

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TODD ROBERTS, claiming as widower of CATHERINE A.H. ROBERTS and
DEPARTMENT OF AGRICULTURE, CLEARWATER NATIONAL FORREST, Orofino, ID

*Docket No. 01-410; Oral Argument Held February 3, 2003;
Issued March 27, 2003*

Appearances: *Dennis Albers, Esq.*, for appellant; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits; and (2) whether the Office properly denied appellant's claim for an oral hearing.

On August 2, 1995 appellant filed a claim for compensation by widower alleging that his wife, the decedent, Catherine Roberts, a 36 year-old local district bus driver, died on August 12, 1994 in a motor vehicle accident while in the performance of federal duties. The alleged employing establishment denied that the decedent was a federal employee. By decision dated September 15, 1995, the Office denied appellant's claim finding that the decedent was not a federal employee within the meaning of the Federal Employees' Compensation Act.¹

Appellant requested an oral hearing on October 4, 1995. Appellant's attorney requested subpoenas. By decision dated October 3, 1997, the hearing representative affirmed the Office's September 13, 1995 decision, but failed to address the request for subpoenas.

Appellant requested review by the Board and by order dated May 21, 1998,² the Board granted the Director's request for remand for a *de novo* decision by the hearing representative. By decision dated May 24, 1999, the hearing representative denied appellant's request for subpoenas and reaffirmed the Office's September 13, 1995 decision. Appellant appealed this decision to the Board on August 23, 1999. However, in a letter dated November 17, 1999, appellant's attorney submitted additional new evidence, requested that the appeal be dismissed

¹ 5 U.S.C. §§ 8101-8193.

² Docket No. 98-650 (issued May 21, 1998).

and requested reconsideration from the Office. The Board issued an order dismissing the appeal on January 11, 2000.³

By decision dated May 31, 2000, the Office reviewed the November 17, 1999 letter and accompanying affidavit and declined to reopen appellant's claim for consideration of the merits. Appellant, through his attorney, requested an oral hearing on June 23, 2000. In a decision dated August 23, 2000, the Office denied appellant's request for an oral hearing.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits.

The Office's regulations provide that a timely request for reconsideration in writing may be reviewed on its merits if the employee has submitted evidence or argument which shows that the Office erroneously applied or interpreted a specific point of law, advances a relevant legal argument not previously considered by the Office, or constitutes relevant and pertinent new evidence not previously considered by the Office.⁴

As the Office issued its last decision discussing the merits of the case on May 24, 1999 more than one year prior to the date of appellant's appeal to the Board on November 14, 2000, the Board may not consider the merits of appellant's claim in this case.⁵ The only issue before the Board is whether the Office reviewed the reconsideration request in accordance with sections 10.609(a) and 10.606(b) of the Office's regulations.⁶

The merit issue in the case is whether the decedent was a federal employee at the time of her death on August 12, 1994. In an attempt to establish this fact, appellant's attorney submitted a series of questions to Vicki Grimm, a member of the employing establishment. Ms. Grimm responded to the questions, but failed to support appellant's claim. Specifically, she stated she did not have any contact with the decedent and that "I informed Mr. Sorenson that if [the decedent] wanted to be hired as a bus driver she could apply for a job at Orofino or at the fire camp and that she would need to meet all legal requirements for hiring prior to employment." Ms. Grimm further stated that she was not aware of how employees leaving Orofino were paid and denied that she informed appellant and his family that she believe there should be coverage under the Act under these circumstances. These statements were reviewed by the Office in reaching its final decisions on the merits.

Appellant's attorney submitted an affidavit from Barbara Roberts dated October 19, 1999 with the November 17, 1999 request for reconsideration. Mrs. Roberts alleged that she was acquainted with Ms. Grimm. She further alleged that Ms. Grimm informed her that she was responsible for making certain that there were adequate bus drivers available to drive the buses to the fire. Mrs. Roberts further alleged that Ms. Grimm had informed her that the decedent was

³ Docket No. 00-4 (issued January 11, 2000).

⁴ 5 U.S.C. §§ 10.609(a) and 10.606(b).

⁵ 20 C.F.R. § 501.3(d)(2).

⁶ 5 U.S.C. §§ 10.609(a) and 10.606(b).

dispatched to take a school car directly to the fire scene rather than reporting to Orofino, Idaho as it was Saturday and the Orofino office was closed. She alleged that Ms. Grimm stated that “under those circumstances [the employee] became an employee at the time she left Kamiah, Idaho and that the [employing establishment] has documentation that proves that fact.”

The Board finds that the affidavit from Mrs. Roberts is not relevant new evidence which would require the Office to reopen appellant’s claim for review of the merits of his claim. As noted above, Ms. Grimm submitted a signed statement to the record which contradicts the affidavit on most relevant points. She denied contact with the decedent or Mrs. Roberts and denied offering her opinion regarding whether coverage under the Act would extend to the decedent. Furthermore, the fact that the decedent’s death occurred on a Saturday is not new evidence as the date of her death was already included in the record. For these reasons, the affidavit is not relevant to the issue in the case, whether the decedent was an employee at the time of her death and is not sufficient to require the Office to reopen appellant’s claim for consideration of the merits.

The Board further finds that the Office did not abuse its discretion by denying appellant’s request for an oral hearing.

Section 8124(b) of the Act,⁷ concerning a claimant’s entitlement to a hearing before an Office representative, states: “Before review under section 8128(a) of this title, a claimant ... 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.”⁸ Thus, appellant must request a hearing within the provided time limitation before he requests reconsideration or he is not entitled to hearing as a matter of right.⁹ In this case, appellant had previously requested an oral hearing and requested reconsideration following the oral hearing decision. A decision was issued in relation to his request for reconsideration prior to the filing of a second request for a hearing. Therefore, appellant is not entitled to a hearing as a matter of right.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case could be resolved through the submission of evidence in the reconsideration process. 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 established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.¹⁰ There is no evidence of an abuse of discretion in the denial of a hearing in this case. Therefore, the Office properly denied appellant’s request for a hearing as he had previously requested reconsideration and properly

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8124(b)(1).

⁹ *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

¹⁰ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

exercised its discretion in determining to deny appellant's request for a hearing as he had other review options available.

The August 23 and May 31, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 27, 2003

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member