

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANET L. MILLER and HEALTH & HUMAN SERVICES,
SOCIAL SECURITY ADMINISTRATION, Eureka, Calif.

*Docket No. 96-2160; Submitted on the Record;
Issued April 2, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether appellant met her burden of proof in establishing that she sustained a back injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to section 8124(b) of the Federal Employees' Compensation Act.

On October 19, 1994 appellant, then a 40-year-old claims representative, filed a claim for compensation alleging that on February 18, 1994 she sustained an injury to her back and right leg when she bent down and twisted to retrieve fallen documents.

In a decision dated January 25, 1995, the Office denied appellant's claim on the grounds that the medical evidence of file failed to establish fact of injury. Appellant thereupon filed several petitions for reconsideration in letters dated February 6, May 15 and July 31, 1995. The Office received appellant's July 31, 1995 request on August 10, 1995. In a merit decision dated September 8, 1995, the Office modified its previous order dated June 6, 1995, to reflect that appellant's "information establishes fact of injury" on February 18, 1994. However, the Office found that the medical condition was not related to factors of federal employment. The Office advised appellant of her appellate right request a hearing.

On September 26, 1995 appellant requested an oral hearing.

In an October 19, 1995 reply, the Director of the Office advised appellant that her "case file had been reviewed and found to be in a posture for an oral hearing."

However, on May 3, 1996 the Office notified appellant that her request for an oral hearing was denied on the grounds that she had requested reconsideration previously in her August 10, 1995 letter.

On July 2, 1996 appellant filed an appeal from the Office's May 3, 1996 decision denying her request for an oral hearing.

The Board finds that the case is not in posture for decision. Section 8124(b)(1) of the Act provides that “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 Section 10.131 of the Office’s federal regulations implementing this section 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 Secretary.² Thus, a claimant has a choice of requesting an oral hearing or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulation.

In *James W. Croake*,³ the Board found that the Office did not abuse its discretion in denying the employee’s hearing request as the request for a hearing under section 8124 was not made until after the employee had sought reconsideration of his claim under section 8128. It was noted that the employee was not entitled to a hearing as a matter of right under section 8124(b)(1) as the employee had previously exercised his right to reconsideration under section 8128. The Board also held that the Office did not abuse its discretionary authority by denying appellant’s request for an oral hearing.

The circumstances in the instant case, however, are that appellant did not request reconsideration of the Office’s September 8, 1995 decision, prior to her request for a hearing. The Board notes that the September 8, 1995 decision, modified the prior decision of June 9, 1995, by finding that appellant established “fact of injury” on February 18, 1994. The practical effect of the Office’s September 8, 1995 decision, was to issue a new decision to appellant, which continued to deny her compensation benefits but found that she had established fact of injury. The Board further notes that the September 8, 1995 decision, was accompanied by a full description of her rights under section 8124 in order that appellant be provided the opportunity for a hearing, as the September 8, 1995 decision, constitutes a modification of the earlier decisions and, therefore, presented a new issue in the claim.

Section 10.131(a) of the Code of Federal Regulations provides:

“Any claimant not satisfied with a decision of the Office shall be afforded an opportunity for an oral hearing before an Office representative designated by the Director. A hearing must be requested in writing within 30 days of the date of issuance of the decision and be made to the Office as set forth in the decision. A claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and § 10.138(b) of this subpart prior to requesting a hearing....”

¹ 5 U.S.C. § 8124(b)(1).

² 20 C.F.R. § 10.131.

³ 37 ECAB 219 (1985).

In light of appellant's timely request for an oral hearing of the Office's September 8, 1995 decision,⁴ the case record will be remanded to the Office in order to schedule an oral hearing.

The May 3, 1996 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
April 2, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

⁴ Appellant's request was received by the Office on October 4, 1995.