

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KEITH J. SCHMIDT and DEPARTMENT OF JUSTICE,  
FEDERAL PRISON SYSTEMS, Washington, DC

*Docket No. 99-1221; Submitted on the Record;  
Issued September 14, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record.

The Office accepted appellant's claim for a lumbar strain, lumbar laminectomy and herniated lumbar disc. He underwent a microlaminectomy on August 22, 1995. Appellant returned to work full duty on October 5, 1995.

In a report dated May 28, 1998, one of appellant's treating physicians, Dr. Wilfrido F. Tolentino, a neurological surgeon, performed a physical examination and reviewed magnetic resonance imaging (MRI) scans performed in 1995 and 1997 showing L4-5 defects with persistent narrowed interspace. He diagnosed low back pain and radiculopathy L5 secondary to possible recurrent herniated nucleus pulposus with epidural scar and collapsing L4-5 interspace, lateral recess stenosis at L4-5 on the right and L5-S1 degenerative disc disease. Dr. Tolentino recommended that appellant undergo posterior lumbar interbody fusion with Ray's Threaded Fusion Case implantation at L4-5 and L5-S1.

By letter dated June 15, 1998, appellant requested the Office's approval of the surgery that Dr. Tolentino recommended.

The Office referred appellant to two physicians, Dr. Seymour Shlomchik, a Board-certified orthopedic surgeon and Dr. Alfredo C. Velasquez, a Board-certified neurological surgeon, to obtain their opinions on the proposed surgery. In their reports dated June 29 and August 31, 1998, respectively, Drs. Shlomchik and Velasquez opined that the proposed surgery of interbody fusion was not appropriate for "the effects of the work injury" or had "little chance" of improving appellant's condition.

By decision dated December 4, 1998, the Office denied appellant's request for authorization of the surgical procedure finding lumbar interbody fusion, stating that the weight

of the medical opinion established that the procedure would not relieve appellant's pain or reduce the degree of disability.

By letter dated January 6, 1999, appellant requested a written review of the record by an Office hearing representative. The letter was postmarked January 6, 1999.

By decision dated January 30, 1999, the Office's Branch of Hearings and Review denied appellant's request for a hearing, stating that appellant's letter requesting a hearing was postmarked January 6, 1999, more than 30 days after the Office issued the December 4, 1998 decision and that, therefore, appellant's request was untimely. The Branch informed appellant that he could request reconsideration by the Office and submit additional evidence.

The Board finds that the Office properly denied appellant's request for review of the written record.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant ... 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> Section 10.615 of the Office's federal regulations implementing this section of the Act, provides that a claimant can choose between an oral hearing or a review of the written record.<sup>2</sup> The regulation also provides that in addition to the evidence of record, the employee may submit new evidence to the hearing representative.<sup>3</sup> Section 10.616(a) of the Office's regulations<sup>4</sup> provides in pertinent part:

"[A] claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district office may obtain a hearing by writing to the address specified in the decision. 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."

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>5</sup> Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a

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<sup>1</sup> 5 U.S.C. § 8124(b)(1).

<sup>2</sup> 20 C.F.R. § 10.615.

<sup>3</sup> *Id.*

<sup>4</sup> 20 C.F.R. § 10.616(a).

<sup>5</sup> *Henry Moreno*, 39 ECAB 475, 482 (1988).

hearing,<sup>6</sup> when the request is made after the 30-day period for requesting a hearing<sup>7</sup> and when the request is for a second hearing on the same issue.<sup>8</sup>

In the present case, the envelope in which the December 4, 1998 decision was mailed was postmarked December 7, 1998 and in a handwritten note on the envelope appellant initialed he received it on December 10, 1998.

On appeal appellant contended that because the December 4, 1998 decision was postmarked December 7, 1998, December 7, 1998 is the date it was issued and his January 6, 1999 letter requesting written review of the decision was made within the statutory 30-day time limit and therefore is timely.

In the present case, the date on the Office's decision, December 4, 1998, is the date it was issued and therefore the 30-day time period for appellant to file his request for a review of the written record commenced on December 5, 1998, not the postmark date.<sup>9</sup> Since appellant's January 6, 1999 letter requesting review of the written record by an Office hearing representative was mailed more than 30 days after the issuance of the December 4, 1998 decision, appellant's letter requesting review is untimely. The Office therefore properly denied appellant's request.

The decision of the Office of Workers' Compensation Programs dated January 30, 1999 is hereby affirmed.

Dated, Washington, DC  
September 14, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Michael E. Groom

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<sup>6</sup> *Rudolph Bremen*, 26 ECAB 354, 360 (1975).

<sup>7</sup> *Herbert C. Holly*, 33 ECAB 140, 142 (1981).

<sup>8</sup> *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

<sup>9</sup> *See Lawrence C. Parr*, 48 ECAB 445, 451 (1997); *William F. Osborne*, 46 ECAB 198, 202 (1994).

Alternate Member