

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DARL L. MORGAN and DEPARTMENT OF THE NAVY,  
MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

*Docket No. 03-764; Submitted on the Record;  
Issued August 13, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b).

On July 15, 1995 appellant, then a 54-year-old computer assistant, filed an occupational disease claim alleging that, on June 23, 1995, she first realized that her tendinitis of the left elbow, arm, hand and fingers was caused by factors of her federal employment.

The Office accepted appellant's claim for right shoulder impingement and bilateral carpal tunnel syndrome.

The Office referred appellant to a vocational rehabilitation counselor who identified the positions of clinical counselor and substance abuse counselor as being within appellant's physical and vocational capabilities.

On December 22, 1999 the Office issued a notice of proposed reduction of compensation based on its determination that appellant had the capacity to earn wages as a substance abuse counselor.

By decision dated March 2, 2000, the Office finalized its preliminary determination and reduced appellant's compensation on the grounds that the selected position of substance abuse counselor represented her wage-earning capacity. In a March 19, 2000 letter, appellant requested reconsideration or an oral hearing before an Office representative. Subsequently, the Office received an undated letter from appellant requesting an oral hearing.

The hearing representative issued a decision, dated March 26, 2001, remanding the case for further development on the issue of whether appellant could perform the duties of the selected position. The hearing representative found that the medical evidence of record established that appellant had been receiving medical treatment for an emotional condition since the filing of her occupational disease claim.

On remand appellant was referred to Dr. Andrea Bates, a Board-certified psychiatrist, for a second opinion medical examination by letter dated April 10, 2001. She submitted a May 5, 2001 report finding that there were no psychological or psychiatric reasons why appellant could not perform the duties of a substance abuse counselor.

By decision dated May 23, 2001, the Office, based on Dr. Bates' opinion, again found that the position of a substance abuse counselor represented appellant's wage-earning capacity, and therefore, the prior reduction in benefits was proper. In a June 22, 2001 letter, appellant stated, "I am requesting reconsideration of my case."

In a June 26, 2001 letter, appellant noted that she had spoken to a representative from her congressman's office and was informed that she could request a hearing. She stated that she misunderstood the appeals rights in the Office's prior decision. Appellant stated, "[s]o I am asking for a HEARING and if that is possible then I withdraw my request for RECONSIDERATION at this time."

In a July 31, 2001 decision, the Office denied appellant's request for a hearing as untimely filed pursuant to 5 U.S.C. § 8124 of the Federal Employees' Compensation Act. Further, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue in this case could equally well be addressed through the reconsideration process.

By decision dated November 13, 2001, the Office denied appellant's request for modification of its prior decision based on a merit review of appellant's claim. Appellant, through her representative, requested a hearing by letter dated January 14, 2002. Appellant's representative argued that appellant "was confused in her June 22, 2001 letter." She enclosed a copy of a certified mail receipt to support her contention that the June 22, 2001 letter was mailed to the Branch of Hearings and Review on that date. She argued that appellant timely requested "a hearing" since her claim was decided on May 23, 2001.

In a February 21, 2002 decision, the Office denied appellant's request for an oral hearing under section 8124(b)(1) of the Act on the grounds that appellant was not entitled to a hearing as a matter of right as she had previously made a request for reconsideration. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue in this case could equally well be addressed through the reconsideration process.<sup>1</sup>

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>2</sup> As appellant filed her appeal with the Board on January 31, 2003, the only decision properly before the Board is the Office's February 21, 2002 decision denying appellant's request for a hearing.

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<sup>1</sup> The Board notes that, subsequent to the Office's February 21, 2002 decision, the Office received additional medical evidence. Also, on appeal, appellant has submitted new evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952); 20 C.F.R. § 501.2(c)(1).

<sup>2</sup> *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

The Board finds that the Office properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b).

Section 8124(b) of the 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>3</sup>

The Board has held that 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 that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>4</sup> 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,<sup>5</sup> when the request is made after the 30-day period for requesting a hearing<sup>6</sup> and when the request is for a second hearing on the same issue.<sup>7</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.<sup>8</sup>

In its February 21, 2002 decision, the Office denied appellant's January 14, 2002 hearing request on the grounds that appellant had previously requested reconsideration. Appellant's representative contended that appellant "was confused" in her June 22, 2001 letter. On appeal, appellant argues that, after speaking to a representative in her congressman's office, she attempted to straighten out the confusion by asking the Branch of Hearings and Review for a hearing and withdrawing her request for reconsideration in a correction letter dated June 26, 2001. She further argues that the Office incorrectly found, in its July 31, 2001 decision, that appellant's request for a hearing was untimely filed as the June 22, 2001 letter was mailed within 30 days of the May 23, 2001 decision.

In her June 22, 2001 letter, appellant specifically stated, "I am requesting reconsideration of my case." In her June 26, 2001 letter, appellant's statement that if it was possible "I withdraw my request for RECONSIDERATION at this time" clearly indicates that she considered her June 22, 2001 letter to be a request for reconsideration. Hence, the Office was correct in stating, in its February 21, 2002 decision, that appellant was not entitled to a hearing as a matter of right because she made her hearing request after she had requested reconsideration.

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<sup>3</sup> See 5 U.S.C. § 8124(b).

<sup>4</sup> *John T. Horrigan*, 47 ECAB 166 (1995).

<sup>5</sup> *Philip G. Feland*, 47 ECAB 418 (1996).

<sup>6</sup> *Frederick D. Richardson*, 45 ECAB 454 (1994).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

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 February 21, 2002 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 issue in the case could be resolved by requesting reconsideration. 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>9</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.

For these reasons, the Office properly denied appellant's request for a hearing under section 8124(b) of the Act.

The February 21, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
August 13, 2003

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>9</sup> *Frederick D. Richardson, supra* note 6; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).