

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

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**DENISE R. DANOWSKI, Appellant**

**and**

**U.S. POSTAL SERVICE, BAYVIEW POST  
OFFICE, Milwaukee, WI, Employer**

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**Docket No. 04-1480  
Issued: January 5, 2005**

*Appearances:*  
*Denise R. Danowski, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On May 5, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated December 11, 2003, denying her schedule award claim and a February 17, 2004 decision of the Office, denying her request for an oral hearing on the grounds that it was untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue and denial of the hearing request issue in this case.<sup>1</sup>

**ISSUES**

The issues on appeal are: (1) whether the Office properly denied appellant's request for an oral hearing on the grounds that it was untimely filed; and (2) whether appellant established that she is entitled to a schedule award for permanent impairment of the cervical spine.

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<sup>1</sup> Following issuance of the Office's February 17, 2004 decision, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

## **FACTUAL HISTORY**

The Office accepted that on March 24, 1998 appellant, then a 39-year-old letter carrier, sustained a cervical strain, cervical subluxations and a left wrist contusion in a motor vehicle accident, when her postal van was struck by a car. Following emergency treatment, she was under the care of Dr. Carol Brown, an osteopath, Board-certified in emergency medicine. Beginning January 15, 1999 appellant was treated by Dr. Jerome Lerner, a Board-certified physiatrist, who diagnosed myofascial pain and somatic dysfunction. He submitted chart notes through October 11, 2001 describing her subjective symptoms and diagnosing a chronic cervical sprain.

On February 12, 2002 appellant claimed a schedule award.<sup>2</sup> In an October 18, 2002 report, Dr. Lerner opined that she had reached maximum medical improvement as of October 2001. He stated that, according to page 392, Table 15-5 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had a category two cervical injury, equivalent to a five to eight percent impairment of the whole person.

In a March 7, 2003 letter, received by the Office on March 17, 2003, appellant advised the Office of her change of address from 1418 West Klein Avenue, Milwaukee, Wisconsin 53221 to 1113 West Violet Drive, Oak Creek, Wisconsin, 53154.

By decision dated December 11, 2003, the Office denied appellant's schedule award claim on the grounds that she did not establish a permanent impairment of a scheduled member due to the accepted injuries. The Office explained that Dr. Lerner's reports did not indicate that the accepted cervical spine injuries affected any extremity. The decision was addressed to appellant at "1418 W. Klein Ave., Milwaukee, WI 53221." The record contains a scan of a window envelope bearing the return address of the Office's London, Kentucky central mailing facility, postmarked December 11, 2003 and stamped "not deliverable as addressed unable to forward."

In a letter dated January 12, 2004 and postmarked January 15, 2004, appellant requested an oral hearing before a representative of the Office's Branch of Hearings and Review.

By decision dated February 17, 2004, the Office denied appellant's request for an oral hearing on the grounds that it was untimely filed. The Office found that her letter requesting an oral hearing was postmarked January 15, 2004 more than 30 days after issuance of the December 11, 2003 decision. The Office also denied appellant's request for an oral hearing on the grounds that the issues involved could be addressed equally well through the submission of new and relevant evidence accompanying a valid request for reconsideration.

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<sup>2</sup> Appellant filed a duplicate schedule award claim on September 18, 2002.

## LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of the Federal Employees' Compensation Act,<sup>3</sup> concerning a claimant's entitlement to a hearing before an Office hearing representative states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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 held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.<sup>4</sup> When the Office revised its regulation effective January 4, 1999, the new regulation provided that a hearing was "a review of an adverse decision by a hearing representative" and that a claimant could choose between two formats: an oral hearing or a review of the written record.<sup>5</sup> These regulation also provide that the request for either type of hearing "must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."<sup>6</sup>

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, including when the request is made after the 30-day period for requesting a hearing and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>7</sup> In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.<sup>8</sup>

## ANALYSIS -- ISSUE 1

Pursuant to the Office's December 11, 2003 denial of appellant's schedule award claim, she requested an oral hearing in a letter postmarked January 15, 2004. Section 10.616 of the Act's implementing regulation provides that a request for a review of the written record or an oral hearing "must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision, for which a hearing is sought."<sup>9</sup> Appellant's letter was postmarked more than 30 days after issuance of the December 11, 2003 decision. Thus, in its February 17, 2004 decision, the Office properly found that she was not entitled to an oral hearing

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<sup>3</sup> 5 U.S.C. § 8124(b).

<sup>4</sup> *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

<sup>5</sup> 20 C.F.R. § 10.615.

<sup>6</sup> 20 C.F.R. § 10.616.

<sup>7</sup> *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994).

<sup>8</sup> *Claudio Vasquez*, 52 ECAB 496 (2001); *Johnny S. Henderson*, 34 ECAB 216 (1982).

<sup>9</sup> 20 C.F.R. § 10.616(a).

as a matter of right. Also, the Office properly found that the issue in appellant's case could be addressed equally well by requesting reconsideration and submitting medical evidence.<sup>10</sup>

However, the Board finds that the Office did not properly exercise its discretion in denying appellant a discretionary oral hearing. While she was not entitled to a hearing as a matter of right, a proper exercise of the Office's discretion would have included reasons for not granting appellant a discretionary oral hearing.<sup>11</sup> In its February 17, 2004 decision denying appellant's request for an oral hearing, the Office did not explain why it did not grant her a discretionary oral hearing. This omission is critical in this case as the record indicates that there were grounds for granting a discretionary oral hearing as, due to a mailing error, appellant was not afforded the full 30 days in which to request an oral hearing as provided in section 10.616.<sup>12</sup>

The Office's December 11, 2003 decision was not sent to appellant's correct address of record. The Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual.<sup>13</sup> Under the mailbox rule, evidence of a properly addressed letter together with evidence of proper mailing may be used to establish receipt.<sup>14</sup> As a rule of law, the presumption of receipt under the mailbox rule must apply equally to claimants and the Office alike, provided that the conditions which give rise to the presumption remain the same, namely, evidence of a properly addressed letter together with evidence of proper mailing.<sup>15</sup> Absent evidence of a properly addressed notice, the presumption cannot arise.<sup>16</sup>

The Board finds that the Office overlooked appellant's March 7, 2003 letter advising that her new address was 1113 West Violet Drive, Oak Creek, Wisconsin, 53134. Thus, the December 11, 2003 decision was sent to an incorrect address, 1418 West Klein Avenue, Milwaukee, Wisconsin, 53221. Also, the record contains a copy of an envelope from the Office, postmarked December 11, 2003, stamped "not deliverable as addressed unable to forward." Therefore, as the December 11, 2003 decision was not sent to appellant's correct address of record, the presumption of receipt under the mailbox rule does not arise.<sup>17</sup>

As the December 11, 2003 decision was misaddressed, the record indicates that appellant was not afforded the full 30 days from the date of that decision in which to request an oral

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<sup>10</sup> *Leona B. Jacobs* (Docket No. 04-1429, issued September 30, 2004). See also *Marilyn F. Wilson*, 52 ECAB 347 (2002).

<sup>11</sup> See *Claudio Vasquez*, *supra* note 8.

<sup>12</sup> *Leona B. Jacobs*, *supra* note 10.

<sup>13</sup> *Samuel R. Johnson*, 51 ECAB 612 (2000).

<sup>14</sup> See *Larry L. Hill*, 42 ECAB 596 (1991).

<sup>15</sup> *Id.*

<sup>16</sup> *Newton D. Lashmett*, 45 ECAB 181 (1993); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

<sup>17</sup> See *Clara T. Norga*, 46 ECAB 473 (1995).

hearing, as provided under 5 U.S.C. § 8124(b) and section 10.616 of the Act's implementing regulation. In its February 17, 2004 decision denying appellant's request for an oral hearing, the Office failed to acknowledge the mailing error or that appellant evidently did not have the full 30 days in which to request an oral hearing as a matter of right. The Office did not set forth its reasons for failing to grant a discretionary oral hearing. Thus, as the Office did not properly exercise its discretion, the case must be remanded to the Office for appellant to be given the opportunity for her requested hearing.<sup>18</sup> After such further development as it considers necessary, the Office shall issue an appropriate decision in the case.

### **CONCLUSION**

The Board finds that the Office properly found that appellant was not entitled to a hearing as a matter of right. The Board further finds that the Office did not properly exercise its discretion in denying appellant a discretionary hearing. Thus, the case will be remanded to the Office for a proper exercise of its discretionary authority to grant a hearing where one is not required as a matter of right. Because of the Board's disposition of this issue, it is premature for the Board to address the second issue, which constitutes the merits of the case.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the February 17, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this opinion.

Issued: January 5, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>18</sup> *Leona B. Jacobs, supra* note 10.