

**United States Department of Labor
Employees' Compensation Appeals Board**

JACQUELINE K. JOHNSON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Spokane, WA, Employer**

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**Docket No. 04-799
Issued: August 26, 2004**

Appearances:
Jacqueline K. Johnson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 5, 2004 appellant filed an appeal of a decision of the Office of Workers' Compensation Programs dated August 21, 2003, which denied her request for an oral hearing before an Office hearing representative. Because more than one year has elapsed between the last merit decision of record dated October 25, 2002 and the filing of this appeal on February 5, 2004, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. § 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office abused its discretion in denying appellant's request for an oral hearing before an Office hearing representative under 5 U.S.C. § 8124(b)(1), on the grounds that she first requested reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 28, 2002 appellant, then a 55-year-old postmaster, filed a claim alleging that on May 28, 2002 she tripped over some telephone books and injured her left knee, the left side of her lower leg and her right ankle. She did not stop work.

Dr. Douglas L. Stagg, a Board-certified emergency medicine specialist, examined appellant on May 28, 2002 the date of injury, reviewed her history and noted that she was complaining of left knee pain, right wrist, right foot and right ankle pain, low back pain and left shoulder pain. Dr. Stagg found no objective findings of injury related to the May 28, 2002 employment incident.

Appellant was seen on June 11, 2002 by Dr. Stagg, who diagnosed improving neck pain, persistent low back and right leg pain, but who found no objective indications of disability and no objective injuries except for a reduced range of motion of her neck. He continued to treat appellant up to September 24, 2002, but continued to elicit no objective findings.

She was seen on June 6, 2002 by Dr. David Kurt Seppi, a Board-certified family practitioner, who found that appellant had good range of motion of her neck.

Appellant was seen on August 13, 2002 by Dr. Richard T. Knoebel, a Board-certified orthopedic surgeon, who noted her subjective complaints of tenderness but found no objective findings or disability on examination related to the May 28, 2003 employing incident. On August 13, 2002 he noted as an injury-related diagnosis: "Nonspecific, diffuse pain complaints without significant objective findings."

By decision dated October 25, 2002, the Office rejected appellant's claim finding that the medical evidence submitted did not establish that a condition was diagnosed in connection with the employment injury. The Office found that the medical evidence lacked a rationalized medical opinion identifying a definitive injury-related condition and establishing a causal relationship between a specific condition and her employment incident. The October 25, 2002 decision contained a statement of appeal rights, noting that, if reconsideration was requested under 5 U.S.C. § 8128(a), appellant would not subsequently be entitled to an oral hearing or a review of the written record under 5 U.S.C. § 8124(b)(1).

On November 10, 2002 appellant requested reconsideration of the October 25, 2002 decision and submitted a lengthy personal statement.

Appellant also submitted an undated witness statement from a coworker, Paul A. Degner, who indicated that he did not remember the exact date of incident but remembered that appellant "did in fact trip and hurt herself."

By decision dated December 20, 2002, the Office denied appellant's request for reconsideration under 5 U.S.C. § 8128(a). The Office found that the evidence submitted was irrelevant as it did not constitute competent medical evidence and was insufficient to require the Office to reopen appellant's claim for further review on its merits.

On January 24, 2003 appellant requested an oral hearing before an Office hearing representative. Accompanying her request were several letters: appellant submitted another personal statement, Dr. Stagg provided a report and a statement from a patient representative was submitted.

By decision dated August 21, 2003, the Branch of Hearings and Review denied appellant's request for an oral hearing, finding that she was not entitled to an oral hearing or a review of the written record. The Branch of Hearings and Review found that appellant had previously requested reconsideration under 5 U.S.C. § 8128(a) and that the Office had issued a decision on December 20, 2002 such that she was not entitled to a hearing by right. It denied her request on the grounds that the case could be equally well pursued by requesting reconsideration from the Office and by submitting new medical evidence not previously considered by the Office.

LEGAL PRECEDENT

Section 8124(b)(1) of the Federal Employees' Compensation Act,¹ concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary."

The Office's procedures implementing this section of the Act are found in the Code of Federal Regulations at 20 C.F.R. §§ 10.615-10.616.

Title 20 of the Code of Federal Regulations § 10.615 states: "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record." In this case, appellant chose an oral hearing, however, the requirements are the same for either choice.

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.² 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 for a hearing,³ when the request is made after the 30-day period for requesting a hearing⁴ and when the request is for a second hearing on the same issue.⁵ In these instances the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the employee with reasons.⁶ The Office's procedures

¹ 5 U.S.C. § 8124(b)(1).

² *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

³ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁴ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

⁵ See *Johnny S. Henderson*, *supra*, note 2.

⁶ *Id.*

which require the Office to exercise its discretion to grant or deny a hearing when a request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.⁷

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are clearly contrary to logic and probable deductions from established facts.⁸

ANALYSIS

Appellant claimed injury at work on May 28, 2002 and submitted medical reports to support her claim. The Office denied her claim on October 25, 2002 on the grounds that the medical evidence of record lacked definitive injury-related diagnoses and opinions on causal relationship. Accompanying the decision were appeal rights that stated that, if reconsideration was requested under 5 U.S.C. § 8128(a), she would not subsequently be entitled to an oral hearing or a review of the written record under 5 U.S.C. § 8124(b)(1).

The Board notes that on November 10, 2002 appellant requested reconsideration under 5 U.S.C. § 8128(a). On December 20, 2002 the Office denied appellant's request for reconsideration under 5 U.S.C. § 8128(a). On January 24, 2003 appellant then requested an oral hearing before an Office hearing representative under 5 U.S.C. § 8124 and submitted additional evidence. By decision dated August 21, 2003, the Branch of Hearings and Review found that appellant had previously requested reconsideration under 5 U.S.C. § 8128(a) and, in accordance with 5 U.S.C. § 8124(b)(1), she was not entitled to a hearing by right. The Board notes that appellant had been so advised on the statement of her rights accompanying the October 25, 2002 decision. The Branch of Hearings and Review further denied the request, after exercising its discretion, finding that appellant could submit additional evidence and request reconsideration.

The Board finds that the Office properly determined that appellant was not entitled to an oral hearing as a matter of right. The Board notes that the Branch of Hearings and Review properly exercised its discretion in denying her request on the grounds that the case could be equally well pursued by requesting reconsideration before the Office and submitting new medical evidence not previously considered which supported her injury as alleged.

The Board finds that the Branch of Hearings and Review properly exercised its discretion under 5 U.S.C. § 8124(b)(1).

CONCLUSION

The Branch of Hearings and Review did not abuse its discretion by denying appellant's request for an oral hearing before an Office hearing representative under 5 U.S.C. § 8124(b)(1) on the grounds that she had already requested reconsideration under 5 U.S.C. § 8128(a).

⁷ See *Herbert C. Holley supra*, note 4.

⁸ See *Claudio Vazquez*, 52 ECAB 496 (2001); *Gregorio E. Conde*, 52 ECAB 410 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 21, 2003 is affirmed.

Issued: August 26, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member