

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

E.O., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Pittsburgh, PA, Employer)

Docket No. 11-943
Issued: January 12, 2012

Appearances:

Anthony L. Rosner, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REVERSING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On March 7, 2011 appellant, through his attorney, filed a timely appeal from the February 8, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied as untimely his request for a precoupment hearing.¹ The original request did not appear in the record. Appellant's attorney sent a copy to OWCP after the fact. The copy showed that the request was dated only 24 days after the July 30, 2010 preliminary determination. Nonetheless, the hearing representative found that appellant was not entitled to a hearing as a matter of right because there was no evidence that he submitted his request to the Branch of Hearings and Review or the district OWCP until he sent a copy of it on the 49th day.

The Board has duly considered the matter and finds that OWCP's February 8, 2011 decision must be reversed. A request for a precoupment hearing is timely if it is mailed within

¹ On September 1, 1988 appellant, a 41-year-old laundry worker, twisted his left knee in the performance of duty. OWCP accepted his claim for strain and traumatic arthritis of the left knee. Appellant underwent multiple surgeries, including a total knee replacement. He received multiple schedule awards, the last of which led to a preliminary determination of overpayment.

30 days.² The record shows that appellant's attorney, in the ordinary course of business on August 23, 2010, mailed a timely request to OWCP's London, KY, address. The hearing representative found the absence of the original request to be dispositive, but the mailbox rule establishes the presumption of receipt by OWCP of the original and timely request.³ The Board therefore finds that appellant is entitled to a prerecoupment hearing as a matter of right.

IT IS HEREBY ORDERED THAT the February 8, 2011 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further action consistent with this order.

Issued: January 12, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

² 20 C.F.R. § 10.432; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings And Reviews of the Written Record*, Chapter 2.1601.4.a (June 1997). There is one exception: If the claimant sent the request to the district OWCP instead of to the Branch of Hearings and Review, the envelope was not retained, and the district OWCP date-stamped the request after the 30th day, the Branch may deny the request on the grounds that failure to send the request to the Branch, as instructed, made it impossible to determine timeliness from the postmark. The exception, which presupposes the district OWCP's actual receipt and date-stamping of the original request, as well as the impossibility of determining timeliness from the date of mailing, does not apply here.

³ *Larry L. Hill*, 42 ECAB 596 (1991) (it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual, a presumption that must apply equally to claimants and OWCP alike).