

The employing establishment submitted a statement from Ella Mays, appellant's acting supervisor, who noted that his position as an equipment operator required him to lift pallets of mail with the forklift; however, she was not aware of him performing substantial lifting. Appellant submitted a February 14, 2006 report from Dr. Roy E. Hanks, II, an osteopath, who noted that he was scheduled for surgery on February 16, 2006 and would be incapacitated for 10 days. In a disability certificate dated February 27, 2006, Dr. Hanks noted that appellant was totally disabled from February 16 to March 9, 2006 and could return to work without restrictions.

The Office advised appellant of the evidence needed to establish his claim. He submitted a statement dated March 6, 2006 contending that he developed a hernia due to his work duties which included lifting mail pallets. Appellant first noticed his hernia condition on January 23, 2006 and believed it was work related. His medical history was significant for four previous work-related hernia surgeries. He submitted a February 27, 2006 report from Dr. Hanks, who treated him since 1998 for multiple hernias. Dr. Hanks opined that appellant had no definitive test to determine the cause of the hernia but asserted a recurrent hernia could be consistent with a job requiring heavy lifting.

In a decision dated May 8, 2006, the Office denied appellant's claim on the grounds that medical evidence was not sufficient to establish the claim.

Appellant submitted a statement dated May 13, 2006 and asserted that his condition was caused by repeated heavy lifting. He indicated that his hobbies included video games and fishing and noted that he did not perform heavy lifting outside of work.

In an appeal request form dated May 13, 2006 but postmarked May 16, 2007, appellant requested a review of the written record. He also submitted a copy of his May 13, 2006 statement.

By decision dated June 22, 2007, the Office denied appellant's request for a review of the written record. The Office found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

LEGAL PRECEDENT

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... 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."¹ Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.² Although there is no right to a review of the written record or an oral hearing if not requested within the

¹ 5 U.S.C. § 8124(b)(1).

² 20 C.F.R. §§ 10.616, 10.617.

30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.³ The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

"If the claimant is not entitled to a hearing or review (*i.e.*, the request was untimely, the claim was previously reconsidered, etc.), [the Office] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons."⁴

ANALYSIS

In the present case, appellant requested a review of the written record in a request that was postmarked on May 16, 2007. Section 10.616 of the federal regulations provides: "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."⁵ As the date of the postmark on the request was more than 30 days following issuance of the May 8, 2006 Office decision, appellant's request for a review of the written record was untimely filed. The Office properly determined that appellant was not entitled to a review of the written record as a matter of right because his request was not made within 30 days of the Office's May 8, 2006 decision.

Appellant indicated that he sent his request within the 30-day time period and received a receipt from the employing establishment; however, he asserts that the Office failed to inform him that he was missing the appeal request form on the decision. The record reflects that the May 8, 2006 decision with accompanying appeal rights was properly mailed to appellant's address of record on May 8, 2006. Under the mailbox rule, he is presumed to have received the decision and accompanying appeal rights.⁶ The appeal rights specifically advised that a hearing request or a request for a review of the written record must be made in writing within 30-calendar days after the date of the decision, as determined by the postmark of the letter. Although appellant submitted a narrative statement dated May 13, 2006, received by the Office on May 24, 2006, he did not indicate that he sought to exercise any particular appeal right. Since he did not request a review of the written record within 30 days of the Office's May 8, 2006 decision, he was not entitled to a review of the written record under section 8124 as a matter of right.

³ *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

⁵ 20 C.F.R. § 10.616.

⁶ 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. Under the mailbox rule, evidence of a properly addressed letter together with evidence of proper mailing may be used to establish receipt. *Joseph R. Giallanza*, 55 ECAB 186 (2003).

While the Office also 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, the Office, in its June 22, 2007 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for a review of the written record on the basis that the case could be resolved by submitting additional evidence to the Office in a reconsideration request. The Board has held that, as the only limitation on the Office's authority is reasonableness, 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.⁷ In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a review of the written record, which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a review of the written record under section 8124 of the Act.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a review of the written record as untimely.

ORDER

IT IS HEREBY ORDERED that the June 22, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 19, 2008
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

⁷ *Samuel R. Johnson*, 51 ECAB 612 (2000).