

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHERYL A. RAFFONE and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Holtsville, NY

*Docket No. 98-1384; Submitted on the Record;  
Issued July 11, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether appellant has more than a 10 percent permanent impairment to the right arm; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

This is the fourth appeal in the case. In the most recent appeal, the Board remanded the case for further development as to whether appellant had more than a 10 percent permanent impairment to the right arm.<sup>1</sup> By decision dated December 18, 1997, the Office determined that appellant was not entitled to an additional schedule award.

In a decision dated February 18, 1998, the Office's Branch of Hearings and Review determined that appellant's request for a hearing was untimely and, therefore, she was not entitled to a hearing as a matter of right. The Office denied appellant's request for a hearing after determining that the underlying issue could equally well be pursued by a request for reconsideration.

The Board has reviewed the record and finds that the case is not in posture for decision with respect to appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides in pertinent part:

“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 title is

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<sup>1</sup> Docket No. 95-1716 (issued August 4, 1997).

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>2</sup>

In the present case, appellant submitted a letter dated January 15, 1998 requesting an oral hearing on her claim. The Office’s Branch of Hearings and Review found the request to be untimely, asserting that the letter was postmarked January 21, 1998. The Office’s regulations provide in pertinent part:

“A hearing must be requested in writing within 30 days of the date of issuance of the decision and be made to the Office as set forth in the decision. 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....”<sup>3</sup>

There is no evidence in the record, however, to substantiate a postmark date of January 21, 1998. There is no envelope provided, nor any probative evidence to establish the postmark date. January 21, 1998 is the date the letter was stamped as received by the Office, not the postmark date. It is the Office’s responsibility to keep the envelope or provide evidence as to the postmark date and if the date of postmark cannot be determined, the Office should presume that the January 15, 1998 letter was a timely request for a hearing.”<sup>4</sup>

The case will, therefore, be remanded to the Office for a proper determination as to appellant’s entitlement to a hearing. As noted above, if the postmark date cannot be determined, the request for a hearing must be considered timely in this case. Regardless of whether the Office grants or denies the hearing request, a *de novo* decision on the merits of the claim should be issued to protect appellant’s appeal rights.<sup>5</sup>

In view of the Board’s findings with respect to the request for a hearing, the Board will not address the schedule award issue on this appeal.

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<sup>2</sup> 5 U.S.C. § 8124(b)(1).

<sup>3</sup> 20 C.F.R. § 10.131(a).

<sup>4</sup> See *Gus N. Rodes*, 43 ECAB 268 (1991), involving a letter requesting a hearing that was dated within 30 days of an Office decision, with no evidence as to the postmark date retained in the record.

<sup>5</sup> *Id.*

The decision of the Office of Workers' Compensation Programs dated February 18, 1998 is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
July 11, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member