

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH STIRLING and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia PA

*Docket No. 01-2190; Submitted on the Record;
Issued May 23, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing.

The Board finds that the Office did not properly deny appellant's request for a hearing.

On September 3, 1993 appellant, then a 35-year-old letter carrier, slipped and fell on ice while in the performance of his duties. The claim was accepted for multiple contusions, left shoulder sprain, lumbar sprain and torn left meniscus and later for L4-5 chronic root irritation in the left lower extremity. Appellant received total temporary disability until compensation was terminated in a July 19, 1999 decision. By letter dated August 7, 1999, appellant requested a hearing which was held on February 2, 2000. In a March 22, 2000 decision, the hearing representative remanded the case for an independent medical examiner to resolve an existing conflict. On September 1, 2000 the Office terminated appellant's compensation.

In a January 11, 2001 letter, appellant through his representative inquired as to the status of an alleged September 29, 2000 hearing request, indicating that he had not received either a hearing date or an acknowledgement that a hearing request had been received.¹

On April 10, 2001 the Branch of Hearings and Review treated appellant's January 11, 2001 letter as an initial request for a hearing and stated that the Office had no record of appellant's September 29, 2000 letter. The hearing request was denied as untimely and because the issue in question was essentially a medical issue that could be addressed through the reconsideration process.

¹ Appellant, in his representative's brief to the Board, alleges the Office, through a January 25, 2001 letter, acknowledged receipt of appellant's September 29, 2000 request. The record does not contain the January 25, 2001 letter.

In an April 20, 2001 letter from appellant's representative, a copy of the September 29, 2000 letter was submitted. On July 9, 2001 the Office again denied the request as untimely and stated that appellant must provide evidence that the letter was mailed within the 30 days after issuance of the final decision. "Such evidence can consist of regular, certified or registered receipt from the U.S. Postal Service."

The Board finds that the case is not in posture for decision and must be remanded to the Office so that it may properly consider the September 29, 2000 letter from appellant's attorney as evidence and make a determination whether it constitutes a timely hearing request, including a finding of whether it effectuates a timely hearing request through application of the mailbox rule.

The only decisions on appeal before the Board are the Office's April 10 and July 9, 2001 decisions denying appellant's request for a hearing in connection with its September 1, 2000 decision. The Board has no jurisdiction to review the September 1, 2000 decision, as it was issued more than one year before the September 7, 2001 filing of the current appeal.

Section 8124(b)(1) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary."² 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.³

In this case, appellant's attorney stated in a letter dated April 20, 2001 that he was enclosing a copy of a letter, which he indicated was originally sent to the Office on September 29, 2000. The case record contains a copy of a September 29, 2000 letter, in which appellant's attorney stated that appellant was appealing the Office's September 1, 2000 decision and requesting a hearing before a representative. By letter decision dated July 9, 2001, the Office determined that appellant was not entitled to a hearing as a matter of right because his hearing request was postmarked January 11, 2001 and, therefore, was not made within 30 days of the Office's decision dated September 1, 2000.

The Board finds that the Office, in reaching its determination that appellant's hearing request was untimely, failed to properly consider the copy of the September 29, 2000 letter from appellant's attorney as evidence and to make a determination whether it constituted a timely hearing request, including a finding of whether it effectuates a timely hearing request through application of the mailbox rule.

Under the mailbox rule, the Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed properly addressed in the ordinary course of business was received. As a rule of law, the presumption of receipt under the mailbox rule must

² 5 U.S.C. § 8124(b)(1).

³ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

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.⁴

Despite the presence of the copy of the September 29, 2000 letter in the case record, the Office failed to take appropriate note of it in its July 9, 2001 decision denying appellant's hearing request. The Office determined that the January 11, 2001 letter, standing alone, from appellant's attorney constituted a hearing request and based its finding of untimeliness on this improper determination. The purpose of the January 11, 2001 letter was not to effectuate a hearing request, but rather to make note of the fact that a hearing had been requested. The purpose of the April 20, 2001 letter was to enclose the September 29, 2000 letter, as evidence that a hearing was requested and to indicate that it was originally sent on or about September 29, 2000. The Office failed to consider whether the September 29, 2000 letter constituted a timely hearing request.

Accordingly, the case must be remanded to the Office so that it may properly consider the September 29, 2000 letter from appellant's attorney as evidence and make a determination whether it constitutes a timely hearing request, including a finding of whether it effectuates a timely hearing request through application of the mailbox rule. After such further development as it considers necessary, the Office shall issue a *de novo* decision, on appellant's request for a hearing.

The July 9 and April 10, 2001 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case remanded for further development consistent with this decision of the Board.⁵

Dated, Washington, DC
May 23, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ *Larry L. Hill*, 42 ECAB 596 (1991).

⁵ To preserve appellant's appeal rights on the merits, the Office should issue a *de novo* decision.