

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KEN L. PALMER and DEPARTMENT OF THE AIR FORCE,  
LOGISTICS COMMAND, McCLELLAN AIR FORCE BASE, CA

*Docket No. 98-1562; Submitted on the Record;  
Issued February 8, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether appellant established that he sustained an emotional condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied his request for a hearing under 5 U.S.C. § 8124.

On May 20, 1997 appellant, then a 36-year-old industrial engineering technician, filed an occupational disease claim, alleging that factors of his employment caused depression. In support of his claim he submitted a written statement and medical evidence. The employing establishment submitted a statement from appellant's supervisor, David G. Haltom, and further documentation regarding a decision to suspend appellant for five days in May 1997. By decision dated December 12, 1997, the Office denied the claim on the grounds that appellant's emotional condition did not occur in the performance of duty. By letter dated January 10, 1998 and stamped received by the Office on January 16, 1998, appellant requested a hearing and submitted additional evidence. In a February 25, 1998 decision, an Office hearing representative denied appellant's request on the grounds that it was not timely filed. The Branch of Hearings and Review indicated that the request for a hearing was postmarked January 16, 1998 which was more than 30 days after the December 12, 1997 Office decision and, therefore, appellant was not entitled to a hearing as a matter of right. The instant appeal follows.

The Boards finds that this case is not in posture for decision.

Section 8124(b)(1) of the Federal Employees' Compensation Act<sup>1</sup> 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."<sup>2</sup> As section 8124(b)(1) is unequivocal in setting forth

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 5 U.S.C. § 8124(b)(1).

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>3</sup>

With respect to timeliness of a request for a hearing, 20 C.F.R. § 10.131(a) provides: “A claimant is not entitled to an oral 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.” Therefore the postmark date, not the date the request is received, may determine the timeliness of the request.<sup>4</sup> The Board has held that it is the Office’s responsibility to keep evidence of the postmark date in the case record.<sup>5</sup> In the present case, while the Office noted the letter was postmarked January 16, 1998, the envelope was not retained for the record. Since there is no postmark date in the record, the Board finds that the January 10, 1998 request was timely and the Office should grant the request for a hearing.

In light of the Board’s decision regarding appellant’s entitlement to a hearing before an Office hearing representative, the merit issue of whether appellant has established that he sustained an emotional condition in the performance of duty is not in posture for decision and will not be addressed by the Board.

The decisions of the Office of Workers’ Compensation Programs dated February 25, 1998 and December 12, 1997 are hereby set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.  
February 8, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>3</sup> See *William E. Seare*, 47 ECAB 663 (1996).

<sup>4</sup> See *Gus N. Rodes*, 43 ECAB 268 (1991).

<sup>5</sup> *Id.*; see also *Lee F. Barrett*, 40 ECAB 892 (1989).