

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

SHIRLEY A. WILLIAMS, Appellant)
)
and) **Docket No. 04-653**
) **Issued: May 10, 2004**
)
DEPARTMENT OF VETERANS AFFAIRS,)
JAMES A. HALEY HOSPITAL, Tampa, FL,)
Employer)

Appearances:
Rafael Gonzalez, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On January 12, 2004 appellant, through her attorney, filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated December 18 and April 11, 2003 denying her request for an oral hearing. As the Office issued the last merit decision on March 18, 2002, more than one-year prior to the date of the appeal to the Board on January 12, 2004, the Board lacks jurisdiction over the merits of this case pursuant to 20 C.F.R. § 501.3(d)(2).

ISSUE

The issue is whether the Branch of Hearings and Review properly denied appellant's request for oral hearings on April 11 and December 18, 2003.

FACTUAL HISTORY

On July 21, 1997 appellant, then a 57-year-old nursing assistant, filed a notice of traumatic injury alleging on July 15, 1997 she injured her back lifting a patient. The Office

accepted her claim for lumbosacral strain on November 10, 1998. Appellant filed additional claims for back injuries occurring on July 9 and August 16, 1999 likewise accepted for lumbosacral strain on September 7 and October 5, 1999 respectively.

By decision dated September 11, 2001, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work. Appellant, through her authorized representative, Capp P. Taylor, Esq., requested a schedule award on October 17, 2001.¹ The Office informed appellant that she was not entitled to a schedule award by letter dated October 23, 2001.²

In a letter dated January 9, 2002, Rafael Gonzalez, Esq., stated that he represented appellant in her workers' compensation claim and requested reconsideration on her behalf. By decision dated March 18, 2002, mailed to appellant's address of record, the Office reviewed appellant's claim on the merits and declined to modify the September 11, 2001 decision. The Office noted in the March 18, 2002 decision that there was no written release in the record designating Mr. Gonzalez as appellant's representative. The appeal rights accompanying the March 18, 2002 decision included the right to an oral hearing before the Branch of Hearings and Review.

In a separate letter dated March 18, 2002, the Office informed Mr. Gonzalez that appellant must submit written authorization in order for the Office to correspond with him on appellant's behalf. On April 3, 2002 Mr. Gonzalez provided the Office with an attorney authorization signed by appellant and dated January 14, 2002.

In letter dated February 19, 2003, Mr. Gonzalez requested an oral hearing on the March 18, 2002 decision. He alleged that neither he nor appellant had received a copy of the March 18, 2002 decision until February 10, 2003 and that therefore he was requesting an oral hearing within 30 days from the date of receipt of the decision. By decision dated April 11, 2003, the Branch of Hearings and Review denied the request for an oral hearing on the grounds that it was untimely and the issue could be pursued through the reconsideration process.

In a letter dated April 22, 2003 and addressed to the Branch of Hearings and Review, Mr. Gonzalez requested reconsideration of the April 11, 2003 decision and alleged that neither he nor appellant received a copy of the March 18, 2002 decision until February 10, 2003. He requested that the oral hearing proceed as previously requested. On October 20, 2003 Mr. Gonzalez again requested an oral hearing.

By decision dated December 18, 2003, the Branch of Hearings and Review noted that the Office had not received written notification prior to the issuance of its March 18, 2002 decision that appellant had authorized Mr. Gonzalez to represent her before the Office and that therefore the Office could not provide Mr. Gonzalez with a formal copy of the March 18, 2002 decision

¹ Appellant has not formally withdrawn the authorization of Mr. Taylor as her representative in accordance with 20 C.F.R. § 10.700(b).

² The Office has not issued a final decision regarding appellant's entitlement to a schedule award and the Board may not, therefore, address this issue on appeal. 20 C.F.R. § 501.3(d)(2).

when it was issued. The hearing representative further found that the February 19, 2003 request for an oral hearing was not timely, that the March 18, 2002 decision erroneously included the right to an oral hearing in the attached appeal rights, that appellant was not entitled to an oral hearing following a reconsideration decision in accordance with section 8124(b)(1) of the Federal Employees' Compensation Act³ and that the issue in the case could be adequately addressed through the reconsideration process.

LEGAL PRECEDENT

Section 8124(b) of the Act,⁴ 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."⁵

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 the request is filed within the requisite 30 days.⁶ Even where the hearing request is not timely filed, the Office may within its discretion, grant a hearing and must exercise this discretion.⁷

ANALYSIS

In the instant case, the Office properly determined appellant's February 19, 2003 request for a hearing was not timely filed as it was made more than 30 days after the issuance of the Office's March 18, 2002 decision. Mr. Gonzalez argued that the 30-day time period should be tolled as appellant did not receive the March 18, 2002 decision until February 10, 2003. However, it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.⁸ The record shows that the Office mailed the decision to appellant at her last known address. Appellant has submitted no evidence to rebut the presumption that she received the March 18, 2002 decision.

Mr. Gonzalez further alleged that the time period should be tolled until the date he received a copy of the Office's March 18, 2002 decision on February 10, 2003. Section 10.127

³ 5 U.S.C. §§ 8101-8193, 8124(b)(1).

⁴ *Id.*

⁵ *Id.*; see also 20 C.F.R. § 10.616(a).

⁶ *Tammy J. Kenow*, 44 ECAB 619 (1993).

⁷ *Id.*

⁸ *Levi Drew, Jr.*, 52 ECAB 442, 444 (2001).

of the Office's regulations provide that a copy of the decision shall be mailed to a designated representative but that notice to either the claimant or the representative is considered notification to both.⁹ Section 10.700 of the Office's regulations allows a claimant to appoint one individual to represent her interests but require that the appointment be made in writing.¹⁰ At the time of the March 18, 2002 decision, neither appellant nor Mr. Gonzalez had provided the Office with written notice of his designation as her representative.¹¹ As Mr. Gonzalez was not designated as appellant's representative at the time of the decision, he was not entitled to receive a copy of the decision.¹² As neither appellant nor her duly authorized representative requested an oral hearing within 30 days of the March 18, 2002 decision, the Office properly denied appellant's hearing as a matter of right.

In addition to the failure of appellant and her representative to make a timely request for an oral hearing, the Act and the regulations do not provide for an oral hearing following a reconsideration request and decision under section 8128(a) of the Act.¹³ Thus as noted in the December 18, 2003 decision of the Branch of Hearings and Review, appellant must request a hearing within the provided time limitation before she requests reconsideration or she is not entitled to a hearing as a matter of right. In this case, appellant requested reconsideration, and a decision was issued prior to her filing a request for a hearing. Therefore, appellant was not entitled to a hearing as a matter of right.

After determining that appellant was not entitled to a hearing as a matter of right, the Branch of Hearings and Review 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 denying appellant's request for a hearing as she had other review options available.

CONCLUSION

The Board finds that appellant was not entitled to an oral hearing as her request was not timely and as it followed a reconsideration request and resulting Office decision. Furthermore, the Branch of Hearings and Review properly exercised its discretion and determined that appellant could pursue her case through the reconsideration process.

⁹ 20 C.F.R. § 10.127.

¹⁰ 20 C.F.R. § 10.700(a).

¹¹ As noted previously, the record does not indicate that appellant rescinded the appointment of Mr. Taylor as her representative after reinstating him on June 1, 2000.

¹² *Nancy Marcano*, 50 ECAB 110, 113 (1998).

¹³ 5 U.S.C. § 8124(b)(1); *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

ORDER

IT IS HEREBY ORDERED THAT the December 18 and April 11, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 10, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member