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<b>MICKEY L. CARVER, Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 04-1549</b>
	)	<b>Issued: January 31, 2005</b>
<b>DEPARTMENT OF THE ARMY, FORT POLK</b>	)	
<b>FIRE PROTECTION DIVISION, Fort Polk, LA,</b>	)	
<b>Employer</b>	)	
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*Case Submitted on the Record*

Before:  
COLLEEN DUFFY KIKO, Member  
WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member

On May 26, 2004 appellant filed an appeal of a May 12, 2004 decision of the Office of Workers' Compensation Programs denying his request for an oral hearing as untimely. The October 9, 2002 decision denying his claim for a recurrence of disability commencing January 22, 2002 is not before the Board as it was issued more than one year before the date appellant filed his appeal. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the denial of oral hearing issue in this case.<sup>1</sup>

The issue is whether the Office properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124.

<sup>1</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2). See also *Marilyn F. Wilson*, 51 ECAB 234 (1999).

## **FACTUAL HISTORY**

The Office accepted that, on November 16, 1990, appellant, then a 38-year-old firefighter, sustained tinnitus and headaches when a gas space heater exploded.<sup>2</sup> He received wage-loss compensation for periods of intermittent work absence. Following a period of total disability, appellant returned to work at the employing establishment on February 20, 2001 as a modified firefighter, performing clerical work. He performed this position until approximately January 10, 2002, when Dr. Miguel A. Garcia, an attending Board-certified internist, held him off work indefinitely due to a psychiatric condition requiring hospitalization.

By decision dated January 18, 2002, the Office found that the position of modified firefighter represented appellant's wage-earning capacity based on his actual earnings.<sup>3</sup>

On September 7, 2002 appellant filed a claim for total wage loss beginning January 22, 2002. The Office developed the claim as a claim for a recurrence of disability commencing January 22, 2002.

By decision dated October 9, 2002, the Office denied appellant's claim for a January 22, 2002 recurrence of disability on the grounds that the medical evidence was insufficient to support a causal relationship between the November 16, 1990 injury and the claimed recurrence of disability.

In a letter dated November 15, 2002 and signed November 17, 2002, appellant requested an oral hearing regarding the October 9, 2002 decision. The letter was imaged into the Office's electronic case management system on November 21, 2002. A fax cover sheet indicates that appellant's request for oral hearing was sent to the Office's Branch of Hearings and Review on January 24, 2003. In a letter dated and postmarked April 12, 2004, appellant again requested an oral hearing regarding the Office's October 9, 2002 decision.

By decision dated May 12, 2004, the Office denied appellant's request for an oral hearing on the grounds that it was untimely filed. The Office found that the last decision of the Office was issued on October 9, 2002 and appellant's request for an oral hearing was dated November 15, 2002 and was thus not timely filed within 30 days. The Office also denied appellant's request for an oral hearing on the grounds that the issue in the case could be addressed equally well through a valid request for reconsideration presenting new, relevant evidence establishing the claimed causal relationship to the November 15, 1990 incident.<sup>4</sup>

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<sup>2</sup> On November 17, 1994 appellant filed a claim for depression and anxiety related to the November 16, 1990 explosion. The record indicates that the Office did not accept this claim.

<sup>3</sup> The Office issued a January 25, 2002 decision finding an overpayment of \$175.53 as appellant received compensation for total disability from February 20 to 24, 2001 although he returned to work on February 20, 2001. This decision is not before the Board on the present appeal.

<sup>4</sup> Following the issuance of the Office's May 12, 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).

### **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.”<sup>5</sup> Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide 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.<sup>6</sup>

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>7</sup> 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.<sup>8</sup>

### **ANALYSIS**

In the present case, pursuant to the Office’s October 9, 2002 denial of his claim for a recurrence of disability commencing January 22, 2002, appellant requested an oral hearing in a letter dated November 15, 2002 and signed November 17, 2002. 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.”<sup>9</sup> The envelope which contained appellant’s request for a review of the written record is not of record. However, appellant’s letter was not signed until November 17, 2002, more than 30 days after issuance of the October 9, 2002 decision. Thus, appellant’s request for a review of the written record was not timely filed.

As appellant did not request a hearing within 30 days of the October 9, 2002 decision, he 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 12, 2004 decision, the Office considered the issue involved and found that appellant could pursue it equally well through submitting new, relevant evidence on reconsideration. Therefore, the Office properly exercised its discretion in denying appellant’s request for a review of the written record.

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<sup>5</sup> 5 U.S.C. § 8124(b)(1).

<sup>6</sup> 20 C.F.R. §§ 10.616, 10.617.

<sup>7</sup> *Joseph R. Giallanza*, 55 ECAB \_\_\_\_ (Docket No. 03-2024, issued December 22, 2003); *Leona B. Jacobs*, 55 ECAB \_\_\_\_ (Docket No. 04-1429, issued September 30, 2004).

<sup>8</sup> *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

<sup>9</sup> 20 C.F.R. § 10.616(a).

However, by failing to issue a decision on appellant's hearing request in a timely fashion, the Office prevented appellant an opportunity to obtain a merit review of the October 9, 2002 decision before the Board. Appellant's November 17, 2002 hearing request went unanswered for approximately 17 months. By the time the Office issued its May 12, 2004 decision denying the hearing request, appellant did not have the opportunity to timely request reconsideration before the Office or appeal the merits of the Office's October 9, 2002 decision denying his claim for the January 22, 2002 recurrence of disability. This delay prevented appellant from obtaining further timely review on the merits of his claim pursuant to section 8128 of the Act<sup>10</sup> by the Office and the Board. The Board thus finds that the Office abused its discretion. As such, the Office should grant appellant a merit review of his claim.<sup>11</sup>

### **CONCLUSION**

The Board finds that the Office properly denied appellant's November 17, 2002 request for an oral hearing on the grounds that it was untimely filed. The Board further finds, however, that the case is not in posture for a decision as the case must be remanded to the Office for a merit review.

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<sup>10</sup> 5 U.S.C. § 8128(a).

<sup>11</sup> *Marilyn F. Wilson*, *supra* note 1; *Brian R. Leonard*, 43 ECAB 255 (1991) (the Board held that the Office's delay in processing appellant's request for a hearing effectively denied appellant the opportunity to obtain merit review of his claim, and thus, constituted an abuse of discretion). *See also Gregory S. Dixon*, Docket No. 03-1535 (issued December 12, 2003) (the Board held that the Office's nine-month delay in processing appellant's request for an oral hearing effectively denied him the opportunity to obtain a merit review of his claim before the Office or the Board).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 12, 2004 is affirmed insofar as it denied appellant's request for an oral hearing as untimely. The case is remanded for further action consistent with this opinion.

Issued: January 31, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member