

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PHYLLIS L. LADD and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Richmond, VA

*Docket No. 03-1974; Submitted on the Record;  
Issued November 19, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for a second hearing pursuant to 5 U.S.C. § 8124(b)(1).

Appellant, a 66-year-old tax examiner, submitted several claims (Forms CA-1 and CA-2) notices of traumatic injury and occupational disease, alleging that she had neck pain, carpal tunnel syndrome, burning bilaterally in her arm pits, swelling in her left shoulder and hand, headaches, painful wrists and painful swollen hands.

By decision dated November 7, 2001, the Office denied appellant's claim finding that fact of injury had not been established. The Office accepted that, although she experienced the claimed employment factors, the medical evidence of record failed to establish that a personal injury resulted from those factors.

Appellant requested an oral hearing before an Office hearing representative, which was held on May 21, 2002, at which appellant testified. By decision dated August 5, 2002, the hearing representative affirmed the November 7, 2001 decision finding that appellant had failed to submit sufficient medical opinion relating her neck, shoulder and arm conditions to her duties as a tax examiner.

By letter dated August 14, 2002, appellant requested an appeal before the Board, which was docketed as No. 02-2146. By letter dated September 12, 2002, appellant requested that her appeal be withdrawn "because of new evidence." On October 11, 2002 the Board issued an Order Dismissing Appeal.<sup>1</sup>

On December 4, 2002 appellant requested a second hearing before an Office hearing representative and submitted several claim forms and additional medical evidence. Appellant

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<sup>1</sup> Docket No. 02-2146 (issued October 11, 2002).

submitted a Civil Service Retirement System (CSRS) applicant's statement of disability, indicating that she had a torn rotator cuff, a painful arm pit, a withered arm, no strength to hold a pen, cramps, a stiff arm and elbow, headaches and carpal tunnel syndrome with painful fingers. Appellant also submitted a June 28, 2000 medical report containing electromyographic (EMG) and nerve conduction velocity (NCV) study results.

In a May 20, 2002 medical report, Dr. Robert J. Fallis, a Board-certified neurologist, diagnosed bilateral carpal tunnel syndrome, headaches and hypertension.

A May 29, 2002 EMG report indicated that appellant had entrapment of both right and left median nerves at the wrist (carpal tunnel) and chronic bilateral denervation with moderate acute denervation on the left. It was noted that the entrapments were relatively severe bilaterally and affected both motor and sensory fibers. An abnormal examination of the C6 right myotome was noted which revealed mild chronic denervation.

In an October 7, 2002 report, Dr. Cecelia G. Fisher, a Board-certified internist, noted that appellant's recent magnetic resonance imaging (MRI) scan showed chronic tendinosis and a full thickness tear of her muscle and tendon area there.

An October 29, 2002 report from Dr. Fisher noted that appellant had carpal tunnel syndrome and rotator cuff injury and would need surgery for both of these conditions. Dr. Fisher noted that "[s]he states that these are work-related injuries."

On April 17, 2003 appellant sent a handwritten letter to the Office requesting an appeal.

By letter dated May 6, 2003, the Office requested that appellant clarify whether she wanted reconsideration, an oral hearing or an appeal. On June 20, 2003 she returned the Office's letter with "oral hearing" written on it. Appellant also noted that she was "asking for appeal" of case No. A06-2040572 because her hand was still too painful to write.

By decision dated July 14, 2003, the Office considered appellant's request for a second oral hearing, noting that she was not entitled by right to a second hearing or a review of the written record as she had previously had an oral hearing on the same issue. The Office denied the request on the grounds that the issue in the case could equally well be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered which established that she sustained an injury as alleged.

The Board finds that the Office did not abuse its discretion by denying appellant's request for a second hearing pursuant to 5 U.S.C. § 8124(b)(1).

The only decision before the Board on this appeal is the July 14, 2003 denial of a second hearing. As appellant's appeal to the Board was date stamped as received by the Board on Wednesday, August 6, 2003, which was more than one year from August 5, 2002, the date of the most recent merit decision, the Board has no jurisdiction to consider the August 5, 2002 decision of the Office hearing representative.<sup>2</sup>

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<sup>2</sup> See 20 C.F.R. § 501.3(d)(2).

Section 8124(b)(1) of the Federal Employees' Compensation Act<sup>3</sup> provides in pertinent part as follows:

“Before review under § 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 issuance of the decision, to a hearing on his claim before a representative of the Secretary.”<sup>4</sup>

The Board has noted that section 8124(b)(1) “is unequivocal in setting forth the limitation in requests for hearings...”<sup>5</sup> The Office's procedures implementing this section of the Act are found at 20 C.F.R. § 10.616(a), which provides in pertinent part:

“A claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district 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 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>6</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 of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>7</sup> 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 for a hearing,<sup>8</sup> when the request is made after the 30-day period for requesting a hearing<sup>9</sup> and when the request is for a second hearing on the same issue.<sup>10</sup> In these instances the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.<sup>11</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a

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<sup>3</sup> 5 U.S.C. § 8124(b)(1).

<sup>4</sup> 5 U.S.C. § 8124(b)(1)

<sup>5</sup> *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

<sup>6</sup> 20 C.F.R. § 10.616(a).

<sup>7</sup> *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

<sup>8</sup> *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

<sup>9</sup> *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

<sup>10</sup> *Johnny S. Henderson*, *supra* note 7.

<sup>11</sup> *Id.*; *Rudolph Bermann*, *supra* note 8.

hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.<sup>12</sup>

In the present case, an Office hearing representative issued an August 5, 2002 decision which denied appellant's claim for corporation. Appellant requested a hearing under 5 U.S.C. § 8124(b)(1) on December 4, 2002 and by letter dated May 21, 2003. A hearing request must be made within 30 days of the issuance of an Office decision.<sup>13</sup> Since appellant did not request a hearing within 30 days of the Office's August 5, 2002 decision the request was untimely and she was not entitled to a hearing as a matter of right. Further, appellant had previously requested and received an oral hearing on the issue in question and the Office found that she was not entitled to a second hearing on the same issue.<sup>14</sup>

The Office, in its discretion, considered appellant's hearing request, in its July 14, 2003 decision, and denied the request on the basis that appellant could pursue her claim by requesting reconsideration and submitting additional evidence pertaining to her occupational injury claims. An 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 known facts.<sup>15</sup> There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's second hearing request.

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<sup>12</sup> See *Herbert C. Holley*, *supra* note 9.

<sup>13</sup> 20 C.F.R. § 10.6161(a).

<sup>14</sup> See *Johnny S. Henderson* *supra* note 7. The Board has held that, where circumstances warrant, the Office has discretionary authority to hold a second hearing on the same issue. However, such circumstances were not evident in this case.

<sup>15</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).

Accordingly, the decision of the Office of Workers' Compensation Programs dated July 14, 2003 is hereby affirmed.

Dated, Washington, DC  
November 19, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member