United States Department of Labor
Employees' Compensation Appeals Board

TERESITA SIMMONS, Appellant	)	
and	)	**Docket No. 04-2137**
	)	**Issued: February 10, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer	)	

Appearances:
Alan J. Shapiro, 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
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 1, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated August 6, 2004, which denied her request for an oral hearing on the grounds that she had previously requested and received an oral hearing. Because more than one year has elapsed between the last merit decision of the hearing representative dated June 4, 2003, denying appellant's claim for a schedule award, and the filing of this appeal, the Board's jurisdiction is limited to review of the August 6, 2004 nonmerit decision pursuant to 20 C.F.R. §§ 501.2 and 501.3.

ISSUE

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

FACTUAL HISTORY

On July 9, 1999 appellant, a 38-year-old clerk, filed an occupational disease claim alleging that on July 2, 1999 she first realized her repetitive employment duties of casing mail

caused her back and knee problems.[1] The Office accepted the claim for cervical, lumbar and bilateral knee strains.

Appellant filed a claim for a schedule award on April 11, 2002.

In a report dated August 2, 2002, Dr. Sheldon Kaffen, a second opinion Board-certified orthopedic surgeon, concluded that appellant had a zero percent impairment of her upper extremities and a zero percent impairment of her lower extremities. A physical examination revealed full range of motion in the lumbar and cervical spine and bilaterally in the knees.

By decision dated August 16, 2002, the Office denied her claim for a schedule award based upon Dr. Kaffen's opinion that appellant had no residuals due to her accepted employment injuries.

In a letter dated August 29, 2002, appellant's counsel requested an oral hearing before an Office hearing representative. A hearing was held on March 24, 2003 at which appellant was represented by counsel and provided testimony.

On June 14, 2004 the Office received a claim for a schedule award dated April 1, 2001.

In a decision dated June 4, 2003, an Office hearing representative affirmed the denial of appellant's claim for a schedule award. In reaching this conclusion, the Office hearing representative relied upon the opinion of Dr. Kaffen, a second opinion Board-certified orthopedic surgeon, to find the medical evidence was insufficient to establish that appellant had a permanent impairment of a scheduled member.

On June 24, 2004 the Office noted receipt of appellant's claim for a schedule award and determined it to be a duplicate claim for a schedule award. The Office informed appellant that she had previously filed a claim for a schedule award on April 11, 2002, which had been denied by decision dated August 16, 2002 and affirmed by an Office hearing representative on June 4, 2003.

In a letter dated July 4, 2004, appellant requested an oral hearing on a June 24, 2004 Office letter.

By decision dated August 6, 2004, the Office considered appellant's request for a second oral hearing, noting that she was not entitled by right to a second hearing or a review of the written record as she had previously had an oral hearing on the same issue, *i.e.*, entitlement to a schedule award, and the hearing representative had issued a June 24, 2003 decision affirming the denial of the schedule award. The Office further denied the request on the grounds that the issue in the case could equally well be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered which established that she sustained an injury as alleged.

[1] This was assigned claim number 09-0455377. The Board notes that appellant also filed an occupational disease claim on August 6, 1999 alleging that on July 22, 1999 she realized her neck condition was due to the repetitive motion involved in her employment. This was assigned claim number 09-0456097 and the Office accepted the claim for neck strain.

LEGAL PRECEDENT

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing, states: "Before review under section 8128(a) of this title, a claimant for compensation 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 [her] claim before a representative of the Secretary."[2]

The Office regulations at section 10.616(a) provide that a claimant, injured on or after July 4, 1966, who has received a final adverse decision by the Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by the postmark or other carrier's date marking) of the date of the decision for which a hearing is sought. The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[3]

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 the Office must exercise this discretionary authority in deciding whether to grant a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[4] Moreover, the Board has held that the Office has discretion to grant or deny a hearing when the request is made for a second hearing on the same issue.[5]

ANALYSIS

In the present case, the Office properly determined in its August 6, 2004 decision that appellant was not entitled to a hearing as a matter of right since appellant had previously requested an oral hearing from the August 16, 2002 schedule award denial and an Office hearing representative had issued a June 4, 2003 decision affirming the denial. In her request for an oral hearing, appellant's counsel referenced the Office's June 24, 2004 letter as the decision he was requesting an oral hearing on. The Board finds that the June 24, 2004 letter from the Office was not a decision as it contained no findings of fact and statement of reasons, no appeal rights accompanied it[6] and the letter was to inform appellant that she had previously filed a duplicate request for a schedule award which had previously been considered and denied by the Office and by one of its hearing representatives. Thus, the Board finds that the Office properly found appellant was not entitled to a hearing as a matter of right.

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[2] 5 U.S.C. § 8124(b)(1).

[3] 20 C.F.R. § 10.616(a) (1999); *Brenton A. Burbank*, 53 ECAB ___ (Docket No. 00-2017, issued January 3, 2002).

[4] *Sandra F. Powell*, 45 ECAB 877 (1994).

[5] *See generally André Thyratron*, 54 ECAB ___ (Docket No. 02-1833, issued December 20, 2002).

[6] *See* 20 C.F.R. § 10.126.

Regarding the Office's discretionary authority, the Office considered her request in relation to the issue involved and the hearing was denied on the basis that she could have the issue further addressed by submitting evidence on reconsideration. 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.[7] There is no evidence that the Office abused its discretion in denying appellant's request for a hearing under these circumstances. Thus, the Board finds that the Office acted properly in denying appellant's July 4, 2004 request for a second hearing.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 6, 2004 is affirmed.

Issued: February 10, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] *Id.; see also Daniel J. Perea*, 42 ECAB 214 (1990).