

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES R. MIXON, SR. and DEPARTMENT OF THE AIR FORCE,
ROBINS AIR FORCE BASE, AIRCRAFT MAINTENANCE DIVISION, GA

*Docket No. 03-21; Submitted on the Record;
Issued February 14, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied his request for a review of the written record by an Office hearing representative; and (2) whether the Office properly denied his request for an oral hearing on his claim by an Office hearing representative.

On February 15, 1994 appellant, a 48-year-old aircraft worker, filed a claim for benefits, alleging that he sustained a left hip fracture in the performance of duty on February 10, 1994.

By decision dated June 28, 2001, the Office denied appellant's claim on the grounds that he did not submit medical evidence sufficient to establish that the claimed injury was sustained in the performance of duty.¹

By letter dated September 7, 2001, received by the Office on September 9, 2001, appellant requested a review of the written record.

By decision dated October 24, 2001, the Office found that appellant's request for a review of the written record was untimely filed. The Office noted that his request was postmarked September 9, 2001, which was more than 30 days after the issuance of the Office's June 28, 2001 decision and that he was therefore not entitled to a review of the written record as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue could be equally well addressed through the reconsideration process by submitting additional evidence.

¹ This claim has an extensive procedural history. The Office denied the claim by decisions dated May 18, 1994 and January 27, 1995. By decision dated August 21, 1996, the Board remanded the case for further development of the medical evidence. The Office denied the claim by decision dated November 3, 1999, remanded for further development of the medical evidence by decision dated June 7, 2000, then denied compensation by decision dated June 28, 2001.

By letter to the Office dated May 16, 2002, appellant requested an oral hearing.

In a decision dated July 29, 2002, the Office found that appellant's request for an oral hearing was untimely filed. The Office noted that appellant's request was postmarked May 16, 2002, which was more than 30 days after the issuance of the Office's June 28, 2001 merit decision, and that he was therefore not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue in the case could be equally well addressed through the reconsideration process by submitting additional evidence.

The Board finds that the Office did not abuse its discretion in denying appellant's September 7, 2001 request for a review of the written record and his May 16, 2002 request for a hearing before an Office hearing representative, pursuant to 5 U.S.C. § 8124.

Section 8124(b)(1) of the Federal Employees' Compensation Act,² concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made 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 held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.³ The Board has held that section 8124 provides the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing," and that such review of the written record is also subject to the same requirement that the request be made within 30 days of the Office's final decision.⁴

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 of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁵

The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing.⁶ The Office's procedures, which require the Office to exercise its discretion to grant or deny a request

² 5 U.S.C. § 8124(b)(1).

³ *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

⁴ *See Michael J. Welsh*, 40 ECAB 994; 20 C.F.R. § 10.131(b).

⁵ *Johnny S. Henderson*, 34 ECAB 216 (1982).

⁶ *Johnny S. Henderson*, *supra* note 5; *Herbert C. Holley*, 33 ECAB 140 (1981); *Rudolph Bernmann*, 26 ECAB 354 (1975).

for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.⁷

In the present case, the Office on June 28, 2001 issued its decision denying compensation for a claimed left hip fracture. On September 7, 2001 appellant requested a review of the record by an Office hearing representative. By decision dated October 24, 2001, the Office denied appellant's request for a review of the record because it was not made within 30 days. Appellant subsequently requested an oral hearing on May 16, 2002. The Office exercised its discretion in considering appellant's requests, noting that it had considered the matter and determined that the issue in the case could be resolved through the reconsideration process by submitting evidence not previously considered in regard to whether his claimed injury was sustained in the performance of duty as alleged.

An abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, prejudice, partiality, intentional wrong or action against logic.⁸ There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's requests for a review of the record and an oral hearing. The Office exercised its discretionary powers in denying appellant's requests for a review of the record and an oral hearing, and in so doing did not act improperly.⁹

As the case record reveals no such abuse of discretion by the Office, the Office properly denied appellant's requests for a review of the written record and an oral hearing, respectively, by an Office hearing representative pursuant to section 8124 of the Act.

⁷ *Holley C. Holly*, *supra* note 6.

⁸ *See Sherwood Brown*, 32 ECAB 1847 (1981).

⁹ *Stephen C. Belcher*, 42 ECAB 696 (1991); *Ella M. Garner*, 36 ECAB 238 (1984).

The decisions of the Office of Workers' Compensation Programs dated July 29, 2002 and October 24, 2001 are hereby affirmed.

Dated, Washington, DC
February 14, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member