

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLIE D. SISLO and DEPARTMENT OF COMMERCE,
BUREAU OF THE CENSUS, Superior, WI

*Docket No. 01-384; Submitted on the Record;
Issued August 16, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay; and (2) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

On February 3, 2000 appellant, then a 25-year-old clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he injured his back hauling boxes and cabinets. He listed the date of injury as January 27, 2000 but placed a question mark next to the date. The Office accepted appellant's claim for subluxations at C1, C5, C6 and L5.

In a letter dated March 4, 2000, appellant related that he felt a sharp pain in his back on January 27, 2000 after lifting heavy boxes and cabinets. He stated that he waited until February 3, 2000 to report the incident because he believed that his back would improve. Appellant stated that the pain grew worse instead.

By letter dated May 19, 2000, the Office requested that Dr. Carl Miller, appellant's attending chiropractor, clarify discrepancies in his reports regarding the date of injury. In a report dated June 23, 2000, Dr. Miller stated that appellant's condition began "on or about January 27, 2000 and definitely worse[ned] on February 3, 2000 [] while lifting boxes for the [employing establishment]. He had a lumbar strain caused by work exposure January 27 thr[ough] February 3, 2000...."

In a decision dated July 29, 2000, the Office denied appellant's claim for continuation of pay based on its determination that appellant's subluxations were due to an occupational disease rather than a traumatic injury.

By letter postmarked September 21, 2000, appellant requested a hearing before an Office hearing representative.¹ In a decision dated November 6, 2000, the Office denied appellant's request for a hearing as untimely under section 8124.

The Board finds that the Office properly denied appellant's claim for continuation of pay.

An employee is not entitled to continuation of pay unless the employee has sustained a traumatic injury.² The initial analysis must be to determine whether a traumatic injury, rather than an occupational disease, has been sustained.

The terms "traumatic injury" and "occupational disease" are defined by regulation. Traumatic injury is defined as follows:

*"Traumatic injury means a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected."*³

Occupational disease is defined as follows:

*"Occupational disease or illness means a condition produced by the work environment over a period longer than a single workday or shift."*⁴

In this case, appellant alleged that he sustained a traumatic injury on January 27, 2000 while moving heavy boxes and cabinets. However, he placed a question mark on the claim form next to date of injury and related that his condition worsened over a period of days following the onset of pain on January 27, 2000. In a report dated June 23, 2000, Dr. Miller stated that appellant's condition began "gradually" around January 27, 2000 and grew worse on February 3, 2000 due to lifting boxes at work. He attributed appellant's back condition to the performance of his work duties from January 27 through February 3, 2000. As the evidence shows that appellant sustained the onset of pain on January 27, 2000 with a significant worsening of his condition over the next few days, his injury constitutes an occupational disease as it occurred over a period

¹ Appellant sent an earlier request for a hearing to the employing establishment in a letter dated August 30, 2000. The employing establishment forwarded the letter to the district Office. The Office date-stamped the letter as received on September 20, 2000. By letter dated September 21, 2000, the Office notified appellant of the appropriate address to send his hearing request. The Board notes that Office procedures indicate that the Office should forward requests for hearings received in the district Office to the Branch of Hearings and Review. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.3-4 (October 1992). However, appellant's request for a hearing, date-stamped received by the district Office on September 20, 2000, would not constitute a timely request under the circumstances and thus any error is harmless.

² *Richard D. Wray*, 45 ECAB 758 (1994); 20 C.F.R. § 10.220(a).

³ 20 C.F.R. § 10.5(ee).

⁴ 20 C.F.R. § 10.5(q).

longer than a single workday or shift by continued or repetitive stress. Appellant, therefore, is not entitled to continuation of pay.

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

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing, states that or 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 issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁵ 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.⁶

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 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,⁷ when the request is made after the 30-day period established for requesting a hearing,⁸ or when the request is for a second hearing on the same issue.⁹ 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.¹⁰

In this case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated July 29, 2000 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter postmarked September 21, 2000. Hence, the Office was correct in stating in its November 6, 2000 decision that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's July 29, 2000 decision.

While 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, in its November 6, 2000 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by submitting additional evidence to establish that he was entitled to continuation of

⁵ 5 U.S.C. § 8124(b)(1).

⁶ *Frederick D. Richardson*, 45 ECAB 454 (1994).

⁷ *Rudolph Bermann*, 26 ECAB 354 (1975).

⁸ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁹ *Johnny S. Henderson*, 34 ECAB 216 (1982).

¹⁰ *Sandra F. Powell*, 45 ECAB 877 (1994).

pay. 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.¹¹ 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 could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The decisions of the Office of Workers' Compensation Programs dated November 6 and July 29, 2000 are affirmed.

Dated, Washington, DC
August 16, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

¹¹ *Daniel J. Perea*, 42 ECAB 214 (1990).