

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ANDRÉ THYRATRON and U.S. POSTAL SERVICE,  
POST OFFICE, Birmingham, AL

*Docket No. 02-1833; Submitted on the Record;  
Issued December 20, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

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

This is appellant's thirty-fifth appeal. In many appeals, appellant withdrew his appeal requests and sought further proceedings with the Office. However, in 16 appeals, the appeal continued and the Board issued final decisions.<sup>1</sup> In the first decision, the Board affirmed the Office's issuance of a schedule award for a 10 percent permanent impairment of the left foot.<sup>2</sup> In the next two decisions, the Board affirmed the Office's denial of a lump-sum payment.<sup>3</sup> On August 28, 1969 the Office found that appellant had a 59 percent loss of wage-earning capacity and thereupon approved a lump-sum payment. In a January 23, 1974 decision, the Office found that appellant had a temporary total disability due to an employment-related emotional condition, retroactive to August 28, 1969. The Office further found that appellant was entitled to receive compensation for a 41 percent loss of wage-earning capacity because he had already received a lump-sum payment for a 59 percent loss of wage-earning capacity. In its fourth decision, dated December 3, 1974, the Board affirmed the Office's January 23, 1974 decision.<sup>4</sup> In that decision the Board noted that the medical evidence did not establish that the additional 41 percent loss of wage-earning capacity was permanent. In the next three decisions, the Board affirmed the

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<sup>1</sup> Docket No. 93-2006 (issued February 14, 1994); Docket No. 92-112 (issued June 23, 1992); Docket No. 89-1387 (issued December 6, 1989); Docket No. 89-319 (issued April 26, 1989); Docket No. 86-954 (issued April 18, 1986); 36 ECAB 708 (1985); Docket No. 84-250 (issued February 17, 1984); Docket No. 82-943 (issued May 4, 1982); 32 ECAB 720 (1981); 30 ECAB 1127 (1979); 29 ECAB 432 (1978); 28 ECAB 307 (1977); 26 ECAB 176 (1974); 20 ECAB 232 (1969); 19 ECAB 575 (1968); 16 ECAB 489 (1965).

<sup>2</sup> 16 ECAB 489 (1965).

<sup>3</sup> 19 ECAB 575 (1968); 20 ECAB 232 (1969).

<sup>4</sup> 26 ECAB 176 (1974).

Office's denial of a lump-sum payment.<sup>5</sup> In the eighth decision, the Board found that appellant was entitled only to the consumer price index increases on a 41 percent loss of wage-earning capacity and not on a 100 percent loss of wage-earning capacity.<sup>6</sup> In its ninth decision, the Board found that appellant's August 28, 1969 lump-sum payment had been properly computed.<sup>7</sup> In its tenth decision, the Board affirmed the Office's denial of appellant's request for reconsideration of the August 28, 1969 lump-sum payment.<sup>8</sup> In its eleventh decision, the Board found that the Office had properly denied appellant's requests for modification of the August 28, 1969 decision and for advance payment to him for the purchase of prescribed drugs.<sup>9</sup> In its twelfth, thirteenth and fourteenth decisions, the Board affirmed the Office's denials of appellant's requests for reconsideration.<sup>10</sup> In its fifteenth decision, the Board found that the Office abused its discretion in denying appellant's request for a lump-sum payment because it had applied unrelated factors in determining appellant's "best interest" under 5 U.S.C. § 8135(a)(3).<sup>11</sup> In its sixteenth decision, the Board found that the Office had properly denied appellant's request for a lump-sum payment.<sup>12</sup>

In an October 11, 2000 letter, appellant's attorney contended that appellant had not been paid at the rate of 2/3 of his wages as required by the Federal Employees' Compensation Act.<sup>13</sup> The attorney stated that appellant had not been paid the correct compensation since August 28, 1969. In a November 7, 2000 letter, the attorney argued that appellant had been disabled since 1961. He noted that appellant was awarded a 59 percent disability but was subsequently found to be 100 percent disabled. He stated that appellant was paid a \$50,300.60 lump-sum payment based on the 59 percent disability. He commented that it was later found that the lump sum should not have been paid and it was vacated. He contended that appellant was ordered to repay the lump sum but was unable to do so. Therefore, compensation was withheld from appellant's 41 percent disability check. The attorney argued that the Office had erred in not reinstating appellant's compensation at 100 percent even though the 59 percent lump-sum payment had been repaid. He demanded appellant's disability payments for his 59 percent disability from 1961 to the present time and the cost-of-living increases on the 59 percent disability plus interest.

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<sup>5</sup> 28 ECAB 307 (1977); 29 ECAB 432 (1978); and 30 ECAB 1127 (1979).

<sup>6</sup> 32 ECAB 720 (1981).

<sup>7</sup> Docket No. 82-943 (issued May 4, 1982).

<sup>8</sup> Docket No. 84-250 (issued February 17, 1984).

<sup>9</sup> 36 ECAB 708 (1985).

<sup>10</sup> Docket No. 89-1387 (issued December 6, 1989); Docket No. 89-319 (issued April 26, 1989); and Docket No. 86-954 (issued April 18, 1986).

<sup>11</sup> Docket No. 92-112 (issued June 23, 1992).

<sup>12</sup> Docket No. 93-2006 (issued February 14, 1994).

<sup>13</sup> 5 U.S.C. § 8105(a).

In a November 29, 2000 letter, the Office advised the attorney of the appeal rights contained in appellant's April 16, 1996 decision and indicated that he should pursue the appellate process as set forth in that decision.

In a September 7, 2001 letter, appellant contended that he was entitled to temporary total disability compensation from August 28, 1969 to the present. He claimed that he had been deprived of his right to appeal the Office's decisions. In an October 3, 2001 letter, the Office stated that appellant's concerns had been addressed in previous correspondence and he had been repeatedly advised of his right to appeal. In an October 12, 2001 letter, appellant contended that the January 28, 1975 decision of the Office vacated the lump-sum settlement because he had been found to be totally disabled due to an emotional condition. He demanded that the lump-sum payment for his 59 percent loss of wage-earning capacity for the period August 28, 1969 to the present should be sent to him. In a November 8, 2001 letter, the Office stated that, if appellant disagreed with the decisions in his case, he should avail himself of his appeal rights. In a December 19, 2001 letter, the Office informed appellant that his file had been transferred to the Branch of Hearings and Review but, as there was no evidence he had requested a hearing, the case had been sent to the Branch in error. His case record, therefore, was returned to the district Office. In an April 4, 2002 response, appellant requested a hearing before an Office hearing representative.

In an April 18, 2002 decision, the Office denied appellant's request for a hearing. The Office noted that the Board had issued a decision on February 14, 1994 on the issue of whether he was entitled to a lump-sum payment. The Office stated that the decisions of the Board were final and the Branch of Hearings and Review had no jurisdiction to review the decisions of the Board. The Office indicated that although appellant was not entitled to an oral hearing, the Office exercised its discretion to consider his request. The Office denied the request for a hearing on the grounds that appellant's request could be equally well considered by a request for reconsideration.

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

Section 8124(b)(1) of the Act<sup>14</sup> 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...."<sup>15</sup>

In this case, appellant's request for a hearing was dated April 4, 2002. However, he had previously sought review of his case under section 8128(a) on numerous occasions, most recently in a June 27, 1995 letter. That request was denied in an April 16, 1996 decision as untimely and lacking in clear evidence of error. As appellant has already requested

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<sup>14</sup> 5 U.S.C. § 8124(b)(1).

<sup>15</sup> *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

reconsideration of the Office's and the Board's decisions on this issue on many occasions, he is not entitled to a hearing as a matter of right under section 8124(b)(1).<sup>16</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 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. The Office exercised its discretion in this case and found that appellant's right to further proceedings could be equally well addressed by requesting reconsideration. 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 deductions from known facts.<sup>17</sup> There is no evidence that the Office abused its discretion in denying appellant's request for a hearing under these circumstances.

The decision of the Office of Workers' Compensation Programs dated April 18, 2002 is hereby affirmed.

Dated, Washington, DC  
December 20, 2002

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>16</sup> The Board also notes that appellant's claim was filed in 1961, before the 1966 amendments.

<sup>17</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).