

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LARRY J. SHIVELY and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Marion, IN

*Docket No. 03-822; Submitted on the Record;  
Issued June 11, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

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

On July 3, 1996 appellant, then a 41-year-old motor vehicle operator, was injured in the performance of duty when he was dumping trash into an incinerator and a bag of blood burst and splashed into his face and arms. He was immediately tested for hepatitis and human immunodeficiency virus, but the results of the tests did not come back negative until August 1, 1996. During the week following the incident, appellant's coworker's made insensitive remarks to him regarding mortality and the possibility that he had a disease. The Office accepted the claim for acute stress reaction, panic disorder and post-traumatic stress disorder. Appellant did not stop off work immediately following his work injury. The Office paid compensation for wage loss from November 14 to November 30, 1996, at which time appellant returned to regular duty.

On January 8, 1997 appellant filed a claim for a recurrence of disability. The Office paid compensation for intermittent periods of wage-loss disability from February 10, 1996 to June 14, 1997.<sup>1</sup> Appellant subsequently retired from the employing establishment effective November 26, 1997 and began working as a truck driver for a company delivering baked goods.

On July 23, 1999 appellant filed a claim for a recurrence of disability beginning September 21, 1998.

In an August 2, 1999 letter, the Office advised appellant of the factual and medical evidence required to establish his claim. In a decision dated September 27, 1999, the Office

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<sup>1</sup> Appellant sought another recurrence of disability claim beginning August 28, 1997, but that claim was denied by the Office in a decision dated January 13, 1998.

denied compensation on the grounds that appellant failed to establish that his claimed recurrence of disability was causally related to the accepted work injury.<sup>2</sup>

Appellant subsequently requested reconsideration on September 8, 2000 and submitted additional evidence.

In a November 1, 2000 decision, the Office performed a merit review but denied modification of its prior decision. Appellant requested an oral hearing on October 21, 2002, but was informed in a November 14, 2002 decision that his request was denied since he had already received reconsideration of the Office's September 27, 1999 decision denying his claim for a recurrence of disability.

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>3</sup> Because appellant's appeal was filed on February 12, 2003, the Board does not have jurisdiction to consider the decisions issued by the Office on September 27, 1999 and November 1, 2000, as they were issued more than one year prior to appellant's appeal. The only case before the Board in this appeal is the Office decision dated November 14, 2002, which denied appellant's hearing request.

The Board finds that the Office properly denied appellant's request for a hearing under section 8124(b) of the Federal Employees' Compensation Act.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states that: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>4</sup> The Office regulations at section 10.616(a) provide that a claimant, injured on or after July 4, 1966, who has received a final adverse decision by the Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by the postmark or other carrier's date marking) of the date of the decision for which a hearing is sought. The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.<sup>5</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

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<sup>2</sup> The Office further denied that the conditions of chronic fatigue syndrome and hepatitis C were employment related.

<sup>3</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *see Earl David Seal*, 49 ECAB 152 (1997).

<sup>4</sup> 5 U.S.C. § 8124(b)(1).

<sup>5</sup> 20 C.F.R. § 10.616(a) (1999); *Brenton A. Burbank*, 53 ECAB \_\_\_\_ (Docket No. 00-2017, issued January 3, 2002).

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>6</sup> when the request is made after the 30-day period established for requesting a hearing,<sup>7</sup> or when the request is for a second hearing on the same issue.<sup>8</sup> 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.<sup>9</sup>

In this case, the Office properly determined in its November 14, 2002 decision that appellant was not entitled to a hearing as a matter of right since appellant's request was made after a reconsideration of his case pursuant to section 8128(a).<sup>10</sup> The Office correctly informed appellant of his rights to a hearing reconsideration and an appeal with the Board in an enclosure with its original September 27, 1999 decision. The Office also exercised its discretion and further considered the hearing request but concluded that since his case involved a medical issue, appellant could equally well pursue his claim by requesting reconsideration along with the submission of the medical evidence.<sup>11</sup> For these reasons, the Office acted properly in denying appellant's October 21, 2002 request for a hearing.<sup>12</sup>

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<sup>6</sup> *Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>7</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>8</sup> *Johnny S. Henderson*, 34 ECAB 216 (1982).

<sup>9</sup> *Sandra F. Powell*, 45 ECAB 877 (1994).

<sup>10</sup> *See generally* 5 U.S.C. § 8128.

<sup>11</sup> 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. *See Daniel J. Perea*, 42 ECAB 214 (1990).

<sup>12</sup> The Board notes that appellant submitted additional evidence subsequent to the Office's November 14, 2002 decision. The Board's jurisdiction, however, to decide appeals from final decisions of the Office is limited to reviewing the evidence that was before the Office at the time of its final decision. *See* 20 C.F.R. § 501.2(c). Thus, the Board may not consider the evidence submitted by appellant on appeal. This decision, however, does not preclude appellant from submitting additional evidence to the Office along with a reconsideration request.

The decision of the Office of Workers' Compensation Programs dated November 14, 2002 is hereby affirmed.<sup>13</sup>

Dated, Washington, DC  
June 11, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>13</sup> Appellant's appeal references a decision issued on November 15, 2002; however, the only document of record dated November 15, 2002 is an informal letter from the Office with respect to its November 14, 2002 decision.