

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LESTER H. JOHNSON and DEPARTMENT OF VETERANS AFFAIRS,  
MEDICAL CENTER, Prescott, Ariz.

*Docket No. 97-396; Submitted on the Record;  
Issued August 19, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
WILLIE T.C. THOMAS

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

The Board has duly reviewed the record on appeal and finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act 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.”<sup>1</sup>

A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.<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 or, if not, will so advise the claimant with reasons.<sup>4</sup>

The Office issued its most recent decision on the merits of appellant's claim on January 6, 1994, when it found that he failed to establish that his current condition was causally

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<sup>1</sup> 5 U.S.C. § 8124(b)(1).

<sup>2</sup> 20 C.F.R. § 10.131(a)-(b).

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

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

related either to his work injuries of July 29, 1988 or February 7, 1990 or to factors of his federal employment.<sup>5</sup> With that decision, the Office provided appellant a notice of review rights (labeled appeal rights). That notice advised that any request for a hearing must be made within 30 days of the date of the January 6, 1994 decision as determined by the postmark of the letter.

The record in this case shows no request made within 30 days. The first indication of a request for a hearing is appellant's letter dated January 6, 1995. Appellant did not send this letter to the Branch of Hearings and Review in Washington, D.C., as instructed by the notice of review rights. He addressed it instead to the district Office in San Francisco, California. The Office date stamped this letter received on December 29, 1995 and did not retain the envelope. In this letter, appellant indicated that he had made a previous request for a hearing, and he was inquiring when he was going to get his hearing.

With no evidence in the case record of a previous request for a hearing, the Office properly considered whether appellant may be entitled to a hearing on the basis of his January 6, 1995 letter. Treating the letter as a request, the Office correctly found that the request was not made within 30 days of the January 6, 1994 decision and that he was therefore not entitled to a hearing as a matter of right. The Office issued a letter decision on July 31, 1996 denying appellant's request for a hearing. The Office exercised its discretion in the matter, however, and advised appellant that the issue in the case could equally well be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered that establishes that the medical condition or disability is causally related to the work injury.

As appellant may address the issue of causal relationship through the reconsideration process, the Board finds that the Office did not abuse its discretion in its July 31, 1996 decision in denying appellant's untimely request for a hearing.<sup>6</sup>

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<sup>5</sup> The Board has no jurisdiction to review the Office's January 6, 1994 decision because that decision was issued more than one year prior to appellant's October 25, 1996 request for an appeal before the Board. 20 C.F.R. § 501.3(d)(2).

<sup>6</sup> *E.g., Jeff Micono*, 39 ECAB 617 (1988). The Office properly exercised its discretion to the extent that appellant need not have a hearing to address the issue of causal relationship or to submit the medical opinion evidence necessary to establish causal relationship. By denying appellant's request for a hearing, however, the Office has ensured that appellant will bear a more difficult burden of proof: Any request for reconsideration made more than one year after a merit decision is untimely as well, and the Office will not review the merits of a claim in such circumstances unless the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office, a standard that is intended to be difficult to meet. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b)-3(c) (May 1996). For this reason, it may be misleading to state that the issue in this case can "equally well" be addressed by requesting reconsideration.

The July 31, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
August 19, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member