

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. INGOLD and U.S. POSTAL SERVICE,
POST OFFICE, Haledon, N.J.

*Docket No. 97-236; Submitted on the Record;
Issued January 4, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that she sustained an injury in the performance of duty on March 17, 1990; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

On October 9, 1991 appellant filed a notice of recurrence of disability alleging that on March 17, 1990 she sustained a recurrence of disability causally related to her November 9, 1985 employment injury. On the reverse side of the claim form, appellant's supervisor indicated that she had resigned from the employing establishment in July 1990.

In a statement accompanying her claim, appellant related that following her November 1985 motor vehicle accident she had pain in her back, right hip and right knee which worsened following her May 1989 fall. She stated:

"I had severe pain in my right knee, shoulders, neck and left foot [and] ankle. It became worse with lifting and standing. I continued this way until March 17, 1990. While delivering my route, I experienced a sharp pain in my lower back. It was there and gone within a few seconds."

By letter dated December 26, 1991, the Office informed appellant that it had accepted her claim for a recurrence of disability on March 17, 1990 causally related to her May 24, 1989 employment injury. The Office recommended that appellant file a Form CA-7 for any lost wages.¹ On January 28, 1992 appellant filed a claim for compensation on account of traumatic injury or occupational disease (Form CA-7).

¹ By letter dated July 16, 1992, the Office indicated that it had combined appellant's case file for her accepted May 24, 1989 employment injury, File No. A02-0601615 with her case file for her November 9, 1985 employment injury, File No. A02-0550366 into the master File No. A02-0550366. The record indicates that in October 1991 the Office misplaced appellant's case file No. A2-601615 and attempted reconstruction of the record.

The Office, in an internal memorandum dated February 10, 1994, determined that appellant's March 17, 1990 recurrence of disability claim should have been classified as a claim for a new injury.

By decision dated February 11, 1994, the Office denied appellant's claim for a recurrence of disability on the grounds that the evidence established that she was alleging a new injury.

By decision dated March 11, 1996, the Office denied appellant's claim for a traumatic injury on March 17, 1990.

In a letter dated April 10, 1996, appellant requested a hearing before an Office hearing representative. The letter in which appellant requested the hearing was not date stamped received by the Office and the envelope in which the letter was sent was not retained for the record.

The Office, by decision dated June 18, 1996, denied appellant's claim for a hearing as untimely. The Branch of Hearings and Review indicated that the request for a hearing was postmarked April 11, 1996 which was more than 30 days after the March 11, 1996 decision, and therefore, found that appellant was not entitled to a hearing as a matter of right.

The Board finds that the case is not in posture for a decision.

Section 8124(b)(1) of the Federal Employees' Compensation 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."² As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.³

With respect to timeliness of a request for a hearing, 20 C.F.R. § 10.131(a) provides: "A claimant is not entitled to an oral 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.*" Therefore the postmark date, not the date the request is received, may determine the timeliness of the request.⁴ The Board has held that it is the Office's responsibility to keep evidence of the postmark date in the case record.⁵ In the present case, it is not clear whether appellant's April 10, 1994 letter requesting a hearing was timely, since there is no postmark date in the record.

On remand, the Office should produce evidence of the postmark date of appellant's request for a hearing under 20 C.F.R. § 10.131(a). If the date of the postmark cannot be produced, the Office should presume the request was timely and grant the request for a hearing.

² 5 U.S.C. § 8124(b)(1).

³ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

⁴ *See Gus N. Rodes*, 43 ECAB 268 (1991).

⁵ *Id.*; *see also Lee F. Barrett*, 40 ECAB 892 (1989).

Regardless of whether the Office grants or denies the hearing request on remand, it should issue an appropriate decision on the merits in order to protect appellant's appeal rights.

In light of the Board's decision regarding appellant's entitlement to a hearing before an Office hearing representative, the merit issue of whether appellant has established that she sustained an injury in the performance of duty on March 17, 1990 is not in posture for a decision and will not be addressed by the Board.

The decisions of the Office of Workers' Compensation Programs dated June 18 and March 11, 1996 are hereby set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
January 4, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member