

FACTUAL HISTORY

This case has previously been on appeal twice before the Board. In an October 9, 2002 decision, the Board affirmed the Office's February 16, 2002 decision which found that appellant failed to establish that he sustained an injury while in the performance of duty.¹ In an October 21, 2003 decision, the Board found that his April 18, 2003 request for reconsideration was timely filed and remanded the case to the Office for consideration of appellant's request under the appropriate standard for evaluating timely requests for reconsideration.² The facts and circumstances up to this point are contained in the Board's prior decisions and are hereby incorporated by reference.

A brief review of the procedural history of the case is as follows. By decision dated February 16, 2002, the Office found the evidence of record insufficient to establish that appellant sustained an injury while in the performance of duty, which the Board affirmed on October 9, 2002.³ Following the Board's October 9, 2002 decision, appellant, in an April 18, 2003 letter, requested reconsideration before the Office. On June 20, 2003 the Office denied his request on the grounds that it was not timely filed and failed to present clear evidence of error.

After the Board's October 21, 2003 decision remanding the case to the Office for consideration of appellant's timely request for reconsideration, the Office issued a November 10, 2003 decision denying his request for modification of its February 16, 2002 decision. The Office found the evidence of record insufficient to establish a causal relationship between his claimed injury and factors of his federal employment. Appellant requested an oral hearing before an Office hearing representative.⁴

By decision dated June 17, 2005, the Office's Branch of Hearings and Review denied appellant's request for a hearing on the grounds that he was not entitled to a hearing as a matter of right as he had previously requested reconsideration pursuant to 5 U.S.C. § 8128 and the Office had issued a November 10, 2003 decision in response. The Office further found that the issue could be resolved equally well by a request for reconsideration and the submission of new evidence establishing that he sustained an injury while in the performance of duty.

¹ Docket No. 02-1287 (issued October 9, 2002).

² Docket No. 03-1797 (issued October 21, 2003). On November 6, 2001 appellant, then a 54-year-old mail processor, filed an occupational disease claim alleging that he suffered from degenerative arthritis and a pinched nerve in his neck, right shoulder and arm.

³ See *supra* note 1.

⁴ The Board notes that appellant's request for a hearing is not contained in the case record.

LEGAL PRECEDENT

Section 8124(b)(1) of the Act provides that, before review under section 8128(a), a claimant not satisfied with a decision of the Secretary of Labor is entitled, on a request made within 30 days after the date of issuance of the decision, to a hearing on his claim.⁵

The claimant can choose between two formats: an oral hearing or a review of the written record.⁶ The requirements are the same for either choice.⁷ The Board has held that section 8124(b)(1), is unequivocal in setting forth the time limitation for requesting hearings or reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by the postmark or other carrier's date marking⁸ and before the claimant has requested reconsideration.⁹ However, when the request is not timely filed or when reconsideration has previously been requested, the Office may within its discretion, grant a hearing or review of the written record and must exercise this discretion.¹⁰

ANALYSIS

The Office issued a February 16, 2002 merit decision, finding that appellant did not sustain an injury while in the performance of duty. He appealed to the Board which issued a decision on October 9, 2002 affirming the Office's decision. Appellant then requested reconsideration of the Board's decision. The Office declined to reopen his claim for consideration of the merits, by decision dated June 20, 2003, on the grounds that his request was not timely filed and failed to present clear evidence of error. Appellant again appealed to the Board. In an October 21, 2003 decision, the Board found that his reconsideration request was timely filed and remanded the case to the Office for consideration of his request. The Office reviewed the merits of his claim and issued a decision on November 10, 2003 which denied modification of the February 16, 2002 decision. As appellant has previously requested reconsideration of the February 16 and October 9, 2002 merit decisions covering the same issue, the Board finds that he is not entitled to an oral hearing as a matter of right.

The Board further finds that the Branch of Hearings and Review properly exercised its discretion in determining that appellant's claim could be pursued through the reconsideration process. 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 deductions from known facts.¹¹ As

⁵ 5 U.S.C. §§ 8101-8193, § 8124(b)(1).

⁶ 20 C.F.R. § 10.615.

⁷ *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

⁸ 20 C.F.R. § 10.616(a); *Tammy J. Kenow*, 44 ECAB 619 (1993).

⁹ *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

¹⁰ *Id.*

¹¹ *Daniel J. Perea*, 42 ECAB 214 (1990).

appellant was not entitled to an oral hearing as a matter of right and as the Office's Branch of Hearings and Review properly exercised its discretion in denying his request for an oral hearing, the Board finds that the Office properly denied appellant's request for an oral hearing.

CONCLUSION

The Board finds that the Office's Branch of Hearings and Review properly denied appellant's request for a hearing on the grounds that he had already obtained reconsideration of his claim under section 8128 of the Act, on the issue of whether he sustained an injury while in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 16, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board