

hearing. The Board further found that it did not have jurisdiction to review the last merit decision of record, an August 7, 1997 Office decision, which denied appellant's claim for compensation on the grounds that the medical evidence was insufficient.¹ In the second appeal, the Board found that the Office in its January 4, 2002 decision properly found that appellant's June 11, 2000 request for reconsideration was untimely filed and did not establish clear evidence of error.² In the third appeal, the Board found that the Office in its November 25, 2005 decision properly found that appellant's February 18, 2005 request for reconsideration of an August 7, 1997 merit decision was untimely. However, as the Office did not address appellant's evidence and argument that he had timely filed a request for a hearing on August 21, 1997, the Board remanded the case for the Office to review this argument and evidence and to issue an appropriate decision. The Office was directed to conduct a merit review if it denied appellant's request for a hearing.³ The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

By decision dated September 29, 2006, the Office advised that it was unable to confirm that a request for a hearing was made within 30 days of the Office's last merit decision of August 7, 1997.⁴ It denied appellant's claim for compensation on the grounds that there was no well-rationalized medical opinion from a qualified physician which established a causal relationship between the diagnosed medical condition and appellant's official duties.⁵

In an October 10, 2006 letter, appellant disagreed with the Office's September 29, 2006 decision and requested an oral hearing. He argued that the August 21, 1997 letter from attorney Nelson Cameron was a timely request for an oral hearing of the Office's last merit decision of August 7, 1997 and the Office abused its discretion in its September 29, 2006 decision. Copies of previous Office decisions and correspondence were submitted along with a list entitled "Clear Evidence of Errors."

By decision dated November 20, 2006, the Office denied appellant's request for a hearing as reconsideration had previously been requested under section 8128 and the Office had issued its reconsideration decision on September 29, 2006. Appellant was informed that his case had been considered in relation to the issue involved and that the request was further denied for the reason that the issue in this case could be addressed by requesting reconsideration from the Office and submitting evidence not previously considered which establishes that a timely request for an oral hearing was filed in 1997.

¹ Docket No. 99-602 (issued May 11, 2000).

² Docket No. 02-695 (issued June 18, 2003).

³ Docket No. 06-767 (issued September 11, 2006).

⁴ It noted that appellant's August 21, 1998 letter entitled "Request for Appeal and Oral Hearing and Reconsideration" was "date-stamped" received in the Office on August 13, 1998.

⁵ It noted that appellant's reaction to the identified work factor, the "messes" on the dock he would find when coming on shift to begin his workday, would ordinarily be considered self-generated.

An oral argument before the Board was held in the above matter on May 23, 2007, during which appellant argued that he timely filed his request for an oral hearing in August 1997 and the Office abused its discretion in its September 29 and November 20, 2006 decisions.

LEGAL PRECEDENT -- ISSUES 1 & 2

Section 8124(b)(1) of the Federal Employees' Compensation Act⁶ provides that before review under section 8128(a), a claimant for compensation not satisfied with a decision of the Secretary 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.⁷ Section 10.615 of the federal regulation implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.⁸ The Office's regulation provides that the request must be sent within 30 days of the date of the decision, for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.⁹ 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.¹⁰

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.¹¹ 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.¹²

ANALYSIS

In this case, appellant requested a hearing on October 10, 2006. In its November 20, 2006 decision, the Office denied this request on the grounds that he had previously requested reconsideration under section 8128. The record shows that the Office's September 29, 2006 decision was based on appellant's February 18, 2005 reconsideration request, which the Board in its September 11, 2006 decision, had remanded to the Office for issuance of an appropriate decision. As previously noted, a claimant is not entitled to a hearing or a review of the written

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 5 U.S.C. § 8124(b)(1).

⁸ 20 C.F.R. § 10.615; *Gerard F. Workinger*, 56 ECAB ____ (Docket No. 04-1028, issued January 18, 2005).

⁹ 20 C.F.R. § 10.616(a).

¹⁰ *Claudio Vazquez*, 52 ECAB 496 (2001).

¹¹ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹² *Teresa M. Valle*, 57 ECAB ____ (Docket No. 06-438, issued April 19, 2006); *Claudio Vazquez*, *supra* note 10; see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

record as a matter of right if the request is made after a reconsideration request.¹³ As appellant had previously requested reconsideration, the Office properly found that he was not entitled to a hearing as a matter of right.¹⁴

The Office also has the discretionary power to grant a request for a hearing when a claimant is not entitled to such as a matter of right. In the November 20, 2006 decision, 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 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.¹⁵ 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 request for a hearing which could be found to be an abuse of discretion. Here, the Office informed appellant in its November 20, 2006 decision, that it had considered the matter in relation to the issue involved and denied his hearing request on the basis that appellant could further pursue the matter through the reconsideration process. There is no indication that the Office abused its discretion in this case in denying appellant's hearing request. Further, appellant was advised that he could request reconsideration and submit evidence in support of his argument that he had timely filed a request for an oral hearing in 1997. Thus, the Board finds that the Office properly denied appellant's request for a hearing in its November 20, 2006 decision.

Regarding the Office's September 29, 2006 decision, the Office analyzed the evidence to determine whether appellant had established his cerebral vascular accident on January 13, 1997 was caused or aggravated by his federal employment. The Board notes that, upon examining the case record, the case is not in posture for a decision on the merit issue at this time. The Board finds that the Office did not follow the instructions issued by this Board in its September 11, 2006 decision with respect to consideration of evidence with regard to whether appellant timely filed a request for a hearing on August 21, 1997 of the Office's August 7, 1997 merit decision. The statutory right to a hearing under section 8124(b)(1) follows an initial final decision of the Office.¹⁶ In this case, the record contains evidence and argument regarding appellant's request for an oral hearing on August 21, 1997 following the Office's August 7, 1997 initial merit decision. This consists of an August 21, 1997 letter from appellant's attorney, an affidavit from the attorney's secretary and a copy of the daily mail log, which are found on pages 1024-26, 1022-23, 960-65 of the record. The Office's September 29, 2006 decision after remand did not specifically address this evidence. The Board notes that a claimant who has received a final adverse decision by the Office may obtain a hearing by writing to the address specified in the

¹³ *Claudio Vazquez*, *supra* note 10.

¹⁴ Moreover, the record shows that, with its September 29, 2006 decision, the Office included a copy of appellant's appeal rights, which clearly made no mention of a hearing.

¹⁵ *See Daniel J. Perea*, 42 ECAB 214 (1990).

¹⁶ *Patricia G. Aiken*, 57 ECAB ____ (Docket No. 06-75, issued February 17, 2006).

decision within 30 days of the date of the decision, for which a hearing is sought.¹⁷ The Office's procedure manual provides for a preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and, if not, whether a discretionary hearing should be granted; if the Office declines to grant a discretionary hearing, the claimant will be advised of the reasons.¹⁸ In this case, the record shows that appellant submitted evidence and argument pertaining to an August 21, 1997 request for an oral hearing and no preliminary review by an Office hearing representative was conducted to determine whether the hearing request was timely filed. Thus, the Office failed to follow its own procedures and there remains an outstanding request for an oral hearing that must be considered.

Consequently, on remand, the Office's Branch of Hearings and Reviews should review appellant's evidence and argument pertaining to an August 21, 1997 request for an oral hearing and determine whether he had timely requested a hearing of the Office's August 7, 1997 decision and issue an appropriate decision.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing in its November 20, 2006 decision. The Board further finds that the case is not in posture for a decision on the merits of this case as the Office's Branch of Hearings and Review did not address appellant's evidence and argument that he had timely filed a request for a hearing on August 21, 1997. Accordingly, the Board will remand the case for the Office to review this argument and evidence and to undertake any appropriate additional development it deems necessary.

¹⁷ 20 C.F.R. § 10.616(a).

¹⁸ *Belinda J. Lewis*, 43 ECAB 552, 558 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

ORDER

IT IS HEREBY ORDERED THAT the November 20, 2006 decision of the Office of Workers' Compensation Programs is affirmed. The September 29, 2006 decision of the Office is set aside and the case remanded to the Office for further proceedings consistent with this opinion of the Board.

Issued: June 18, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board