

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

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<b>W.A., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 06-1452</b>
	)	<b>Issued: November 27, 2006</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Columbus, OH, Employer</b>	)	
_____	)	

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant*  
*Office of 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 June 5, 2006 appellant, through his attorney, filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated May 2, 2006 denying his request for a hearing as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the denial of the hearing request. As more than one year has elapsed between the filing of this appeal and the most recent merit decision of May 22, 2005, the Board lacks jurisdiction to review the merits of this case.

**ISSUE**

The issue is whether the Office properly denied appellant's request for an oral hearing on the grounds that it was untimely filed.

**FACTUAL HISTORY**

On December 30, 2004 appellant, then a 50-year-old letter box mechanic, filed a claim for a traumatic injury (Form CA-1). On May 14, 2004 he twisted his back, ruptured three discs and tore a cartilage in his knee when he slipped while pulling down the door on the back of his

truck. Appellant stopped work on May 17, 2004 and did not return. On the CA-1 form his address was listed as 1065 Lelton Avenue, Columbus, Ohio 43206-1725. The Office assigned the case file number 092055588.

The record contains a September 16, 2004 letter sent by the Office to appellant in connection with his notice of recurrence of disability in another case, assigned file number 090444190. The Office sent the letter to appellant at 1065 Kelton Avenue, Columbus, Ohio 43206-1725. By letter dated February 9, 2005, the Office requested additional factual and medical evidence from appellant in support of his claim. The Office addressed the request to 1065 Lelton Avenue, Columbus, Ohio 43206-1725.

On February 17, 2005 the Office's February 9, 2005 development letter was returned as undeliverable.

By decision dated March 22, 2005, the Office denied appellant's claim on the grounds that he did not establish an injury in the performance of duty on May 14, 2004. The Office sent the decision to appellant at 1065 Lelton Avenue, Columbus, Ohio 43206-1725.

On February 2, 2006 appellant's attorney indicated that he had not heard from the Office regarding his claim and requested information. The attorney indicated that he was sending a copy of the February 2, 2006 letter to appellant at 1065 Kelton Avenue, Columbus, Ohio 43206-1725. The Office acknowledged the representation in a March 13, 2006 letter to counsel. The Office also sent a copy of the letter to appellant at 1065 Kelton Avenue, Columbus, Ohio 43206-1725.

On March 24, 2006 appellant, through his attorney, requested an oral hearing before an Office hearing representative. By decision dated May 2, 2006, the Office denied his request for an oral hearing as untimely under section 8124. The Office found that the issue could be equally well addressed through the submission of new and relevant evidence accompanying a valid request for reconsideration.

### **LEGAL PRECEDENT**

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing, states: "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 within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>1</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8124(b)(1).

<sup>2</sup> *Frederick D. Richardson*, 45 ECAB 454 (1994).

Section 10.615 of Title 20 of the Code of Federal Regulations provides, “A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record.”<sup>3</sup>

Section 10.616(a) further provides, “A claimant injured on or after July 4, 1966, who had 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>4</sup>

The Office’s regulations provide that a request received more than 30 days after the Office’s decision is subject to the Office’s discretion and the Board has held that the Office must exercise this discretion when a hearing request is untimely.<sup>5</sup>

### ANALYSIS

The Office issued a decision on March 22, 2005 denying appellant’s claim for an injury on May 14, 2004. Appellant sought an oral hearing on March 24, 2006. The Office denied appellant’s hearing request as untimely by decision dated May 2, 2006. As appellant’s request for a hearing was dated March 24, 2006, more than 30 days after the Office issued its March 22, 2005 decision, he was not entitled to a hearing as a matter of right.

The Office determined that the issue involved in appellant’s case could be equally well addressed by requesting reconsideration and submitting medical evidence. The Board, however, finds that the Office did not properly exercise its discretion in denying appellant a discretionary oral hearing. While he was not entitled to a hearing as a matter of right, a proper exercise of the Office’s discretion would have included reasons for not granting him a discretionary oral hearing.<sup>6</sup> In its May 2, 2006 decision denying appellant’s request for an oral hearing, the Office did not explain why it did not grant him a discretionary oral hearing. This omission is critical in this case as the record indicates that there were grounds for granting a discretionary oral hearing as, due to a mailing error, appellant was not afforded the full 30 days in which to request an oral hearing as provided in section 10.616.<sup>7</sup>

The Office mailed the March 22, 2005 decision to 1065 Lepton Avenue, Columbus, Ohio 43206-1725. Appellant’s correct address is 1065 Kelton Avenue, Columbus, Ohio 43206-1725. 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>8</sup>

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<sup>3</sup> 20 C.F.R. § 10.615.

<sup>4</sup> 20 C.F.R. § 10.616(a).

<sup>5</sup> 20 C.F.R. § 10.616(b); *Joseph R. Giallanza*, 55 ECAB 186 (2003).

<sup>6</sup> *Leona B. Jacobs*, 55 ECAB 753 (2004); *Denise R. Danowski*, Docket No. 04-1480 (issued January 5, 2005).

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

<sup>8</sup> *Samuel R. Johnson*, 51 ECAB 612 (2000).

Under the mailbox rule, evidence of a properly addressed letter together with evidence of proper mailing may be used to establish receipt.<sup>9</sup> The Office sent a February 9, 2005 development letter to appellant at 1065 Lelton Avenue, Columbus, Ohio 43206-1725, which appeared to be the address on the Form CA-1. The February 9, 2005 letter, however, was returned to the Office as undeliverable. The Office thus was on notice that its address for appellant was incorrect. The record contains no evidence that the Office attempted to ascertain the correct address by telephoning appellant. The record also includes evidence that the Office mailed correspondence to appellant's correct address in conjunction with another claim and that this evidence was associated with the current case record prior to the issuance of the March 9, 2005 decision. Consequently, the March 9, 2005 decision was not sent to appellant's correct address, and thus the presumption of receipt under the mailbox rule does not arise.<sup>10</sup>

As the March 9, 2005 decision was misaddressed, appellant was not afforded the full 30 days from the date of that decision in which to request an oral hearing as required by 5 U.S.C. § 8124 and section 10.616 of the Act's implementing regulations. In its May 2, 2006 decision denying appellant's request for an oral hearing, the Office failed to acknowledge the mailing error or fully set forth its reasons for failing to grant a discretionary oral hearing. Thus, the case will be remanded to the Office to properly exercise its discretion in determining whether to grant appellant a hearing.<sup>11</sup> After such further development as it deems necessary, the Office shall issue an appropriate decision in this case.

### CONCLUSION

The Board finds that the Office properly found that appellant was not entitled to a hearing as a matter of right. The Board further finds that the Office did not properly exercise its discretion in denying appellant a discretionary hearing. Thus, the case will be remanded to the Office for a proper exercise of its discretionary authority.

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<sup>9</sup> See *Joseph R. Giallanza*, *supra* note 5.

<sup>10</sup> See *Clara T. Norga*, 46 ECAB 473 (1995).

<sup>11</sup> See *Leona B. Jacobs*; *supra* note 6.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 2, 2006 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 27, 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