

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DELORES L. BAILEY and U.S. POSTAL SERVICE,
POST OFFICE, Coppell, TX

*Docket No. 00-767; Submitted on the Record;
Issued October 11, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has more than a 19 percent right arm impairment and a 4 percent left arm impairment for which she received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for written review of the record pursuant to section 8124 of the Federal Employees' Compensation Act.

The Office accepted appellant's claim for right carpal tunnel syndrome and aggravation of cervical degenerative disc disease. On April 27, 1997 appellant filed a claim for a schedule award. The record contains a medical report from appellant's treating physician, Dr. Juan J. Capello, a Board-certified orthopedic surgeon, dated June 9, 1999, who used the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1994) to determine that appellant had a 4 percent impairment to the left upper extremity and a 19 percent impairment to the right upper extremity. In a report dated July 22, 1999, the district medical adviser concurred with Dr. Capello's findings.

By decision dated August 30, 1999, the Office issued appellant an award for a 19 percent impairment to her right arm and a 4 percent impairment to her left arm.

By letter dated September 29, 1999, appellant requested a written review of the record.

By decision dated November 12, 1999, the Office denied appellant's request, stating that appellant's letter requesting written review of the record was postmarked September 30, 1999, and therefore was filed more than 30 days after the August 30, 1999 decision and was untimely.

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

Section 8124(b)(1) of the 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.”¹ Section 10.131 of the Office’s federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.² Thus, a claimant has a choice of requesting an oral hearing or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulation.

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.³ 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 hearing,⁴ when the request is made after the 30-day period for requesting a hearing,⁵ and when the request is for a second hearing on the same issue.⁶

The 30-day time period for determining the timeliness of appellant’s written review request commences on the first day following the issuance of the Office’s decision.⁷ In this case, the 30-day period for filing the request commenced August 31, 1999, the day after the issuance of the August 30, 1999 decision, and appellant had 30 days from August 31, 1999 or through September 29, 1999 to file her request for a written review. The postmark date of appellant’s letter requesting a written review of the record is not in the record. Appellant’s letter requesting review of the written record, however, is dated September 29, 1999 and therefore is timely. The Office erred in determining that appellant’s request was untimely filed. The case will therefore be remanded for the Office to address appellant’s request for a written review of the record.

Since the case must be remanded for the Office to respond to appellant’s request for written review of the record, the degree of appellant’s impairment need not be addressed.

¹ 5 U.S.C. § 8124(b)(1).

² 20 C.F.R. § 10.131.

³ *Henry Moreno*, 39 ECAB 475, 482 (1988).

⁴ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁵ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

⁶ *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

⁷ *See Donna A. Christley*, 41 ECAB 90, 91 (1989).

The November 12 and August 30, 1999 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case remanded for further action consistent with this decision.

Dated, Washington, DC
October 11, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member