

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TONY KITTREDGE and U.S. POSTAL SERVICE,  
GENERAL MAIL FACILITY, Denver, CO

*Docket No. 97-2141; Submitted on the Record;  
Issued August 12, 1999*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs' denial of appellant's request for a hearing pursuant to 8124 constituted an abuse of discretion; and (2) whether the Office properly denied appellant's request for a schedule award.

On July 19, 1991 appellant, then a 32-year-old clerk, sustained an injury to his left knee while in the performance of duty. The Office accepted appellant's claim for left torn meniscus and subsequently approved arthroscopic surgery on appellant's left knee. On January 23, 1993 appellant returned to work in a limited-duty position working part-time. Appellant remained at work in a limited-duty position with a modified work schedule until he stopped work on March 22, 1995. By letter dated August 1, 1995, the employing establishment offered appellant a limited-duty position with restrictions as outlined by his treating physician. In a letter dated September 6, 1995, the Office advised appellant that this position was within his physical requirements and was suitable and he had 15 days to accept the position or the penalty provision of section 8106(c) would be invoked due to failure to accept suitable employment without reasonable cause. By decision dated September 25, 1995, the Office terminated appellant's compensation on the grounds that he refused an offer of suitable work. On January 27, 1997 appellant accepted a limited-duty position with the employing establishment and returned to work. On March 25, 1997 appellant filed a claim for a schedule award in relation to his previously accepted employment injury. In a decision dated March 27, 1997, the Office denied appellant's claim for a schedule award on the grounds that invocation of the section 8106(c) penalty provision barred any further compensation, including schedule awards. By letter dated April 26, 1997, appellant requested an oral hearing before an Office hearing representative concerning his claim for a schedule award. In a decision dated May 28, 1997, the Chief of the Branch of Hearings and Review denied appellant's request for a hearing on the grounds that it was untimely as the last merit decision that was issued was dated September 25, 1995.

The Board has duly reviewed the entire case record on appeal and finds that the Office improperly denied appellant's request for a hearing as untimely filed.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that a "claimant for compensation not satisfied with the 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."<sup>1</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitations for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>2</sup>

The letter decision of the Office issued on March 27, 1997 which denied appellant's claim for a schedule award was a merit decision in relation to the schedule award issue. Consequently, the Office erred in finding appellant had 30 days to file a request for a hearing from the September 25, 1995 decision, finding appellant refused an offer of suitable work, rather than the last merit decision on the subject at issue dated March 27, 1997. Therefore, appellant had 30 days from the March 27, 1997 decision to request a hearing pursuant to section 8124 as a matter of right.

In computing the time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, Sunday or a legal holiday.<sup>3</sup> Thus, in calculating the 30-day period during which appellant would be entitled to a hearing as a matter of right, March 28, 1997 is the first day of the time period and the 30<sup>th</sup> day of the required time period is April 26, 1997 which fell on a Saturday. Accordingly, the time period for requesting a hearing is extended to Monday, April 28, 1997. Appellant requested an oral hearing in a letter dated April 26, 1997. Pursuant to section 10.131 of the implementing regulations, the postmark of the letter determines whether the request was made within the 30-day time period.<sup>4</sup> The envelope for appellant's April 26, 1997 letter was not retained in the case record. Nonetheless, the Office acknowledged receipt of this letter on April 26, 1997. According, appellant's request for a hearing was timely as it was received before Monday, April 28, 1997, the new date by which his request had to be received to be deemed timely. As appellant filed a timely request for a hearing pursuant to section 8124, he is entitled to a hearing as a matter of right and the case must be remanded for this reason. In addition, in view of the disposition of the first issue, it is premature for the Board to address the second issue which concerns the merits of this case.

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<sup>1</sup> 5 U.S.C. § 8124(b)(1).

<sup>2</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

<sup>3</sup> *John B. Montoya*, 43 ECAB 1148 (1992).

<sup>4</sup> 20 C.F.R. § 10.131(a).

The decision of the Office of Workers' Compensation Programs dated May 28, 1997 is hereby reversed and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.  
August 12, 1999

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member