

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CAROLYN O'NEAL and DEPARTMENT OF VETERANS AFFAIRS,  
LOS ANGELES REGIONAL OFFICE, Los Angeles, CA

*Docket No. 02-198; Submitted on the Record;  
Issued July 3, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,  
WILLIE T.C. THOMAS

The issues are: (1) whether appellant established that she sustained an injury on February 21, 2001; and (2) whether appellant's request for an oral hearing was untimely.

On February 21, 2001 appellant, then a 57-year-old finance support clerk, filed a notice of traumatic injury alleging that she injured her left knee, left thigh and lower back when she tried to sit down and her chair moved and she fell to the floor. A witness, Rocio Martinez, stated that he heard appellant's crutch fall, heard her call his name and when he went over to appellant's desk she was on her knee. Witness Joan Kennedy stated that she also did not see appellant fall but that she saw her on the floor afterwards on one knee.

Dr. Rama E. Chandran, a Board-certified orthopedic surgeon, diagnosed appellant with left knee sprain, osteoarthritis of the left knee and lumbar spine strain. Dr. Aqdas S. Kuraishi, a Board-certified family practitioner, also diagnosed appellant with left knee pain and back pain.

By decision dated June 22, 2001, the Office of Workers' Compensation Programs denied appellant's claim, finding that the medical evidence of record was insufficient to establish fact of injury.

In an undated letter, appellant requested an oral hearing, which was received by the Office on August 9, 2001.<sup>1</sup> By decision dated September 12, 2001, the Office denied appellant's request for an oral hearing as untimely.

The Board finds that the Office improperly denied appellant's request for a hearing as untimely.

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<sup>1</sup> There is an unclear photocopy of the envelope in the record (the case is imaged) and the Board is unable to determine the date of the postmark.

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu, thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which a hearing is sought.<sup>2</sup> The Office has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>3</sup> In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.<sup>4</sup>

The Office issued its decision in this case on June 22, 2001. In a letter received on August 9, 2001, appellant requested an oral hearing. The record does not contain the envelope itself in which the letter was sent, which would have the postmark. The record does contain a photocopy of the envelope but the date of the postmark is not clear. Under the Office's procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope, which contains the letter requesting a hearing.<sup>5</sup> The Branch of Hearings and Review is required to retain the envelope in which a request for a hearing is made so as to establish the timeliness of the request for a hearing.<sup>6</sup> In this case, the case record does not contain the envelope itself from which the timeliness of the hearing can be determined. The case must therefore be remanded for the Office to determine, if possible, the date that the letter requesting a hearing was postmarked. If the date of the postmark cannot be determined, the Office should presume the request was timely and grant the request for a hearing, as it was the Office's responsibility to keep the envelope or otherwise keep evidence of the date of the delivery in the case record.<sup>7</sup> Regardless of whether the Office grants or denies the hearing request on remand, it should issue a *de novo* decision on the merits in order to protect appellant's appeal rights.<sup>8</sup>

In view of the Board's decision regarding appellant's request for an oral hearing, it is premature for the Board to adjudicate the case on its merits.

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<sup>2</sup> 20 C.F.R. § 10.616(a) (1999).

<sup>3</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>4</sup> *Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 1992).

<sup>6</sup> *Id.* at Chapter 2.1601.3(b).

<sup>7</sup> *Gus N. Rodes*, 43 ECAB 268 (1991).

<sup>8</sup> *Shirley A. Jackson*, 39 ECAB 540, 542 (1988).

The September 12, 2001 decision of the Office of Workers' Compensation Programs is hereby set aside and remanded. The June 22, 2001 decision need not be addressed since the case is remanded for a merit review.

Dated, Washington, DC  
July 3, 2002

Michael J. Walsh  
Chairman

Alec J. Koromilas  
Member

Willie T.C. Thomas  
Alternate Member