

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HARRIETT E. WATTS and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Mountainside, NJ

*Docket No. 02-389; Submitted on the Record;  
Issued July 28, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing.

On December 3, 1997 appellant, then a 66-year-old commercial real estate appraiser and personal property appraiser, filed a traumatic injury claim, alleging that she was injured on May 20, 1997 in a motor vehicle accident.

By letter dated April 14, 1998, appellant's attorney stated that he had received a March 30, 1998 letter from the Office indicating that appellant's claim had been denied. He stated that his April 14, 1998 letter was a "formal response" to the March 30, 1998 letter and he requested that the Office contact him to discuss the matter.<sup>1</sup>

By decision dated April 29, 1998, the Office denied appellant's claim on the grounds that she was not in the performance of duty, when the May 20, 1997 motor vehicle accident occurred. A copy of her appeal rights was included.

By letter dated March 22, 1999, faxed to the Office on May 26, 1999, an attorney stated that his office represented appellant and the letter "was to serve as a formal request to appeal the decision of the Office ... dated April 29, 1998...." The attorney requested reconsideration.<sup>2</sup>

By decision dated June 9, 1999, the Office advised appellant that the March 22, 1999 letter was not a valid request for reconsideration because appellant had not submitted proper

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<sup>1</sup> The record shows that the Office's March 30, 1998 letter was not a final decision but rather a notification that the employing establishment had challenged appellant's claim and a request for additional evidence.

<sup>2</sup> By letter dated April 20, 1999, received by the Office on April 26, 1999, the attorney stated that the letter was a follow-up to the March 22, 1999 "letter of [a]ppeal."

notification of representation as provided in 20 C.F.R. § 10.700.<sup>3</sup> The Office noted that even if the March 22, 1999 request had been submitted by an authorized representative or by appellant, the request would have been untimely as it was received on May 26, 1999 more than one year after the Office's April 29, 1998 decision. The Office stated that it reviewed the evidence submitted since the April 29, 1998 decision to determine whether it demonstrated clear evidence of error in that decision, but no evidence of error was shown.

On June 23 and July 2, 1999, September 8, 2000 and April 18, July 10 and August 10, 2001, appellant, through her attorney, requested an oral hearing before an Office hearing representative.

By decisions dated June 28 and September 26, 2001, the Office denied appellant's requests for an oral hearing on the grounds that the requests were untimely filed. The Office found that appellant's hearing requests were not timely filed within 30 days following the April 29, 1998 decision. The Office noted that appellant could submit a request for reconsideration and additional evidence not previously considered on the issue of whether appellant was in the performance of duty on May 20, 1997.

The Board finds that the Office properly denied appellant's request for an oral hearing as untimely filed.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>4</sup> As appellant filed her appeal with the Board on December 24, 2001, the only decisions properly before the Board are the Office's September 26 and June 28, 2001 decisions denying appellant's requests for a hearing. The Board has no jurisdiction to consider the Office's April 29, 1998 decision denying appellant's claim for a traumatic injury or its June 9, 1999 decision, denying her request for reconsideration.<sup>5</sup>

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that, before review under section 8128(a) a claimant not satisfied with a decision of the Office is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim.<sup>6</sup>

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 as determined by postmark of the

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<sup>3</sup> On September 26, 2000 the Office received a July 2, 1999 statement from appellant authorizing representation by the attorney.

<sup>4</sup> 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

<sup>5</sup> *Algimantas Bumelis*, 48 ECAB 679 (1997).

<sup>6</sup> 5 U.S.C. § 8124(b)(1).

request.<sup>7</sup> The Office has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>8</sup> In such case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.<sup>9</sup>

The Office issued its decision in this case on April 29, 1998. Attached to the decision was a notice of appeal rights informing appellant to read her rights carefully and to clearly specify the procedure she wished to request. The attachment notified appellant that she had 30 days from the date of the Office's decision to request an oral hearing before an Office hearing representative.

By letters dated April 20, June 23 and July 2, 1999, September 8, 2000 and April 18, July 10 and August 10, 2001, more than 30 days following the Office's April 29, 1998 decision, appellant requested an oral hearing. Accordingly, the Board finds that the Office properly found appellant's requests for an oral hearing to be untimely.<sup>10</sup>

The Office proceeded to exercise its discretionary authority in considering appellant's hearing request. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken that are clearly contrary to logic and probable deductions from established facts.<sup>11</sup> In its June 28 and September 26, 2001 decisions, the Office properly determined that appellant could equally well address the issue of performance of duty through the reconsideration process by the submission of additional evidence.<sup>12</sup> The Board finds that the Office acted within its discretion in denying appellant's request for a hearing.<sup>13</sup>

On appeal appellant asserts that her copy of the Office's April 29, 1998 decision did not include a copy of her appeal rights. However, the copy of the Office's April 29, 1998 decision of record contains a copy of the appeal rights. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.<sup>14</sup> This presumption arises when it appears from the record that the notice was

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<sup>7</sup> 20 C.F.R. § 10.131(a).

<sup>8</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>9</sup> *Rudolf Bermann*, 26 ECAB 354 (1975).

<sup>10</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990). The Board notes that appellant's April 14, 1998 letter was sent prior to the Office's April 29, 1998 decision denying her claim. Therefore, even if this letter could be interpreted as a request for a hearing, the case was not in posture for a hearing at that time as the Office had not yet issued a final decision.

<sup>11</sup> *Dorothy Bernard*, 37 ECAB 124 (1985).

<sup>12</sup> *Marilyn D. Polk*, 44 ECAB 673 (1993).

<sup>13</sup> The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *Jeff Micono*, 39 ECAB 617 (1988),

<sup>14</sup> *George F. Gidicsin*, 36 ECAB 175 (1984).

properly addressed and duly mailed.<sup>15</sup> The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.<sup>16</sup> In this case, the record shows that the Office mailed a copy of the April 29, 1998 decision to her last known address and appellant has presented no evidence to overcome the presumption that a copy of the decision, with appeal rights, was received by her.

On appeal appellant further asserts that her April 20, 1999 letter was a timely filed request for reconsideration. However, the Office issued a decision on June 9, 1999 regarding appellant's request for reconsideration. As noted above, the Office's June 9, 1999 decision is not within the Board's jurisdiction.

The September 26 and June 28, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC  
July 28, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>15</sup> *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

<sup>16</sup> *Larry L. Hill*, 42 ECAB 596 (1991).