



forwarded a copy of its November 17, 2004 decision, along with a copy of appellant's appeal rights and an appeal request form, to appellant's address of record: P.O. Box 207, Huntington Beach, CA 92648. The appeal request form contained appellant's file number (132104902/1042D) in the top right-hand corner.

On October 14, 2005 appellant submitted a signed appeal request form containing her file number (132104902/1042D) in the top right-hand corner, reflecting her desire for an oral hearing. The record also contains a copy of a certified mail envelope dated October 14, 2005 and addressed to the Branch of Hearings and Review.

On November 16, 2005 the Office denied appellant's request for an oral hearing as untimely. The Office further found that appellant's case could be equally well addressed by a request for reconsideration.

At oral argument appellant testified that her mail delivery had been erratic and that she may not have received a copy of the Office's November 17, 2004 decision. For this reason, she contended that her request for an oral hearing should be granted.

### **LEGAL PRECEDENT**

Section 8124 of the Federal Employees' Compensation Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of a final decision by the Office.<sup>1</sup> The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.<sup>2</sup>

Section 10.616(a) of Title 20 of the Code of Federal Regulations further provides: "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."<sup>3</sup>

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, including when the request is made after the 30-day period for requesting a hearing, and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>4</sup> In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.<sup>5</sup>

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<sup>1</sup> 5 U.S.C. § 8124(b)(1).

<sup>2</sup> *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

<sup>3</sup> 20 C.F.R. § 10.616(a). See also *Gerard F. Workerger*, 56 ECAB \_\_\_\_ (Docket No. 04-1028, issued January 18, 2005).

<sup>4</sup> *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994).

<sup>5</sup> *Claudio Vasquez*, 52 ECAB 496 (2001); *Johnny S. Henderson*, 34 ECAB 216 (1982).

## ANALYSIS

The Office issued a decision on November 17, 2004 denying appellant's emotional condition claim. Appellant requested an oral hearing by submitting an appeal request form dated and postmarked October 14, 2005. By decision dated November 16, 2005, the Office denied appellant's request for an oral hearing as untimely. As her request for an oral hearing was postmarked on October 14, 2005, more than 30 days after the Office issued its November 17, 2004 decision, appellant was not entitled to an oral hearing as a matter of right.

Appellant contends that she may not have received the Office's November 17, 2004 decision, due to the erratic nature of her mail delivery. The Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual.<sup>6</sup> Under the mailbox rule, evidence of a properly addressed letter together with evidence of proper mailing may be used to establish receipt.<sup>7</sup> The Board notes that a properly addressed copy of the November 17, 2004 decision with attached notification of appeal rights appears in the case record. Moreover, it appears that the October 14, 2005 appeal request form submitted by appellant in furtherance of her request for an oral hearing, was either the same form or a copy of the form forwarded to her as an attachment to the November 17, 2004 decision, as it contained appellant's file number (132104902/1042D) in the top right-hand corner. Consequently, the evidence is not sufficient to rebut the presumption of receipt by appellant under the mailbox rule.

The Office has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right.<sup>8</sup> The Office properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant's request for an oral hearing on the grounds that the case could be resolved by submitting additional evidence to the Office in a reconsideration request. The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.<sup>9</sup> In this case, the evidence of record does not establish that the Office took any action in connection with its denial of appellant's request for an oral hearing which could be construed to be an abuse of discretion. Therefore, the Office properly denied her request for an oral hearing as untimely under section 8124 of the Act.

## CONCLUSION

The Board finds that the Office properly denied appellant's request for an oral hearing.

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<sup>6</sup> *Samuel R. Johnson*, *supra* note 4.

<sup>7</sup> *See Joseph R. Giallanza*, 55 ECAB 186 (2003).

<sup>8</sup> *Afegalai L. Boone*, 53 ECAB 533 (2002).

<sup>9</sup> *See André Thyratron*, 54 ECAB 257 (2002).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 16, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 15, 2006  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board