

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES E. JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Jersey City, NJ

*Docket No. 03-1990; Submitted on the Record;
Issued October 16, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's requests for a hearing under 5 U.S.C. § 8124.

On May 17, 1995 appellant, then a 48-year-old forklift operator, sustained a rotator cuff tear of his right shoulder. He stopped work on that date and, after a period of light-duty work, returned to regular duty on January 3, 1996. In July 1995, appellant underwent a right rotator cuff repair which was authorized by the Office.

By decision dated December 24, 1996, the Office granted appellant a schedule award for an 11 percent permanent impairment of his right arm. The award ran for 34.32 weeks from October 16, 1996 to June 13, 1997. On January 10, 1997 appellant, through his attorney, requested a hearing before an Office hearing representative regarding the Office's December 24, 1996 determination. After several delays in scheduling a hearing, appellant's request was changed to a request for review of the written record by an Office hearing representative. By decision dated March 23, 1998 and finalized March 26, 1998, an Office hearing representative affirmed the Office's December 24, 1996 decision after conducting a review of written record.

On August 24, 1998 appellant, through his attorney, requested reconsideration of his claim. By decision dated November 18, 1998, the Office affirmed its March 26, 1998 decision after reviewing appellant's case on the merits. On January 10, 2003 appellant, through his attorney, requested a hearing before an Office hearing representative. By decision dated March 14, 2003, the Office denied appellant's request for a hearing under 5 U.S.C. § 8124. The Office stated that appellant was not entitled to a hearing as a matter of right since he had previously requested reconsideration. The Office noted that it had exercised its discretion and determined that appellant's request was further denied for the reason that the issue of entitlement to schedule award compensation could be addressed by submitting additional evidence and requesting reconsideration.

By letter dated May 13, 2003, appellant, through his attorney, resubmitted a copy of the January 10, 2003 hearing request and requested the status of his case. The Office interpreted this letter as constituting a new request for a hearing before an Office hearing representative. By decision dated July 2, 2003, the Office again denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act. In support of its denial of appellant's request, the Office provided rationale which was similar to that contained in its March 14, 2003 decision.

The Board finds that the Office properly denied appellant's requests for a hearing under 5 U.S.C. § 8124.

The only decisions on appeal before the Board are the Office's March 14 and July 2, 2003 decisions denying appellant's requests for a hearing before an Office representative. The Board has no jurisdiction to review the merit decisions of record, dated December 24, 1996 and March 26 and November 18, 1998, as they were issued more than one year before the filing of the current appeal.¹

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary."²

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 for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.³ Specifically, 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 to a hearing,⁴ when the request is made after the 30-day period for requesting a hearing,⁵ and when the request is for a second hearing on the same issue.⁶ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.⁷

¹ See 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. § 8124(b)(1).

³ *Henry Moreno*, 39 ECAB 475, 482 (1988).

⁴ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁵ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

⁶ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

⁷ *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

In the present case, appellant's January and May 2003 hearing requests were made after he had requested reconsideration in connection with his claim and, thus, he was not entitled to a hearing as a matter of right. On August 24, 1998 appellant had requested reconsideration of the Office's December 24, 1996 decision which granted him a schedule award for an 11 percent permanent impairment of his right arm.⁸ Hence, the Office was correct in stating in its March 14 and July 2, 2003 decisions that appellant was not entitled to a hearing as a matter of right because he made his hearing requests after he had requested reconsideration.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its March 14 and July 2, 2003 decisions, properly exercised its discretion by determining that appellant's request was further denied for the reason that the issue of entitlement to schedule award compensation could be addressed by submitting additional evidence and requesting reconsideration. 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.⁹ In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing requests which could be found to be an abuse of discretion.

For these reasons, the Office properly denied appellant's requests for a hearing under 5 U.S.C. § 8124.

⁸ Moreover, appellant had previously requested review of the December 24, 1996 decision. This request led to the issuance of a March 26, 1998 decision in which an Office hearing representative affirmed the December 24, 1996 decision after conducting a review of the written record. In addition, appellant made his hearing requests more than 30 days after the last merit decision of record which was issued on November 18, 1998.

⁹ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The July 2 and March 14, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
October 16, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member