

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN MULLINEX and U.S. POSTAL SERVICE,
POST OFFICE, Watertown, CT

*Docket Nos. 98-1902 & 00-282; Submitted on the Record;
Issued February 3, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing.

On March 8, 1995 appellant, then a 43-year-old letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained both physical and emotional conditions as a result of an abusive and hostile work environment.¹ Appellant indicated that he first became aware that his condition was employment related in September 1990. He ceased working on February 10, 1995. After development of the factual and medical record, the Office denied appellant's claim by decision dated April 24, 1997. The Office explained that appellant failed to identify any compensable employment factors and therefore, failed to establish that he sustained an injury in the performance of duty.

Appellant subsequently requested an oral hearing before the Office's Branch of Hearings and Review. The request was date stamped as being received on June 9, 1997. In his letter requesting a hearing, appellant acknowledged that his request was a "few days late." Additionally, appellant's attorney filed a request for reconsideration dated June 14, 1997.

Approximately 10 months after receiving appellant's request for a hearing, the Office denied the request as untimely. In its April 23, 1998 decision, the Office explained that appellant's request was received more than 30 days after the issuance of the April 27, 1997 decision denying compensation and therefore, he was not entitled to a hearing as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue of whether his claimed injury occurred in the performance of duty could be addressed through the reconsideration process. The Office further noted that appellant's counsel had already filed a request for reconsideration.

¹ Appellant had filed a similar claim on November 29, 1990, which the Office denied on March 18, 1991.

On May 26, 1998 appellant filed an appeal with the Board regarding the Office's April 23, 1998 decision denying his request for a hearing.

By decision dated July 29, 1998, the Office denied modification of its April 24, 1997 decision denying compensation. Appellant subsequently filed an appeal with the Board on October 1, 1998.

Initially, the Board finds that the Office did not have the authority to issue its July 29, 1998 decision denying modification. The Board and the Office may not simultaneously exercise jurisdiction over the same issue in a case.² At the time the Office issued its July 29, 1998 decision, appellant had already filed an appeal with the Board regarding the Office's April 23, 1998 denial of his hearing request. Inasmuch as the Board had obtained jurisdiction over the case on May 26, 1998, the Office lacked the authority to issue the July 29, 1998 decision denying modification. Accordingly, the Office's July 29, 1998 decision is set aside as null and void.³

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

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for an oral hearing must be submitted, in writing, within 30 days of the date of issuance of the decision. 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.⁴ The Office has discretion, however, to grant or deny a request that is made after this 30-day period.⁵ In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.⁶

The Office initially rejected appellant's claim for compensation in a decision dated April 27, 1997. Because appellant made his request for an oral hearing on June 9, 1997; more than 30 days after the Office's April 27, 1997 decision, he is not entitled to a hearing as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that the issue of whether his claimed injury occurred in the performance of duty could be addressed through the reconsideration process. The Office further noted that appellant's counsel had already filed a request for reconsideration. Consequently, the Office denied appellant a discretionary hearing. However, in denying appellant a discretionary hearing, the Office neglected to consider that, by failing to respond to appellant's hearing request in a timely fashion, it had effectively exhausted appellant's opportunity to obtain a merit review of

² *Arlonia B. Taylor*, 44 ECAB 591 (1993).

³ *Terry L. Smith*, 51 ECAB ____ (Docket No. 97-808, issued November 29, 1999).

⁴ 20 C.F.R. § 10.131(a).

⁵ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁶ *Rudolph Bermann*, 26 ECAB 354 (1975).

the April 27, 1997 decision before the Board. As previously noted, appellant's June 9, 1997 hearing request went unanswered for more than 10 months. By the time the Office issued its April 23, 1998 decision denying the requested hearing, appellant was left with only a few days within which to perfect an appeal of the Office's April 27, 1997 decision denying compensation. Under the circumstances, the Office's delay in processing appellant's hearing request constitutes an abuse of discretion.⁷ As such, the Office should grant appellant a merit review in the event that the request for a hearing is denied.

The decision of the Office of Workers' Compensation Programs dated July 29, 1998 is set aside as null and void, the Office's April 23, 1998 decision is set aside, and the case is remanded for further action consistent with this opinion.

Dated, Washington, D.C.
February 3, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁷ *Marilyn F. Wilson*, 51 ECAB ____ (Docket No. 98-401, issued December 15, 1999); *Brian R. Leonard*, 43 ECAB 255, 259-60 (1991) (the Board held that the Office's delay in processing appellant's request for a hearing effectively denied appellant the opportunity to obtain merit review of his claim, and thus, constituted an abuse of discretion).