

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBBIE CURL and U.S. POSTAL SERVICE,
POST OFFICE, Carson, CA

*Docket No. 98-1941; Submitted on the Record;
Issued March 2, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing before an Office hearing representative.

On October 6, 1997 appellant, then a 36-year-old letter carrier, filed a claim for an emotional condition. She stated that on September 29, 1997 a postal customer tried to run her down with his car. Appellant indicated that since that time she had been crying and depressed and was experiencing headaches and back and neck pain. In a December 2, 1997 decision, the Office rejected appellant's claim on the grounds that fact of injury was not established. In a letter dated January 1, 1998, appellant requested a hearing before an Office hearing representative. The letter was marked as received by the Office on January 12, 1998. In a February 12, 1998 decision, the Office denied appellant's request for a hearing on the grounds that her request for a hearing was untimely and that, under further review, her request for further review could be equally well addressed by requesting reconsideration.

The Board finds that Office improperly denied appellant's request for a hearing as untimely.

Section 8124(b)(1) of the Federal Employees' Compensation Act¹ dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "[b]efore review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on a request within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." The Board

¹ 5 U.S.C. § 8124(b)(1).

has noted that section 8124(b)(1) “is unequivocal in setting forth the limitation in requests for hearings.”²

The Office issued its decision in this case on December 2, 1997. In a January 1, 1998 letter, addressed to the Office’s Branch of Hearing and Review, appellant’s representative requested an oral hearing before an Office hearing representative. The record does not contain the envelope in which the letter was sent, which would have the postmark. Under the Office’s procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope which contains the letter requesting a hearing.³ The Branch of Hearings and Review is required to retain the envelope in which a request for a hearing is made so as to establish the timeliness of the request for a hearing.⁴ In this case, the case record submitted on appeal does not contain the envelope from which the timeliness of the hearing can be determined. The case must therefore be remanded for the Office to determine, if possible, the date that the January 1, 1998 letter requesting a hearing was postmarked. If the date of the postmark cannot be determined, the Office should presume the request was timely and grant the request for a hearing, as it was the Office’s responsibility to keep the envelope or otherwise keep evidence of the date of delivery in the case record.⁵ Regardless of whether the Office grants or denies the hearing request on remand, it should issue a *de novo* decision on the merits in order to protect appellant’s appeal rights.⁶

² *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 1992).

⁴ *Id.*, Chapter 2.1601.3(b).

⁵ *Gus N. Rodes*, 43 ECAB 268 (1991).

⁶ *See Shirley Jackson*, 39 ECAB 540, 542 (1988). In light of the Board’s decision regarding the timeliness of appellant’s request for a hearing before an Office hearing representative, the Board will not address the issue of whether appellant sustained an injury in the performance of duty, deferring that determination to the Office after it has considered whether appellant’s request for a hearing was timely under the guidelines set forth in this decision.

The decision of the Office of Workers' Compensation Programs dated February 12, 1998 is hereby reversed

Dated, Washington, D.C.
March 2, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member