

as an aggravation of her work-related injuries. Appellant underwent treatment with Dr. Vance J. Bray, a Board-certified orthopedic surgeon.

On February 11, 2002 the Office accepted bilateral medial and lateral epicondylitis and thumb tendinitis. The Office noted that it did not accept fibromyalgia as a work-related injury.

On July 23, 2002 Dr. Bray referred appellant to Dr. Scott J. Primack, a physiatrist, for treatment. In a report dated August 21, 2002, he addressed her history of injury, provided a complete physical examination and reported findings. Dr. Primack stated that appellant may have sustained flexor tendinitis and ordered an electromyogram (EMG) evaluation and nerve conduction studies (NCS) to rule out carpal tunnel syndrome. He also referred her to a pain psychologist as her “pain issues are overwhelming her ability to function.” In a work capacity evaluation dated August 21, 2002, Dr. Primack stated that appellant was able to work an eight-hour day with a restriction against stamping. He advised that she had not reached maximum medical improvement. Dr. Primack submitted additional reports noting her status.

On December 16, 2002 appellant requested that the Office authorize a change in her attending physician. She argued that Dr. Primack had not read her medical records and that he had forcefully manipulated her during examination.

On December 27, 2002 the Office denied appellant’s request to change attending physicians. The Office advised her that she could be treated by another physician at her own expense and that after receipt of a doctor’s report, it would reconsider her request to change attending physicians.

In an April 22, 2003 letter, appellant reiterated her request to change physicians.

By decision dated April 29, 2003, the Office denied her request on the grounds that she had not provided sufficient reasons to warrant a change. The Office noted that appellant was under the care of a qualified specialist and that it appeared her treatment was appropriate. The Office provided a copy of her appeal rights.

In a letter dated April 14, 2004 and received May 4, 2004, appellant requested an oral hearing before the Office.¹ The letter was postmarked on April 19, 2004.

On October 5, 2004 the Office denied appellant’s hearing request on the grounds it was untimely filed. The date of the decision that she requested review was April 29, 2003 and that the postmarked date of her request was April 19, 2004, more than 30 days after the date of the April 29, 2003 decision. The Office further considered the matter and found that the issue she raised could be equally well addressed by pursuing reconsideration before the district Office.

¹ Appellant sent her request for an oral hearing before the Office to the Board. The Board forwarded her letter to the Office’s Branch of Hearings and Review.

LEGAL PRECEDENT

Section 8124(b)(1) of the Federal Employees' Compensation Act,² 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 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.³

The Office's regulations provide that a hearing request sent more than 30 days after the decision is subject to the Office's discretion.⁴ The Board has held that the Office must exercise this discretion when a hearing request is untimely.⁵

ANALYSIS

In the present case, appellant requested an oral hearing in an April 14, 2004 letter, that was postmarked on April 19, 2004. Section 10.616 of the federal regulation provides: "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."⁶ As appellant's hearing request was postmarked more than 30 days after issuance of the April 29, 2003 decision, her request for an oral hearing was untimely filed. Therefore, the Office properly found that she was not entitled to an oral hearing as a matter of right. Appellant's request for a hearing was not made within 30 days of the April 29, 2003 decision.

The Office has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing as a matter of right. The Office properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant's request for an oral hearing on the basis that the case could be pursued by the submission of additional evidence regarding her request to change her attending physician on reconsideration before the district Office.

The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is shown generally through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable

² 5 U.S.C. § 8124 (b)(1).

³ *Joseph R. Giallanza*, 55 ECAB ____ (Docket No. 03-2024, issued December 23, 2003).

⁴ *Id.*; see 20 C.F.R. § 10.616.

⁵ 20 C.F.R. § 10.616(b).

⁶ 20 C.F.R. § 10.616.

deduction from established facts.⁷ In the present case, the evidence of record establishes that the Office did not abuse its discretion in denying appellant's request for an oral hearing. For these reasons, the Office properly denied her request for an oral hearing under section 8124 of the Act.

CONCLUSION

The Board finds that the Office properly denied appellant's request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2004 decision of the Office of Workers' Compensation Programs is affirmed.⁸

Issued: December 14, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

⁷ *Samuel R. Johnson*, 51 ECAB 612 (2000).

⁸ The Board notes that the case record contains evidence which was submitted subsequent to the Office's October 5, 2004 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).