

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of SOLOMON R. LEE and DEPARTMENT OF THE ARMY,  
U.S. ARMY QUARTERMASTER, Fort Lee, VA

*Docket No. 03-487; Submitted on the Record;  
Issued June 24, 2003*

---

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective January 24, 2002 on the grounds that he refused an offer of suitable work; and (2) whether the Office properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

On August 16, 1994 appellant, then a 27-year-old clerk, sustained an employment-related lumbosacral strain and herniated nucleus pulposus at L5-S1. He received compensation for various periods of disability and was terminated from his temporary assignment position for the employing establishment in September 1994.<sup>1</sup> Medical evidence showed that appellant could perform limited work and he participated in vocational rehabilitation efforts.<sup>2</sup> On September 26, 2001 the employing establishment offered appellant a job as an inventory clerk. The position was of a clerical nature and mostly required reading and writing; it did not require lifting, bending or strenuous reaching. The position was temporary with a not-to-exceed date of 120 days. Appellant did not accept the offered position within the time allotted.

On October 31, 2001 the Office advised appellant of its determination that the inventory clerk position was suitable and provided him 30 days to accept the position or provide valid reasons for not doing so. In a letter dated November 27, 2001, the Office advised appellant that he had not provided valid reasons for refusing the offered position. The Office provided appellant with an additional 15 days to accept the position, but appellant did not accept the

---

<sup>1</sup> The employing establishment indicated that, at the time of his termination, appellant was one month short of fulfilling his three-month temporary appointment.

<sup>2</sup> By decision dated August 20, 1997, the Board reversed a November 18, 1996 decision of the Office on the grounds that the Office had not met its burden of proof to terminate appellant's compensation because it had not shown that the constructed position of package handler represented his wage-earning capacity. The Board determined that the medical evidence on which the Office based its decision did not show that appellant could perform the position of package handler.

position within 15 days. By decision dated January 24, 2002, the Office terminated appellant's compensation effective January 24, 2002 on the grounds that he refused an offer of suitable work. By decision dated October 7, 2002, the Office denied appellant's request for an oral hearing on the grounds that it was untimely.

The Board finds that the Office improperly denied appellant's request for a hearing under section 8124 of the Act.

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."<sup>3</sup> 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.<sup>4</sup>

Under the regulations implementing section 8124(b) of the Act, the date the request is filed is determined by the postmark of the request.<sup>5</sup> In this case, the 30-day period for determining the timeliness of appellant's hearing request would commence on January 25, 2002, the date following the issuance of the Office's January 24, 2002 decision terminating his compensation. However, 30 days from January 25, 2002 would be February 23, 2002 which fell on a Saturday. The first regular business day following February 23, 2002 was Monday, February 25, 2002 and appellant's hearing request would be timely if filed by February 25, 2002.

Appellant's letter requesting a hearing from the Office's January 24, 2002 decision is dated February 25, 2002. 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.<sup>6</sup> 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 February 25, 2002 and the record contains no envelope with a postmark, the Board finds that his request is timely filed and he is entitled to a hearing as a matter of right.<sup>7</sup> 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

---

<sup>3</sup> 5 U.S.C. § 8124(b)(1).

<sup>4</sup> *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

<sup>5</sup> 20 C.F.R. § 10.616(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.3(b) (October 1992).

<sup>7</sup> *Diane B. Werner*, Docket No. 01-274 (issued September 10, 2001). In its October 7, 2002 decision, the Office indicated that appellant's hearing request was postmarked February 26, 2002. However, without the postmark in the record, it is not possible to verify this assertion.

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.<sup>8</sup>

The October 7, 2002 decision of the Office of Workers' Compensation Programs is reversed and the January 24, 2002 decision of the Office is set aside. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC  
June 24, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

---

<sup>8</sup> 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 the Office properly terminated his compensation effective January 24, 2002 on the grounds that he refused an offer of suitable work.