

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE B. WERNER and U.S. POSTAL SERVICE,
POST OFFICE, Forked River, NJ

*Docket No. 01-274; Submitted on the Record;
Issued September 10, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant's bursitis and frozen left shoulder were causally related to factors of her employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's hearing request.

On January 12, 2000 appellant, then a 55-year-old postal clerk, filed an occupational disease claim alleging that her bursitis and frozen left shoulder resulted from her repetitive employment duties.

In a report dated March 31, 2000, Dr. Mark T. Kasper, appellant's attending Board-certified orthopedic surgeon, opined that appellant's frozen left shoulder could be aggravated by her repetitive work activities.

By letter dated March 13, 2000, the Office informed appellant that the evidence of record was insufficient to support her claim and advised her what type of evidence was necessary.

By decision dated May 10, 2000, the Office denied appellant's claim on the basis that she failed to establish a causal relationship between her shoulder condition and factors of her employment.

In a letter dated June 9, 2000,¹ appellant requested a hearing and enclosed a June 8, 2000 report by Dr. Kasper and a list of her job duties.

By decision dated September 13, 2000, the Office denied appellant's hearing request as untimely.

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

¹ The record contains two copies of appellant's June 9, 2000 letter. One has a facsimile date of July 14, 2000 and the other is noted as being received by the Office on June 12, 2000.

Section 8124(b)(1) of the Federal Employees' Compensation Act² 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."³ Section 10.615 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.⁴ 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.

Section 10.616(a) of the Office's regulations⁵ provides in pertinent part that the hearing request must be sent within 30 days of the date of issuance of the decision (as determined by the postmark or other carriers marking) of the date of the decision for which a hearing is sought.

In this case, appellant's letter requesting a hearing from the May 10, 2000 decision is dated June 9, 2000 and was marked received by the Office on June 12, 2000. The record does not contain the envelope in which the letter was sent, which would have the postmark. The Branch of Hearings and Review is required to retain an envelope in which a request for a hearing is made so as to determine the timeliness of the request for a hearing.⁶ However, the case record submitted on appeal does not contain the envelope from which the timeliness of the hearing can be determined.

Because appellant submitted a request for a hearing which was dated June 9, 2000 and the record contains no envelope with a postmark, the Board finds that her request is timely filed and she is entitled to a hearing as a matter of right. Consequently, the case must be remanded for the Office to provide appellant a hearing under section 8124. Upon return of the case record, the Office should schedule a hearing before an Office hearing representative. After such further development as may be deemed necessary, the Office should issue a *de novo* decision on appellant's claim.⁷

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. § 10.615.

⁵ 20 C.F.R. § 10.616(a).

⁶ Federal (FECA) Procedure Manual , Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 1992).

⁷ 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 had established that her disability was causally related to her employment, 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 September 13, 2000 decision of the Office of Workers' Compensation Programs is set aside, the May 10, 2000 decision is reversed and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
September 10, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member