

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

P.W., Appellant

and

**DEPARTMENT OF THE AIR FORCE, HILL
AIR FORCE BASE, UT, Employer**

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**Docket No. 15-0590
Issued: July 27, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 23, 2015 appellant filed a timely appeal from the December 19, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Since more than 180 days elapsed between the last merit decision on October 17, 2013 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether appellant timely requested a hearing before an OWCP hearing representative.

FACTUAL HISTORY

On June 13, 2013 appellant, a 69-year-old industrial engineering technician, filed an occupational disease claim (Form CA-2) alleging that his foot problems were the result of the

¹ 5 U.S.C. § 8101 *et seq.*

generic safety boots he was required to wear while working in machine areas on cement floors. The employing establishment challenged the claim asserting that it was untimely filed.

In a decision dated October 17, 2013, OWCP denied appellant's claim finding that it was untimely filed. Appeal rights attached to this decision notified appellant that any hearing request must be made in writing within 30 calendar days after the date of the decision, as determined by the postmark of his letter. OWCP mailed the decision to his address of record.

On August 7, 2014 appellant called OWCP for a copy of the denial letter. On August 12, 2014 the employing establishment notified OWCP that it had not received a copy of the denial letter either. It asked if the denial date could be reset due to nonreceipt.

Appellant completed and signed the appeal request form on October 5, 2014 and the form was received by OWCP on October 16, 2014. He indicated that he was requesting an oral hearing before an OWCP hearing representative. Appellant's request was postmarked October 6, 2014. He explained that he never received the denial letter until August 2014.

In a decision dated December 19, 2014, OWCP denied appellant's request for a hearing. As his October 5, 2014 request was not made within 30 days of the October 17, 2013 decision, it found that he was not entitled to a hearing as a matter of right. OWCP denied a discretionary hearing finding that the issue in appellant's case could be addressed equally well by requesting reconsideration and submitting evidence not previously considered establishing that his claim for compensation was filed in a timely manner.

On appeal, appellant argues that he received the October 17, 2013 decision 10 months later, in August 2014, at which time he also received appeal rights dated March 13, 2014. He argues that the postmarks on the receipt of these letters demonstrated the delay relative to the letter dates.² Appellant adds that he was never informed of his right to file a claim, nor was he given any information as to time frames for filing.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA provides:

“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.”³

The hearing request 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.⁴ OWCP has

² On August 7, 2014 appellant asked for a copy of the October 17, 2013 denial letter. OWCP promptly sent him one and when the employing establishment indicated on August 12, 2014 that it had also not received the decision, OWCP again mailed copies.

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. § 10.616(a).

discretion to grant or deny a request that is made after this 30-day period.⁵ In such a case it will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.⁶

ANALYSIS

In its December 19, 2014 decision, OWCP found that appellant was not entitled to a hearing as a matter of right because his October 5, 2014 request was not made within 30 days of the October 17, 2013 decision denying his claim. Appellant argued, however, that he did not receive the October 17, 2013 decision until August 2014, when the appeal rights had already expired.

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. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of OWCP itself, will raise the presumption that the original was received by the addressee.⁷

OWCP maintains the ultimate burden of proof that it properly mailed the notice to the claimant. The presumption that arises from a properly addressed and duly mailed notice is a rebuttable presumption, one that is based on circumstantial evidence, and one that places on the claimant the burden of producing any evidence that he or she did not receive the notice.

OWCP's October 17, 2013 decision denying appellant's claim was properly addressed. Under the Mailbox Rule, it is presumed that he received it. However, this is a rebuttable presumption. The presumption is one that will disappear in light of any evidence that supports that he did not receive the correspondence.

On August 12, 2014 the employing establishment advised OWCP that it had also not received a copy of the October 17, 2013 decision. It would thus appear that neither of the parties to whom OWCP supposedly mailed the decision actually received the intended notice. The question before the Board is whether evidence of nonreceipt by the employing establishment is sufficient, in conjunction with appellant's own assertion of nonreceipt, to rebut the presumption that arose from the Mailbox Rule.

The Board finds that the evidence of concurrent nonreceipt by a party other than the claimant has a tendency to make the claimant's assertion of nonreceipt more probable than it would be without the evidence. In other words, this evidence tends to support appellant's assertion that he did not receive the October 17, 2013 decision. A mere presumption of receipt follows logically from the fact that a properly addressed and properly mailed notice usually reaches its intended audience, but it must also be acknowledged that such mail, for whatever reason, is not always delivered.

⁵ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁶ *Rudolph Bermann*, 26 ECAB 354 (1975).

⁷ See *Larry L. Hill*, 42 ECAB 596 (1991). See generally Annotation, *Proof of Mailing by Evidence of Business or Office Custom*, 45 A.L.R. 4th 476, 481 (1986).

When multiple addressees attest that they never received the notice in question, there can be some doubt whether the notice was delivered. There may be some question whether the notice was ever properly mailed, a fact that is not established by evidence in these cases, but only assumed from the mailing custom or practice of OWCP. Under such circumstances, the presumption of receipt cannot survive.

The Board finds that appellant has met his burden of producing evidence that supports he did not receive the October 17, 2013 decision. The presumption of receipt under the Mailbox Rule is therefore rebutted.

The Board will set aside OWCP's December 19, 2014 decision denying a hearing and will remand the case for a *de novo* decision, properly issued, on appellant's June 13, 2013 occupational disease claim. OWCP shall afford him full appeal rights.

CONCLUSION

The Board finds that this case is not in posture for decision. Further action by OWCP is warranted.

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: July 27, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board