

employing establishment controverted the claim as it was not filed within 30 days, the incident did not occur on postal premises and appellant was not a letter carrier.

In letter dated April 29, 2002, the Office advised appellant of the type of additional factual and medical evidence needed to establish her claim. Appellant was given 30 days to submit the requested information.

Subsequent to the letter, the Office received a copy of the police report for the automobile accident, a duty status report dated April 22, 2002 and a March 6, 2002 report by Dr. Graves T. Owen, a treating physician specializing in pain management.

In a letter dated May 22, 2002, appellant requested an extension of time to July 29, 2002 for submission of the evidence requested by the Office. In a letter dated May 28, 2002, the Office received a letter from appellant's attorney requesting information regarding the claim.

In a decision dated May 29, 2002, the Office denied appellant's claim on the grounds that she failed to establish that the injury was sustained while in the course of her employment.

In a letter dated January 14, 2003, appellant's attorney repeated her request to obtain a copy of the evidence received by the Office.

By decision dated January 27, 2003, the Office modified the May 29, 2002 decision. The Office denied appellant's claim on the grounds that the record contained no evidence establishing that the event occurred as alleged and that the record was devoid of any medical evidence diagnosing a medical condition as a result of the claimed event.¹

By letter dated and postmarked February 16, 2005, received by the Office on March 28, 2005, appellant requested an oral hearing before an Office hearing representative. She subsequently submitted medical evidence in further support of her claim.

By decision dated May 3, 2005, the Office Branch of Hearings and Review denied appellant's request for an oral hearing as a matter of right, finding that it was not filed within the requisite 30 days following the January 27, 2003 decision pursuant to section 8124 of the Federal Employees' Compensation Act.² The Branch explained that the Office rendered its decision on January 27, 2003³ and appellant's oral hearing request was postmarked February 16, 2005, more than two years later thereby rendering the request as untimely. Further, the Branch exercised its discretion in considering whether or not to grant appellant an oral hearing and concluded that the issue could be equally well addressed through the reconsideration process.

¹ Following issuance of the Office's January 27, 2003 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); *see Albert S. Becker*, 56 ECAB ___ (Docket No. 04-574, issued September 6, 2005).

² 5 U.S.C. § 8124.

³ The Board notes that the Branch included a date of February 27, 2003 as the date of the Office's decision. The Board concludes that this is a typographical error.

LEGAL PRECEDENT

Section 8124(b)(1) of the Act provides that “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.”⁴ Sections 10.617 and 10.618 of the federal regulations 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 by a representative of the Secretary.⁵ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant’s request and must exercise its discretion.⁶ The Office’s procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

“If the claimant is not entitled to a hearing or review (*i.e.*, the request was untimely, the claim was previously reconsidered, *etc.*), H&R [Hearings and Review] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons.”⁷

ANALYSIS

The Office’s January 27, 2003 decision denied appellant’s traumatic injury claim. She requested an oral hearing on a letter dated and postmarked February 16, 2005. Section 10.616 of the federal regulations 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.⁸ Appellant’s request for an oral hearing was not postmarked until February 16, 2005, significantly more than 30 days after issuance of the January 27, 2003 decision. Thus, appellant’s request for an oral hearing was not timely filed.

As appellant did not request a hearing within 30 days of the January 27, 2003 decision, she is not entitled to a hearing as a matter of right. The Office must then exercise its discretion to determine whether appellant’s request for a review of the written record should be granted. In its May 3, 2005 decision, the Office considered the issue involved and found that appellant could pursue the claim equally well through the reconsideration process. Under these circumstances, the Board finds that the Office properly denied a discretionary hearing on the matter.⁹

⁴ 5 U.S.C. § 8124(b)(1).

⁵ 20 C.F.R. §§ 10.616, 10.617.

⁶ *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4 (b)(3) (October 1992).

⁸ 20 C.F.R. § 10.616(a).

⁹ The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office’s discretion. *E.g.*, *André Thyatron*, 54 ECAB 257 (2002); *Jeff Micono*, 39 ECAB 617 (1988).

CONCLUSION

The Board finds the Office properly denied appellant's February 26, 2005 request for an oral hearing on the grounds that it was untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 3, 2005 is affirmed.

Issued: April 11, 2006
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