

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DELCENIA WILLIAMS and U.S. POSTAL SERVICE,
POST OFFICE, Baltimore, MD

*Docket No. 01-1518; Submitted on the Record;
Issued April 26, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
DAVID S. GERSON

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

On May 6, 1984 appellant, then a 30-year-old letter-sorting machine clerk, filed a claim for tendinitis, myositis and bursitis which she attributed to a March 14, 1984 incident in which she developed severe arm pain while working on flat mail. On July 10, 1984 she was removing plastic trays containing flats when she suddenly developed pain in both arms and hands.

In a November 19, 1994 report, Dr. E.F. Shaw Wilgis, a Board-certified surgeon specializing in hand surgery, stated that appellant had chronic tenosynovitis aggravated by her work. Dr. Wilgis indicated that appellant had returned with an acute problem with recurrent tenosynovitis and swelling in both arms and forearms. He noted that appellant was not working and commented that she should not work under the current conditions.

The Office accepted appellant's claim for bilateral bursitis of the hand and wrist and flexor tendinitis. The Office paid temporary total disability compensation for the periods appellant did not work and partial compensation for the hours appellant did not work when she returned to work four hours a day. Appellant worked intermittently at several positions offered by the employing establishment but stopped working on February 2, 1996.

In a March 2, 1998 letter, the Office informed appellant that a rehabilitation counselor had reported that appellant had discontinued good faith participation in a job placement program it had approved. The Office indicated that appellant had discontinued treatment in an approved substance abuse program. The Office stated that it had approved the substance abuse treatment program to assist appellant in resuming participation in rehabilitation services. The Office gave appellant 30 days to resume a good faith effort in the job placement program or give reasons for not resuming placement efforts. The Office stated that if appellant did not resume a good faith effort in the placement program or did not show good cause for discontinuing her effort, the rehabilitation effort would be terminated and action would be taken to reduce her compensation

to reflect her wage-earning capacity in a job which the rehabilitation counselor found to be within appellant's restrictions and abilities. In a separate March 2, 1998 letter, the Office noted that appellant had been enrolled in a 21-day inpatient drug treatment program but had checked herself out after 2 days. It noted that she had been enrolled in another treatment program. The Office stated that upon completion of the program, it anticipated appellant would resume participation in rehabilitation services and accept the position offered by the employing establishment. The Office warned that if the expected improvement did not occur, or if substance abuse continued after completion of the program, her compensation benefits would be partially suspended until she reentered a program and discontinued abuse of the substance in question. The Office stated that appellant's compensation would be suspended at the rate of pay which reflected her wage-earning capacity, as represented by the salary level of the job which was the goal of training.

In a May 4, 1999 letter, the Office noted that the March 2, 1998 letters had indicated appellant had discontinued good faith participation in an approved job placement program. The Office indicated that she was being sent a second notice and given 30 days to resume good faith participation in the placement program or show good cause for discontinuing her participation. The Office warned her that failure to do so would result in the termination of the rehabilitation effort and action would be taken to reduce her compensation to reflect her wage-earning capacity to a job which the rehabilitation counselor found to be within her restrictions and abilities. The Office warned appellant that if she failed to undergo vocational rehabilitation efforts when directed to do so, it had the statutory authority to reduce prospectively her compensation based on what her wage-earning capacity would have been had she not failed to apply for and undergo vocational rehabilitation. The Office further warned appellant that if she failed to participate in the essential preparatory efforts of vocational rehabilitation without good cause, it would assume, in absence of evidence to the contrary, that the rehabilitation effort would have resulted in a return to work without any loss of wage-earning capacity and would thereby reduce her compensation to zero. The Office indicated that the reduction would continue until she, in good faith, complied with the Office's directions regarding rehabilitation.

In a February 2, 2000 letter, the Office noted that, after several attempts to place appellant in a substance abuse program, the rehabilitation counselor had found a free, 28-day program and scheduled appellant to begin the program on February 13, 1998. The Office indicated that it did not appear that appellant was willing to make a good faith effort in cooperating with the program. The Office stated that appellant's substance abuse problem had been identified as hindering her participation in rehabilitation services and her ability to qualify for reemployment with the employing establishment. The Office stated it would make one more effort to enroll appellant in a substance abuse program. The Office warned appellant that if the expected improvement did not occur or if her substance abuse continued after completion of the program, her compensation would be partially suspended until such time as she reentered a program and willingly participated and discontinued substance abuse. The Office indicated that the compensation would be suspended at the rate of pay, which reflected her wage-earning capacity as represented by the salary level, which was the goal of the training.

In a March 6, 2000 decision, the Office reduced appellant's compensation to zero as of March 26, 2000 due to her failure to undergo the essential preliminary effort of vocational

training which would permit the Office to determine what her wage-earning capacity would have been if she had undergone the testing and rehabilitation program.

Appellant submitted a letter showing that she had enrolled in a treatment program. In a March 17, 2000 decision, the Office stated that, because of appellant's previous failures to with rehabilitation efforts, the reduction of her compensation would continue until the addictions counselor indicated that she had satisfactorily cooperated and completed her assigned substance abuse program. The Office indicated that appellant needed to submit additional information, including the date she started the program, the date she was expected to complete the program, monthly progress reports, and a final report when she completed the program.

In a September 14, 2000 letter, a union representative submitted statements from a counselor at a treatment center attesting to appellant's cooperation with the treatment program. She requested reconsideration of the Office's decision which reduced appellant's compensation.

In an undated letter received by the Office on March 9, 2001, appellant indicated that she had not received any compensation since March 2000. She asked for information on what she had to do to get a proper hearing.

In an April 6, 2001 decision, the Office denied appellant's request for a hearing on the grounds that it was not made within 30 days of the Office's March 17, 2000 decision. The Office considered appellant's request on its own motion and found that the issue in her case could be equally well addressed by requesting reconsideration and submitting new evidence which showed she had satisfactorily cooperated and timely completed an assigned substance abuse program.

The jurisdiction of the Board is limited to final decisions of the Office issued within one year prior to the filing of an appeal with the Board.¹ As appellant's appeal was filed on May 10, 2001, the Board has jurisdiction only over the Office's April 6, 2001 decision.

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

Section 8124(b)(1) of the Federal Employees' Compensation Act² dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "[b]efore review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request 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 noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings...."³ The Office issued merit decisions on March 6 and 17, 2000. Appellant's request for a hearing, received on March 9, 2001, was made approximately one year after these decisions. Appellant's request for a hearing before an Office hearing representative, therefore,

¹ 20 C.F.R. § 501.3(d).

² 5 U.S.C. § 8124(b)(1).

³ *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

was not made within the required 30 days of the Office's decision. She therefore was not entitled to a hearing as a matter of right.

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; 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.⁴ In this case, the Office found that appellant's case could be equally well considered if she requested reconsideration and submitted new evidence regarding her treatment for substance abuse. There is no evidence that the Office's refusal to conduct a hearing was an abuse of its discretion. The Board notes, however, that appellant's representative had previously requested reconsideration and submitted the type of evidence that the Office stated was necessary for reconsideration. The Office has not issued a final decision on this request for reconsideration. Therefore, while the Office did not abuse its discretion in denying appellant's request for a hearing, it has not acted on a timely request for reconsideration. The case must therefore be returned to the Office for a final decision on that issue.

The decision of the Office of Workers' Compensation Programs dated April 6, 2001 is hereby affirmed.

Dated, Washington, DC
April 26, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.2(a) (October 1992).