

**United States Department of Labor
Employees' Compensation Appeals Board**

TEDDY M. MARSHALL, Appellant)	
)	
and)	Docket No. 03-2288
)	Issued: April 19, 2004
U.S. POSTAL SERVICE,)	
GENERAL MAIL FACILITY,)	
Oklahoma City, OK, Employer)	

Appearances:
Teddy M. Marshall, pro se,
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 25, 2003 appellant filed a timely appeal of the August 8, 2003 decision of the Office of Workers' Compensation Programs, which denied her request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the Office's August 8, 2003 decision. The Board, however, does not have jurisdiction over the merits of appellant's claim as the Office issued its last merit decision on June 22, 2001.

ISSUE

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

FACTUAL HISTORY

On March 9, 1988 appellant, then a 44-year-old clerk, sustained a traumatic injury while pushing a general purpose container in the performance of duty. The Office accepted her claim for lumbar strain. Appellant received appropriate wage-loss compensation and later accepted a permanent reassignment as a distribution clerk effective June 15, 1991.

On January 30, 2001 appellant filed a claim for compensation (Form CA-7), for lost wages dating back to May 13, 1995. In an accompanying letter, she explained that she suffered a loss of wage-earning capacity as a result of her work schedule being changed initially in May 1995. On the Form CA-7 appellant indicated that she lost "Sunday pay." She claimed that her work schedule was changed as a result of her March 9, 1988 injury. In contrast, the employing establishment denied that appellant's schedule was changed due to her injury and submitted a May 4, 1995 letter, which advised her that her change in duty status effective May 13, 1995 was "[b]ased on needs of the service...."¹

In a June 22, 2001 decision, the Office found that there was no evidence that appellant incurred a loss of wage-earning capacity due to her work-related injury of March 9, 1988. The Office explained that the decision regarding her change of schedule and the resulting loss of Sunday premium pay was an internal administrative action and not compensable.

On June 16, 2003 the Office received a request for an oral hearing from appellant. The request was dated July 10, 2001.² By decision dated August 8, 2003, the Office denied appellant's request for an oral hearing on the grounds that the request was untimely. The Office found that she did not submit her request for an oral hearing within 30 days of the Office's June 22, 2001 decision and, therefore, she 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 could equally well be addressed through the reconsideration process.

LEGAL PRECEDENT

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.³ A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which a hearing is sought. However, the Office has discretion to grant or deny a request that was made after this 30-day period.⁴ In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.⁵

¹ This personnel action changed appellant's nonscheduled days from Friday and Saturday to Saturday and Sunday.

² Appellant's request appears to have been submitted along with a June 2, 2003 letter from Brian D. Delp, a representative of the American Postal Workers' Union.

³ 20 C.F.R. § 10.616(a) (1999).

⁴ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁵ *Rudolph Bermann*, 26 ECAB 354 (1975).

Under the Office's procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope, which contains the letter requesting a hearing.⁶ The Branch of Hearings and Review is required to retain the envelope in which a request for a hearing is made so as to establish the timeliness of the request for a hearing.⁷ If the date of the postmark cannot be determined, the Office should presume the request was timely and grant the request for a hearing, as it was the Office's responsibility to keep the envelope or otherwise keep evidence of the date of the delivery in the case record.⁸

ANALYSIS

The Office issued its decision in this case on June 22, 2001. In a letter dated July 10, 2001, appellant requested an oral hearing. In this case, the case record does not contain the envelope itself from which the timeliness of the hearing can be determined. The Board finds that the case must therefore be remanded for the Office to determine, if possible, the date that the letter requesting a hearing was postmarked. As stated above, if the postmark cannot be determined, the Office shall presume that appellant's request was timely. Based on further development of the record, the Office shall issue a *de novo* decision with respect to appellant's request for an oral hearing.

CONCLUSION

The Board finds that the Office improperly exercised its discretion in denying appellant's request for an oral hearing as untimely.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 1992).

⁷ *Id.* at Chapter 2.1601.3(b).

⁸ *Gus N. Rodes*, 43 ECAB 268 (1991).

ORDER

IT IS HEREBY ORDERED THAT the August 8, 2003 decision of the Office of Workers' Compensation Programs is hereby set aside and remanded.

Issued: April 19, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member