

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GREGORY S. DIXON and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Raleigh, NC

*Docket No. 03-1535; Submitted on the Record;
Issued December 12, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124.

On March 21, 2001 appellant, then a 39-year-old mail processor, filed a traumatic injury claim alleging that on November 16, 2000 he twisted his right knee when he tripped over a flat tub and fell onto the floor. Appellant submitted factual and medical evidence in support of his claim.

By decision dated November 7, 2001, the Office found the evidence of record sufficient to establish that appellant actually experienced the claimed accident, but insufficient to establish that he sustained a condition causally related to the incident. In an undated letter that was postmarked July 10, 2002 and received by the Office on July 15, 2002, appellant requested an oral hearing before an Office hearing representative.

More than nine months after receiving appellant's request for a hearing, the Office denied the request as untimely filed pursuant to 5 U.S.C. § 8124. In its April 30, 2003 decision, the Office explained that appellant's request was received more than 30 days after the issuance of the November 7, 2001 decision denying compensation and, therefore, he was not entitled to a hearing as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue of whether he sustained an injury due to the November 16, 2000 employment incident could be addressed through the reconsideration process.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As

¹ *Marilyn F. Wilson*, 51 ECAB 234, 235 (1999); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

appellant filed his appeal with the Board on June 3, 2003, the only decision properly before the Board is the Office's April 30, 2003 decision denying appellant's request for a hearing.

The Board finds that the case is not in posture of decision.

Section 8124(b) of the Federal Employees' Compensation Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision 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

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,⁴ when the request is made after the 30-day period established for requesting a hearing⁵ or when the request is for a second hearing on the same issue.⁶ 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.⁷

The Office initially rejected appellant's claim for compensation in a decision dated November 7, 2001. Because appellant made his request for an oral hearing on July 10, 2002, more than 30 days after the Office's November 7, 2001 decision, he is not entitled to a hearing as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that the issue of whether his claimed injury was due to the November 16, 2000 employment incident could be addressed through the reconsideration process. Consequently, the Office properly denied appellant a discretionary hearing. However, the Office neglected to consider that, by failing to issue a decision on appellant's hearing request in a timely fashion, it had effectively exhausted appellant's opportunity to obtain a merit review of the November 7, 2001 decision before the Board. Appellant's July 10, 2002 hearing request went unanswered for more than nine months. By the time the Office issued its April 30, 2003 decision denying the requested hearing, appellant did not have the opportunity to timely request reconsideration before the Office or appeal the merits of the Office's November 7, 2001 decision

² See 5 U.S.C. § 8124(b)(1).

³ See 20 C.F.R. § 10.616(a) (1999); *Charles J. Prudencio*, 41 ECAB 499, 501 (1990).

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

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

⁶ *Johnny S. Henderson*, 34 ECAB 216 (1982).

⁷ *Sandra F. Powell*, 45 ECAB 877 (1994).

denying compensation. This delay prevented appellant from obtaining further timely review on the merits of his claim pursuant to section 8128 of the Act by the Office and the Board, the Board finds that the Office abused its discretion. As such, the Office should grant appellant a merit review of his claim.⁸

The April 30, 2003 decision of the Office of Workers' Compensation Programs is affirmed. The case is remanded for further action consistent with this decision.

Dated, Washington, DC
December 12, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁸ *Marilyn F. Wilson*, *supra* note 1; *Brian R. Leonard*, 43 ECAB 255, 259-60 (1991) (the Board held that the Office's delay in processing appellant's request for a hearing effectively denied appellant the opportunity to obtain merit review of his claim, and thus, constituted an abuse of discretion).