

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

DEBORAH L. WALUS, Appellant

and

**DEPARTMENT OF THE AIR FORCE,
SELFRIDGE AIR NATIONAL GUARD BASE,
Mount Clemens, MI, Employer**

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**Docket No. 04-366
Issued: November 28, 2005**

Appearances:
Deborah L. Walus, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 24, 2003 appellant timely filed an appeal from a September 26, 2003 decision by the Office of Workers' Compensation Programs which denied her request for a hearing before an Office hearing representative on the grounds that she had previously requested reconsideration. The Board does not have jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

On November 20, 1998 appellant, then a 46-year-old secretary, filed a claim for an occupational injury. She stated that on November 16, 1998 the janitorial staff at the employing establishment used a cleaning solution, which included a product known as nillium, outside her office.

In an August 31, 1999 letter, the Office accepted appellant's claim for allergic rhinitis and asthma due to exposure to fumes or vapors on the job.

On July 19, 2001 appellant filed a claim for a reaction to fumes. She stated that, on July 18, 2001, a coworker came into her office wearing an overpowering cologne. Appellant had a reaction to the odor with difficulty breathing and a light-headed feeling.

In an October 1, 2001 decision, the Office denied appellant's claim for compensation on the grounds that the evidence was insufficient to establish that she sustained an injury on that date.

In a January 29, 2002 letter, the Office accepted appellant's claim for temporary aggravation of rhinitis.

In a May 21, 2002 letter,¹ appellant requested reconsideration. She submitted numerous medical reports and test results in support of her request.

In an August 21, 2002 decision, the Office denied the request for modification on the grounds that causal relationship between the July 18, 2001 incident and his employment had not been established.

In a July 28, 2003 letter, appellant requested a hearing before an Office hearing representative for the July 18, 2001 incident and the January 29, 2002 letter which had accepted her claim for a temporary aggravation of rhinitis. In a September 26, 2003 decision, the Office denied appellant's request for a hearing on the grounds that she had previously requested and received reconsideration. The Office considered appellant's request at its own discretion and concluded that the issue in the case could be equally well addressed by appellant requesting reconsideration and submitting evidence not previously considered.

LEGAL PRECEDENT

Section 8124(b) (1) of the Federal Employees' Compensation Act² dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "[b]efore 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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary." The Board has noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings..."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. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request

¹ The letter was dated May 21, 2001 but made reference to the January 29, 2002 letter from the Office. The Board assumes that appellant intended to date the letter as May 21, 2002.

² 5 U.S.C. § 8124(b)(1).

³ *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing; when the request is made after the 30-day period established for requesting a hearing; or when the request is for a second hearing on the same issue. 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. 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 established facts.⁴

ANALYSIS

The only issue before the Board is whether the Office abused its discretion in denying appellant's request for a hearing.⁵ The Act specifically requires that any request for a hearing must be made within 30 days of the Office's decision and must be made before the claimant requests reconsideration of the Office's decision. Appellant, in this case, received an October 1, 2001 decision and requested reconsideration on May 21, 2002. The Office issued a decision modifying its October 1, 2001 decision on August 12, 2002 but still denied appellant's claim for compensation. Appellant then requested a hearing before an Office hearing representative, after she had requested and received reconsideration of the October 1, 2001 decision. Appellant, therefore, did not have a right to a hearing as she requested in her July 28, 2003 letter. The Office still has the discretion to grant a hearing even if appellant has no right to a hearing under the Act. In this case, the Office exercised its discretion and found that appellant could seek further review by submitting a request for reconsideration and submitting new medical evidence that her reaction to the July 18, 2001 exposure to a coworker's perfume was causally related to her employment. There is no evidence that the Office abused its discretion.

CONCLUSION

Appellant was not entitled to a hearing before an Office hearing representative because she had requested reconsideration prior to her request for a hearing. The Office did not abuse its discretion in denying appellant's request for a hearing.

⁴ *Cleo R. Hatch*, 49 ECAB 636 (1998).

⁵ Appellant has contended that her respiratory condition is a permanent result of her exposure to fumes at work, not a temporary aggravation. The Office has not issued a final decision on this part of appellant's claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs, dated September 26, 2003, is affirmed.

Issued: November 28, 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