

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of THERESA MURRY and U.S. POSTAL SERVICE,  
POST OFFICE, Dallas, TX

*Docket No. 02-1250; Submitted on the Record;  
Issued October 8, 2002*

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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 January 28, 2002 request for an oral hearing as untimely.

On December 2, 1991 appellant, then a 32-year-old bulk mailhandler, filed an occupational disease claim alleging that beginning on or about August 7, 1991 she experienced intermittent pain and stiffness in her neck, shoulders and back while in the performance of duty. The Office accepted the claim for cervical sprain, left rotator cuff syndrome and authorized arthroscopy surgery to the left shoulder.<sup>1</sup>

Following an impairment evaluation, the Office by decision dated October 17, 2000 issued appellant an additional schedule award for a nine percent impairment of the left upper extremity for the period August 17 through November 12, 2000.

In a letter dated April 24, 2001, appellant requested reconsideration of the schedule award. She indicated that she still experienced severe intermittent pain from her neck to her shoulder and further argued that a medical report from her treating physician was not considered in the rating. Appellant submitted with her letter an October 9, 2000 diagnostic report, which showed results of a computerized tomography scan of the cervical spine that was addressed to her physician.

In a letter dated May 18, 2001, the Office responded to appellant's letter and advised that if she did not agree with the October 17, 2000 decision, she should follow an appropriate avenue

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<sup>1</sup> In a decision dated February 1, 1994, the Office issued appellant a schedule award for a three percent permanent loss of use of the left upper extremity for the period September 2 through November 6, 1993. Appellant thereafter appealed to the Board. By decision issued August 23, 1996, the Board found that appellant was entitled to an additional two percent, to equal a five percent impairment of the left upper extremity due to her employment-related cervical condition. In accordance with the Board's decision, the Office issued appellant an additional two percent impairment for the left upper extremity on October 18, 1996.

of appeal discussed in appeal rights attached to the decision. The Office then advised appellant that the Office did not award compensation for impairment of the spine and that her previous awards were only based on impairment to her upper extremity.

In a letter dated January 28, 2002, appellant requested an oral hearing of the October 17, 2000 schedule award. She argued that reconsideration should be granted because the medical report of her treating physician was not considered in the rating.

By decision dated February 13, 2002, the Office denied appellant's request for an oral hearing as untimely.

The Board finds that the Office did not abuse its discretion in denying appellant's January 28, 2002 request for an oral hearing but should have considered appellant's April 24, 2001 request for reconsideration.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on her claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary.<sup>2</sup> 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.<sup>3</sup> As appellant's request for a hearing was dated January 28, 2002, more than 30 days after the Office's October 17, 2000 decision, appellant was not entitled to a hearing as a matter of right.

The Office then exercised its discretion by stating that it had considered the issue involved and had determined that it could be resolved by submitting additional medical evidence to establish that appellant was entitled to a higher impairment rating for her left upper extremity.

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.<sup>4</sup> In this 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.

The Board further finds, however, that prior to appellant's January 28, 2002 letter requesting an oral hearing she had timely requested reconsideration of the schedule award in a letter dated April 24, 2001, appropriately addressed to the Office's Employment Standards Administration as directed in the appeal rights. The Office in a letter dated May 18, 2001 indicated that appellant had not properly followed her appeal rights. The Office further referred to evidence submitted with the April 24, 2001 letter and noted that the Office does not award compensation for impairment of the spine and that her rating was based only on impairment of

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<sup>2</sup> See 5 U.S.C. § 8124(b)(1).

<sup>3</sup> See *Charles J. Prudencio*, 41 ECAB 499 (1990).

<sup>4</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).

the upper extremity. Since the Office did not consider appellant's request for reconsideration, upon return of the case record the Office should consider appellant's pending request for reconsideration under section 8128(a) of the Act.

The decision of the Office of Workers' Compensation Programs dated February 13, 2002 is hereby affirmed.

Dated, Washington, DC  
October 8, 2002

Michael J. Walsh  
Chairman

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member