U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AMADO LUIS and DEPARTMENT OF THE AIR FORCE, LACKLAND AIR FORCE BASE, TX

Docket No. 03-1952; Submitted on the Record;
Issued November 13, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record.

On February 9, 2001 appellant, then a 46-year-old mason, filed a claim for compensation alleging that he developed high blood pressure and other complications due to stress at work. After developing the evidence in the case, the Office denied appellant's claim for compensation by decision dated June 7, 2001. In an attached statement of review rights, the Office advised that any request for a review of the written record must be postmarked within 30 days of the date of that decision.

On April 23, 2003 appellant inquired about the status of his case. On May 7, 2003 the Office informed him that his case was denied on June 7, 2001. The Office provided him a copy of that decision and stated: "If you desire to take any action regarding this case you must exercise your appeal rights which are attached to the decision."

In a letter dated May 26, 2003, appellant argued the merits of his case and stated: "Therefore, I am requesting for [r]econsideration on my case (first request) and [r]eview of the [w]ritten [r]ecord." Appellant identified the subject of his letter as "Review of the Written Record (first request)."

In a decision dated July 10, 2003, the Office denied a review of the written record. The Office found that appellant's request was untimely, as he did not make it within 30 days of the June 7, 2001 decision denying his claim for compensation. Although he was not entitled to a review of the written record as a matter of right, the Office considered granting a discretionary review but determined that appellant could equally well address the issue in his case by requesting reconsideration from the Office and submitting evidence not previously considered establishing that he sustained an injury in the performance of duty.

On July 29, 2003 appellant filed an appeal with the Board. He argued the merits of his claim and submitted new evidence for the Board's consideration.

An appeal to the Board must be mailed no later than one year from the date of the Office's final decision.[1] Appellant's July 29, 2003 appeal gives the Board authority to review the Office's July 10, 2003 decision denying a review of the written record. Because the appeal comes more than a year after the Office's June 7, 2001 decision denying his claim for compensation, the Board may not review that decision or consider the merits of his claim. The only issue the Board may decide is whether the Office properly denied a review of the written record. In deciding this issue, the Board may review only the evidence that was before the Office at the time of its July 10, 2003 decision.[2] The Board may not consider the new evidence appellant submitted on appeal.

The Board finds that the Office properly denied appellant's request for a review of the written record.

A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record.[3] A claimant injured on or after July 4, 1966 who has received a final adverse decision by the district Office, may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[4] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[5] In such a case the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[6]

Because appellant sent his May 26, 2003 request for a hearing more than 30 days after the Office's June 7, 2001 decision denying his claim for compensation, he is not entitled to a

[1] 20 C.F.R. §§ 501.3(d) (time for filing), 501.10(d)(2) (computation of time).

[2] *Id*. at § 501.2(c).

[3] *Id*. at § 10.615 (1999).

[4] *Id*. § 10.616(a); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.3.b (October 1992) (where the request for a hearing or review is sent to the Branch of Hearings and Review, the envelope will be retained and attached to the request).

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

[6] *Rudolph Bermann*, 26 ECAB 354 (1975).

hearing as a matter of right.[7] The Office nonetheless considered granting a discretionary hearing but determined that appellant could equally well address the issue in his case by instead requesting reconsideration from the Office and submitting evidence not previously considered establishing that he sustained an injury in the performance of duty. As appellant may indeed address the issue in his case through the reconsideration process, thereby making a hearing unnecessary, the Board finds that the Office did not abuse its discretion in denying appellant's untimely request for a hearing.[8]

The July 10, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
November 13, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] Because the Office did not retain the envelope, a postmark cannot be used to determine timeliness. Therefore, the Board will use the date of the letter itself to determine when appellant sent his request for a hearing. *Mario Palomo*, Docket No. 01-1373 (issued April 3, 2002). *Cf.* Procedure Manual, *Reconsiderations*, Chapter 2.1602.3.b (May 1996) (if there is no postmark, or it is not legible, other evidence such as (but not limited to) certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date. Otherwise, the date of the letter itself should be used).

[8] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).