

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

JOHNNY R. MULLINS, Appellant

and

**U.S. DEPARTMENT OF AGRICULTURE,
FRENCHBURG JOB CORPS, Frenchburg, KY,
Employer**

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**Docket No. 05-475
Issued: June 14, 2005**

Appearances:
Johnny R. Mullins, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 16, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated July 16, 2004, finding that he did not sustain an injury while in the performance of duty and October 26, 2004, which denied his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and the denial of appellant's oral hearing request.¹

ISSUES

The issues are: (1) whether appellant has established that he sustained an injury while in the performance of duty; and (2) whether the Office properly denied appellant's request for an oral hearing on the grounds that it was not timely filed pursuant to 5 U.S.C. § 8124(b).

¹ The Board notes that with his appeal, appellant submitted additional new evidence. The Board, however, may not review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

In an occupational disease claim dated February 13, 2004, appellant, then a 49-year-old counseling supervisor, alleged that his heart problems were due to his employment duties. Appellant first became aware of his heart problems on December 16, 2002 and first related this condition to his employment duties on December 11, 2003. In a separate statement, he described the events of December 11, 2003, noting that his chest pain started after he had helped unfold and lay out the gym floor covering mats to prepare for the center's Christmas community dinner. Appellant stopped work and went to the hospital the same day. He was treated at the hospital and released on December 16, 2003. Appellant returned to work December 17, 2003.

Appellant submitted an April 19, 2004 letter from the employing establishment, a May 5, 2004 letter from Charles R. Conn, Work Program Administrator, concerning a February 25, 2004 incident where appellant ended up going home after appearing sick during a meeting and reports from Dr. Avichai Eres, a Board-certified internist specializing in cardiovascular disease. In an April 30, 2004 report, Dr. Eres advised that appellant presented to St. Joseph Hospital East Emergency Room on February 25, 2004 with chest pain and was diagnosed with unstable angina and coronary artery disease. Appellant also underwent a left heart catheterization on February 26, 2004. Dr. Eres stated that an event recorder was placed on appellant to determine what was happening when he had another episode. He stated that it could not be determined whether appellant's employment was the actual cause of his problems. Copies of the February 25, 2004 hospital admission and February 26, 2004 catheterization procedure were submitted.

In a letter dated June 9, 2004, the Office advised appellant that the information submitted was not sufficient to determine his eligibility for benefits under the Federal Employees' Compensation Act. The Office requested that he provide additional factual and medical information. The Office did not receive any further evidence from appellant.

By decision dated July 16, 2004, the Office denied appellant's claim for compensation on the grounds that his injury did not occur in the performance of duty.

In a form dated July 27, 2004 and stamped as received by the Office on July 29, 2004, appellant requested an oral hearing and reconsideration of the July 16, 2004 decision.

In an appeal request form dated August 9, 2004, appellant again requested an oral hearing. Such form was stamped received by the Board on September 1, 2004 and by the Office on September 29, 2004. The envelope accompanying the August 9, 2004 oral hearing request was postmarked August 25, 2004 and addressed to the Board.

By decision dated October 26, 2004, the Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that he was not entitled to such a hearing as a matter of right as his request, which was postmarked August 25, 2004, was not timely filed. The Branch of Hearings and Review exercised its discretion and noted that appellant's claim could equally well be addressed through the submission of additional evidence in the reconsideration process.

LEGAL PRECEDENT

Section 8124(b)(1) of the Act provides that “a claimant ... 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 Section 10.615 of the Office’s federal regulation implementing this section of the Act, provides that a claimant can choose between an oral hearing or a review of the written record.³ The regulation also provides that in addition to the evidence of record, the employee may submit new evidence to the hearing representative.⁴

Section 10.616(a) of the federal regulation provides that a request for a review of the written record or an oral hearing “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.”⁵ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant’s request and must exercise its discretion.⁶

ANALYSIS

The Office denied appellant’s request for an oral hearing on the grounds that his request postmarked August 25, 2004 was not timely filed. The record, however, reflects that appellant originally requested both an oral hearing and reconsideration regarding the July 16, 2004 decision denying his claim that an injury occurred in the performance of duty in both a letter and appeal request form dated July 27, 2004 and stamped as received by the Office on July 29, 2004. In this case, the receipt of appellant’s request is evidenced by the Office’s stamp of July 29, 2004. This establishes that appellant’s request for an oral hearing and reconsideration was received by the Office within 30 days of the July 16, 2004 decision and was timely. Under the requirements of section 8124(b), a hearing may be granted only before review under section 8128(a).⁷ The Board has held that where there is a simultaneous request for an oral hearing and for reconsideration before the Office, the Office must properly consider a claimant’s request for a hearing first to avoid creating a conflict with the requirements of section 8124(b)(1) that a hearing may be granted only before review under section 8128(a).⁸ As appellant’s July 27, 2004 request represents a timely filing of an oral hearing request, the Office improperly denied

² 5 U.S.C. § 8124(b)(1).

³ 20 C.F.R. § 10.615.

⁴ *Id.*

⁵ *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

⁶ *Daniel J. Perea*, 42 ECAB 214 (1990).

⁷ 5 U.S.C. § 8124(b).

⁸ *Mary G. Allen*, 40 ECAB 190 (1988).

appellant's hearing request. The Board finds that under these circumstances, the case must be remanded for an oral hearing.⁹

CONCLUSION

The Board finds that the Office improperly denied appellant's request for an oral hearing in its October 26, 2004 decision, as it had a timely request dated July 27, 2004 and stamped received July 29, 2004, for an oral hearing of the July 16, 2004 decision. The October 26, 2004 decision must be set aside and the case remanded for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 26, 2004 is set aside and the case remanded for further action consistent with this decision.

Issued: June 14, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁹ Due to the disposition of this issue, the remaining issue before the Board is not in posture for a decision, as the Branch of Hearings and Review has not issued a final decision on these issues. 20 C.F.R. § 501.2(c).