



sustained injuries when glass shattered and hit her in the left side of the face and in the area of her left eye.

Appellant submitted a form report signed by a physician's assistant dated December 22, 2004.<sup>1</sup>

In a letter dated January 6, 2005, the Office requested additional factual and medical information from appellant and allowed her 30 days to respond. In an undated statement received by the Office on January 24, 2005, appellant reported that on December 23, 2004 she was involved in a motor vehicle accident and that glass flew in her face and that her face felt bruised. She noted that she did not sustain cuts in her left eye or on her face and that her physician did not find any physical damage to her eye or face, but recommended antibiotics as a precautionary measure. Appellant did not use antibiotics.

Appellant also submitted additional emergency room notes dated December 23, 2004 signed by Dr. Shinici Sato, an emergency room physician, noting that appellant reported mild facial pain at 12:34 p.m. following a motor vehicle accident. Dr. Sato noted that appellant's skin color was good and reported no findings with regard to her eyelids and eyelashes with no foreign bodies in her eye and no corneal abrasion. He also noted that appellant had no lacerations, abrasions, ecchymoses or obvious traumatic deformities of the head, face, trunk, neck or extremities. Dr. Sato found that appellant's facial pain had resolved by 1:58 p.m.

By decision dated February 16, 2005, the Office denied appellant's claim finding that she failed to submit any medical evidence of a condition resulting from the December 23, 2004 employment incident.

Appellant requested an oral hearing by form dated March 14, 2005 and received by the Office on March 23, 2005. The postmark on the copy of the envelope included in the record is not legible.

By decision dated May 27, 2005, the Branch of Hearings and Review denied appellant's request for an oral hearing as untimely finding that it was postmarked March 23, 2005 and found that the issues in her case could be resolved through the reconsideration process.

### **LEGAL PRECEDENT**

Section 8124(b)(1) of the Federal Employees' Compensation Act provides in pertinent part as follows:

“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

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<sup>1</sup> A physician's assistant is not considered to be a physician within 5 U.S.C. § 8101(2) and this report does not constitute medical evidence. *John D. Williams*, 37 ECAB 238 (1985).

within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary.”<sup>2</sup>

The claimant can choose between two formats: an oral hearing or a review of the written record.<sup>3</sup> The requirements are the same for either choice.<sup>4</sup> The Board has held that section 8124(b)(1) is “unequivocal” in setting forth the time limitation for requesting hearings or reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier’s date marking<sup>5</sup> and before the claimant has requested reconsideration.<sup>6</sup> However, when the request is not timely filed or when reconsideration has previously been requested, the Office may within its discretion, grant a hearing or review of the written record, and must exercise this discretion.<sup>7</sup>

### ANALYSIS

The Office issued its decision denying appellant’s claim for failure to establish an injury on February 16, 2005. The record contains appellant’s request for an oral hearing dated March 14, 2005 but stamped as received by the Office on March 23, 2005. The postmark on the copy of the accompanying envelope included in the record is illegible. 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>8</sup> 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. As appellant submitted request for a hearing which was dated March 14, 2005 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.<sup>9</sup> Consequently, the case must be remanded for the Office to provide appellant a hearing under section 8124 of the Act. Upon return of the case record, the Office should schedule a hearing

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<sup>2</sup> 5 U.S.C. §§ 8101-8193, § 8124(b)(1).

<sup>3</sup> 20 C.F.R. § 10.615.

<sup>4</sup> *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

<sup>5</sup> 20 C.F.R. § 10.616(a). *Tammy J. Kenow*, 44 ECAB 619 (1993).

<sup>6</sup> *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

<sup>7</sup> *Id.*

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.3(b) (October 1992).

<sup>9</sup> *Robin M. Taylor*, Docket No. 03-2239 (issued December 19, 2003).

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.<sup>10</sup>

**CONCLUSION**

The Board finds that the Office improperly found that appellant had filed an untimely request for an oral hearing.

**ORDER**

**IT IS HEREBY ORDERED THAT** May 27, 2005 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: September 15, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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<sup>10</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 appellant had established that she sustained an injury in the performance of duty on December 23, 2004, deferring that determination to the Office.