1, 1992 the Office awarded appellant a schedule award for a 45 percent permanent impairment of the right leg. The award ran from December 12, 1992 through June 8, 1995. On June 17, 1993 appellant received a \$350.00 schedule award for facial disfigurement.

In a decision dated November 10, 1993, the Office found that appellant had been reemployed as a warehouse worker on November 16, 1992 with the employing establishment with wages of \$384.40 per week. The Office determined that this fairly and reasonably represented appellant's wage-earning capacity and terminated appellant's compensation benefits for wage loss because his actual wages met or exceeded the wages held when injured.

On December 5, 1993 appellant requested a hearing stating that his employment as a warehouse worker was only temporary.

In a decision dated May 31, 1994, the Office hearing representative found that the Office improperly determined that the temporary job appellant returned to on November 16, 1992 as a warehouse worker fairly and reasonably represented his wage-earning capacity, and set aside the Office's November 10, 1993 decision.

In a decision dated October 7, 1994, the Office reconsidered its prior decision and found that appellant's temporary employment as a warehouse worker on November 16, 1992 at

\$380.40 per week fairly and reasonably represented wage-earning capacity. It, therefore, terminated his compensation benefits for wage loss because his actual wages met or exceeded the wages held when injured. In the accompanying memorandum, the Office noted that the position fairly and reasonably represented appellant's wage-earning capacity because the date-of-injury job was also temporary.

In a letter postmarked November 8, 1994, appellant requested a hearing.

In a decision dated November 30, 1994, the Office denied appellant's request for a hearing because it was not received within 30 days of its October 7, 1994 decision. The Office further denied appellant's request for the reason that the issue involved could be equally resolved by requesting reconsideration from the District office and submitting additional evidence on the issue of wage-earning capacity.

The Board finds that the Office properly denied appellant's request for a hearing.

The only decision on appeal before the Board is the November 30, 1994 decision denying appellant's request for a hearing. The Board has no jurisdiction to review any prior decisions because they were issued more than one year before the current appeal which was filed on October 24, 1995.<sup>1</sup>

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative states: "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."<sup>2</sup>

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 or deny 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, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. 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 reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.<sup>3</sup>

In this case, the Office issued its last decision terminating appellant's compensation for wage loss on October 7, 1994. Appellant, however, requested a hearing in a letter postmarked

---

<sup>1</sup> 20 C.F.R. § 501.3(d)(2).

<sup>2</sup> 5 U.S.C. § 8124(b)(1).

<sup>3</sup> *Henry Moreno*, 39 ECAB 475 (1988).

November 8, 1994. Because appellant did not request a hearing within 30 days of the Office's October 7, 1994 decision, he was not entitled to a hearing under section 8124 as a matter of right. The Office also exercised its discretion, but decided not to grant appellant a discretionary hearing on the grounds that he could have his case further considered on reconsideration by submitting additional relevant evidence. Consequently, the Office properly denied appellant's hearing request.

The decision of the Office of Workers' Compensation Programs dated November 30, 1994 is affirmed.

Dated, Washington, D.C.

February 20, 1998

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member