

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHYLLIS SOLKOFF and INTERNAL REVENUE SERVICE,
Plantation, FL

*Docket No. 03-224; Submitted on the Record;
Issued March 7, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained an injury in the performance of duty on February 19, 2002 as alleged; and (2) whether the Branch of Hearings and Review properly denied her request for an oral hearing as untimely.

Appellant, a 56-year-old tax examiner, filed a notice of traumatic injury on March 8, 2002 alleging that on February 19, 2002 she was exposed to fumes in the performance of duty resulting in multiple symptoms including burning eyes, difficulty breathing, headache, nausea and fever. The Office of Workers' Compensation Programs requested additional factual and medical information by letter dated March 25, 2002. Appellant responded on April 3, 2002 and stated that medical evidence was forthcoming. By decision dated April 30, 2002, the Office denied appellant's claim finding that she failed to submit medical evidence establishing that she sustained a medical condition as a result of her February 19, 2002 exposure.¹

Appellant requested an oral hearing in a letter received by the Office on July 19, 2002. By decision dated September 27, 2002, the Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that her request was not timely and that she could submit additional evidence in the reconsideration process.

The Board finds that appellant has failed to submit evidence establishing that she sustained an injury in the performance of duty as alleged.

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered, in conjunction with one another. The first component to be established is that the employee

¹ Appellant submitted additional evidence following the Office's April 30, 2002 decision. As the Office has not reviewed this evidence in reaching a final decision, the Board will not consider it for the first time on appeal. 20 C.F.R. § 501.2(c).

actually experienced the employment incident, which is alleged to have occurred.² The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.³ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁴

In this case, the Office accepted that appellant sustained the alleged exposure to paint fumes. Appellant did not submit any medical evidence with her initial claim. In response to the Office's request for additional evidence, appellant stated that she would submit medical evidence. However, appellant failed to submit any medical evidence within the initial 30-day period allotted by the Office in its March 25, 2002 letter. Therefore, the Office properly found in its April 30, 2002 decision that, as appellant failed to submit any medical evidence establishing that she sustained a condition as a result of this exposure, she failed to meet her burden of proof to establish fact of injury.

The Board further finds that the Branch of Hearings and Review properly denied appellant's request for an oral hearing.

Section 8124(b) of the Federal Employees' Compensation Act,⁵ 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."⁶

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

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *John M. Tornello*, 35 ECAB 234 (1983).

⁴ *James Mack*, 43 ECAB 321 (1991).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8124(b)(1).

the request is filed within the requisite 30 days.⁷ Even where the hearing request is not timely filed, the Office may within its discretion, grant a hearing and must exercise this discretion.⁸

In the instant case, the Office properly determined that appellant's July 19, 2002 request for a hearing was not timely filed as it was made more than 30 days after the issuance of the Office's April 30, 2002 decision. The Office, therefore, properly denied appellant's 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 was medical and could be resolved through the submission of medical evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as she had other review options available.

The decisions of the Office of Workers' Compensation Programs dated September 27 and April 30, 2002 are hereby affirmed.

Dated, Washington, DC
March 7, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁷ *Tammy J. Kenow*, 44 ECAB 619 (1993).

⁸ *Id.*