

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM F. PIERCE and U.S. POSTAL SERVICE,
POST OFFICE, Birmingham, AL

*Docket No. 02-1506; Submitted on the Record;
Issued December 12, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for authorization of a total left knee replacement; and (2) whether the Office properly denied appellant's request for a hearing as untimely.

On September 12, 2000 appellant, then a 54-year-old tractor-trailer operator, filed a claim for a motor vehicle accident occurring on September 11, 2000 in the performance of duty. The Office accepted appellant's claim for a right knee fracture and an abrasion to the scalp and forearm. Appellant underwent an open reduction internal fixation of the right patella on September 11, 2000.

The Office further accepted that appellant sustained a temporary aggravation of preexisting osteoarthritis of the left knee as a consequential injury. By decision dated September 20, 2001, the Office denied appellant's request for a total knee replacement on the left side on the grounds that the evidence did not establish that it was necessary due to his accepted employment injury.

On January 15, 2002 appellant's representative faxed the Office a copy of a request for a hearing dated October 9, 2001. The letter, prepared by appellant's attorney, contained the heading "Via Overnight Delivery" between the date and the address of the Branch of Hearings and Review. Appellant's attorney also submitted an express mail receipt indicating that he had sent an item to the Branch of Hearings and Review on October 9, 2001.

By decision dated February 28, 2002, the Office denied appellant's request for a hearing as untimely. The Office determined that appellant was not entitled to a hearing as a matter of right because his hearing request was postmarked January 15, 2002 and, therefore, was not made within 30 days of the Office's September 20, 2001 decision.

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

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing, states that: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.²

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 the Office must exercise this discretionary authority in deciding whether to grant a hearing. 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,³ when the request is made after the 30-day period established for requesting a hearing,⁴ or when the request is for a second hearing on the same issue.⁵ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.⁶

On January 15, 2002 appellant's attorney faxed the Office a copy of a letter dated October 9, 2001, in which he stated that appellant requested a hearing before an Office hearing representative. The Board notes that, under the mailbox rule, in the absence of evidence to the contrary, it is presumed that a notice properly addressed and mailed in the ordinary course of business was received. As a rule of law, the presumption of receipt under the mailbox rule must apply equally to claimants and the Office alike, provided that the conditions which give rise to the presumption remain the same, namely, evidence of a properly addressed letter together with evidence of proper mailing.⁷ In this case, the record contains a copy of the letter dated October 9, 2001 from appellant's attorney properly addressed to the Branch of Hearings and Review with the words "Via Overnight Delivery" over the address. In addition, the record also contains an express mail receipt indicating that appellant's attorney sent the Branch of Hearings and Review a letter on October 9, 2001. Taken together, this evidence establishes that appellant requested a hearing on October 9, 2001 within 30 days of the Office's September 20, 2001

¹ 5 U.S.C. § 8124(b)(1).

² *Frederick D. Richardson*, 45 ECAB 454 (1994).

³ *Rudolph Bermann*, 26 ECAB 354 (1975).

⁴ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁵ *Johnny S. Henderson*, 34 ECAB 216 (1982).

⁶ *Sandra F. Powell*, 45 ECAB 877 (1994).

⁷ *Larry L. Hill*, 42 ECAB 596 (1991).

decision. Appellant, therefore, is entitled to a hearing as a matter of right. The case will be remanded to the Office for scheduling of a hearing before an Office hearing representative.

In view of the Board's disposition of appellant's request for a hearing, the issue of whether the Office properly denied appellant's request for authorization of a total left knee replacement is premature.

The February 28, 2002 and September 20, 2001 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
December 12, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member