

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

ALTON L. WINNER, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Capital Heights, MD, Employer**

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**Docket No. 06-484
Issued: May 1, 2006**

Appearances:
Alton L. Winner, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 27, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated May 10 and November 7, 2005. Under 20 C.F.R. § 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that he sustained a neck injury in the performance of duty; and (2) whether the Office properly denied appellant's request for an oral hearing before an Office hearing representative.

FACTUAL HISTORY

Appellant, a 49-year-old mail handler, filed a claim for benefits on March 12, 2005, alleging that he strained his neck while moving a container on October 1, 2000. The employing establishment controverted the claim, asserting that it had no knowledge that the alleged incident had occurred more than four years prior to appellant's filing of the claim.

By letter dated April 8, 2005, the Office advised appellant that he needed to submit additional factual and medical evidence in support of his claim. The Office stated that appellant had 30 days to submit the requested information.

Appellant submitted a May 6, 2005 statement in which he alleged that he immediately informed his supervisor of his injury at the time of his alleged October 2000 injury and that he did in fact complete and submit a Form CA-1 at that time. However, appellant alleged that the form was twice returned to him without any action having been taken by the Office.

Appellant also submitted reports dated March 26 and April 23, 2004 from Dr. Mark Cohen, a Board-certified orthopedic surgeon, who related that appellant sustained an employment-related injury on October 1, 1998 and might have underwent a clavicle resection procedure in 2000. Dr. Cohen noted that appellant complained of pain in his neck and right shoulder on examination. He advised that a magnetic resonance imaging (MRI) scan of the neck indicated cervical spondylosis and mild cord deformity at C5-6 and C6-7, with no evidence of myelopathy. An MRI scan of appellant's right shoulder showed osseous changes at the shoulder, which could be associated with rotator cuff impingement disorder and probable mild subacromial bursitis.

By decision dated May 10, 2005, the Office denied appellant's claim, finding that she failed to establish fact of injury.

In a letter postmarked July 16, 2005, appellant requested an oral hearing.

By decision dated November 7, 2005, the Office denied appellant's request for an oral hearing. The Office stated that appellant's request was postmarked July 16, 2005, which was more than 30 days after the issuance of the Office's May 10, 2005 decision, and that he was therefore not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

LEGAL PRECEDENT -- ISSUE 1

Section 8122(a) of the Federal Employees' Compensation Act states, "An original claim for compensation for disability or death must be filed within three years after the injury or death."¹ The statute provides an exception, which states that a claim may be regarded timely if an immediate superior had actual knowledge of the injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.²

¹ 5 U.S.C. § 8122(a).

² 5 U.S.C. § 8122(a)(1); *see Eddie L. Morgan*, 45 ECAB 600 (1994); *Jose Sales*, 41 ECAB 743 (1990).

The issue of whether a claim was timely filed is a preliminary jurisdictional issue that precedes any determination on the merits of the claim. The Board may raise the issue on appeal even if the Office did not base its decision on the time limitation provisions of the Act.³

ANALYSIS -- ISSUE 1

In the instant case, appellant stated that he sustained an employment-related neck injury on October 1, 2000. Appellant, however, did not file an occupational disease claim until March 12, 2005, which was not within the three-year time limitation set forth in the statute. The evidence does not establish that appellant provided any notice of injury to his supervisor prior to this time, or that anything occurred to make his supervisor reasonably aware that he sustained an injury relating to his employment within 30 days after October 1, 2000. The employing establishment controverted the claim alleging that it had no timely notice of injury. While appellant alleges that he timely filed a CA-1, which was returned to him, he has not submitted any evidence to support this allegation. The Board therefore finds that appellant failed to file his traumatic injury claim within the applicable time limitation provisions.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the 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 and Office's final decision.⁴ A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.⁵ The Office has discretion, however, to grant or deny a request that is made after this 30-day period.⁶ 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.⁷

ANALYSIS -- ISSUE 2

In the present case, because appellant's July 16, 2005 request for a hearing was postmarked more than 30 days after the Office's May 10, 2005 decision denying compensation for a claimed neck injury, he is not entitled to a hearing as a matter of right. The Office considered whether to grant a discretionary hearing and correctly advised appellant that he could pursue her claim through the reconsideration process. As appellant may address the issue in this case by submitting to the Office new and relevant evidence with a request for reconsideration, the Board finds that the Office properly exercised its discretion in denying appellant's request for

³ *David R. Morey*, 55 ECAB ____ (Docket No. 04-967, issued August 16, 2004); *Charles Walker*, 55 ECAB ____ (Docket No. 03-1732, issued January 8, 2004).

⁴ 5 U.S.C. § 8124(b)(1).

⁵ 20 C.F.R. § 10.131(a)(b).

⁶ *William E. Seare*, 47 ECAB 663 (1996).

⁷ *Id.*

a hearing. The Board therefore affirms the Office's November 7, 2005 decision denying appellant an oral hearing by an Office hearing representative.

CONCLUSION

The Board finds that appellant failed to file his claim within the time limitation provisions of the Act. The Board finds the Office properly denied appellant's request for an oral hearing before an Office hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the November 7 and May 10, 2005 decisions of the Office of Workers' Compensation Programs be affirmed, as modified.

Issued: May 1, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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