United States Department of Labor
Employees' Compensation Appeals Board

ROBIN M. TAYLOR, Appellant	)	
and	)	**Docket No. 03-2239**
	)	**Issued: December 19, 2003**
DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, Medford, OR, Employer	)	

Appearances:
Robin M. Taylor, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 15, 2003 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated May 6, 2003 and an August 4, 2003 decision denying her request for an oral hearing as being untimely filed. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case, and the nonmerit hearing denial.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b); and (2) whether appellant established that she sustained an injury in the performance of duty.

FACTUAL HISTORY

On February 27, 2003 appellant, a 30-year-old botanist, filed a traumatic injury claim alleging that she injured her left foot on July 31, 2002 when she slipped while performing her employment duties.

In a March 26, 2003 letter, the Office advised appellant of the type of factual and medical evidence needed to establish her claim and requested that she submit such evidence. The Office particularly requested that appellant submit a physician's reasoned opinion addressing the relationship of her claimed condition and specific employment factors.

In response to the Office's request, appellant submitted a treatment note dated February 6, 2003 and a January 6, 2003 report from Dr. Evan C. Merrill, an attending podiatrist, who, in his January 6, 2003 report, noted that appellant had complaints of left heel pain for months. He diagnosed left Achilles tendinitis and left posterior and plantar calcaneal spurring. In the February 6, 2003 treatment note, Dr. Merrill opined that appellant's left Achilles insertional tendinitis was resolving and recommended orthotics for appellant.

In a decision dated May 6, 2003, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that her condition was due to the July 31, 2002 employment incident as required by the Federal Employees' Compensation Act,[1] thus fact of injury was not established.

Appellant requested a hearing in a form dated June 2, 2003 and received on June 17, 2003. The postmark on the attached envelope is indecipherable to determine the date that the envelope was mailed.

LEGAL PRECEDENT – Issue 1

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "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]

ANALYSIS – Issue 1

Under the regulations implementing section 8124(b) of the Act, the date the request is filed is determined by the postmark of the request.[4] Appellant's letter requesting a hearing from the Office's May 6, 2003 decision is dated June 2, 2003. The record does contain a copy of the envelope in which the letter was sent, but the postmark is illegible so that the postmark date cannot be determined. 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

[1] 5 U.S.C. §§ 8101-8193.

[2] 20 C.F.R. § 8124(b)(1).

[3] *Afegalai L. Boone*, 53 ECAB ___ (Docket No. 01-2224, issued May 15, 2002).

[4] 20 C.F.R. § 10.616(a).

hearing.[5] However, the case record submitted on appeal does not contain the envelope with a legible postmark from which the timeliness of the hearing can be determined. Because appellant submitted a request for a hearing which was dated June 2, 2003 and the record contains no envelope with a legible postmark, the Board finds that appellant's 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 hearing representative should issue a *de novo* decision on appellant's claim.[6]

CONCLUSION

The Board finds that the Office improperly found that appellant had filed an untimely request for an oral hearing. Inasmuch as appellant filed a timely request for an oral hearing and the case is remanded to the Office to schedule a hearing, the Board will set aside the May 4, 2003 decision denying appellant's claim. The Board has already found the request to be timely and has remanded the case for scheduling of the hearing.

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.3(b) (October 1992).

[6] *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.

ORDER

IT IS HEREBY ORDERED THAT the August 4, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion.[7]

Issued: December 19, 2003
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] With her appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).