

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

FLORENTINO S. TORRALBA, Appellant

and

**DEPARTMENT OF THE NAVY, SUBIC BAY,
The Philippines, Employer**

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**Docket No. 04-1938
Issued: January 19, 2005**

Appearances:
Florentino S. Torralba, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 29, 2004 appellant filed an appeal of an August 8, 2003 decision in which the Office of Workers' Compensation Programs denied his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the August 8, 2003 decision denying appellant's hearing request. Because more than one year has elapsed between the last merit decision of the Office dated July 8, 2003 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether the Office properly denied appellant's request for a hearing.

FACTUAL HISTORY

On January 7, 1999 the Office accepted that appellant, then a 73-year-old retired marine machinist, sustained employment-related chronic obstructive pulmonary disease.¹ On September 10, 1999 he filed a schedule award claim and submitted medical evidence. On February 7, 2002 the Office referred appellant, together with the medical record, a statement of accepted facts and a set of questions, to Dr. Mark Yamanaka, Board-certified in internal medicine and pulmonary disease, who submitted a March 7, 2002 report in which he found that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had a Class II or a 10 to 25 percent whole person impairment.

In an April 9, 2002 report, an Office medical consultant advised that appellant had no respiratory condition causally related to his employment or impairment under the A.M.A., *Guides*. Appellant was then referred back to Dr. Yamanaka who, in a June 6, 2002 report, diagnosed asthma and reiterated that appellant had a Class II pulmonary impairment. He recommended a high resolution computerized tomography (CT) scan of the lungs to further delineate appellant's diagnosis. In a June 11, 2002 work capacity evaluation, Dr. Yamanaka advised that appellant could work eight hours per day with limitations. By report dated August 12, 2002, he advised that, if appellant's pulmonary condition was employment related, he was entitled to a 25 percent whole person impairment.

On September 24, 2002 the Office informed appellant that, upon the recommendation of Dr. Yamanaka, he was being referred for a high resolution CT scan with contrast. By report dated October 4, 2002, Dr. Yamanaka advised that there were no objective findings to establish that appellant's current pulmonary condition was causally related to his employment.

In a decision dated March 6, 2003, the Office denied appellant's claim for a schedule award.

On May 20, 2003 appellant requested reconsideration. In a decision dated July 8, 2003, the Office denied modification of the March 6, 2003 decision. By letter received July 16, 2003, appellant requested a hearing.

By decision dated August 8, 2003, an Office hearing representative denied appellant's request for a hearing finding that, as appellant had previously requested reconsideration, he was not entitled to a hearing as a matter of right. The request was further denied on the grounds that the issue in the case could be fully addressed by requesting reconsideration with the Office.

¹ Appellant's initial claim form is not contained in the case record before the Board. In a March 6, 1997 decision, his claim was initially denied on the grounds that he was not a civil employee. Following appellant's request for a review of the written record, in a May 8, 1997 decision, an Office hearing representative found that appellant was a civil employee and remanded the case for further development. On January 7, 1999 the Office accepted that he sustained employment-related chronic obstructive pulmonary disease.

LEGAL PRECEDENT

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.² The Board has held that the Office, in its broad discretionary authority in the administration of the Federal Employees' Compensation Act,³ 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.⁴ 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.⁵

ANALYSIS

In this case, the Office denied appellant's request for a hearing on the grounds that he had previously requested reconsideration with the Office. In the August 8, 2003 decision, the Office properly found that appellant was not, as a matter of right, entitled to a hearing since he had previously requested reconsideration. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue of whether he sustained a permanent impairment to the lungs could be addressed through a reconsideration application.

While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office, in its August 8, 2003 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue in this case could be addressed through a reconsideration application. 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.⁶ 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 request which could be found to be an abuse of discretion.

² *Claudio Vazquez*, 52 ECAB 496 (2001).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

⁵ *Claudio Vazquez*, *supra* note 2.

⁶ *See Claudio Vazquez*, *supra* note 2; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing.⁷

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 8, 2003 be affirmed.

Issued: January 19, 2005
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ The record contains a CT scan with contrast and medical reports dated December 1 and 2, 2003. However, the Board cannot consider this evidence as its review is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).