

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

HAROLD C. BANKS, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Palo Alto, CA, Employer**

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**Docket No. 04-827
Issued: June 18, 2004**

Appearances:
Harold C. Banks, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 10, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated November 10, 2003, which denied his request for an oral hearing as untimely. Because more than one year has elapsed between the last merit decision dated February 18, 1997, and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2 and 501.3.

ISSUE

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

FACTUAL HISTORY

On September 11, 1994 appellant, then a 55-year-old police officer, filed a traumatic injury claim alleging that on September 9, 1994 he injured his neck and back while trying to restrain a patient. The Office accepted that appellant sustained cervical and lumbar strains. Appellant stopped work on September 9, 1994 and returned to work on September 10, 1994.

On October 8, 1996 appellant filed a notice of recurrence of disability alleging that on August 25, 1996 he experienced a flare-up of cervical and lumbar pain, which was causally related to his accepted conditions. In a report dated August 26, 1996, Dr. Sally Thomas, a family practitioner, diagnosed a lumbar strain and advised that appellant would be disabled from work from August 26 to 31, 1996.

By decision dated February 18, 1997, the Office denied appellant's recurrence of disability on the grounds that the medical evidence failed to demonstrate that the claimed condition was causally related to the accepted injury of September 9, 1994.

In a letter dated April 5, 2003, appellant noted that he was last treated for his work-related injuries in 1998 and experienced continuous pain and discomfort since the original injury. He noted that in 2003 he sought medical treatment because his cervical injury had intensified and he was informed that his compensation claim was closed. Appellant requested that his claim be reinstated.

By letter dated June 12, 2003, the Office advised appellant that, upon review of his correspondence of April 5, 2003, he may have sustained a recurrence of disability. On June 26, 2003 appellant advised the Office that he did not experience a recurrence of disability, but rather a continuation of his injury since September 9, 1994. He indicated that he sought medical treatment and his doctor advised him that his cervical strain was permanent and could be treated with medication and physical therapy.

In a letter dated July 30, 2003, the Office requested that appellant complete a notice of recurrence of disability and provide additional factual and medical information in support of his claim. Appellant responded in a letter dated August 11, 2003, noting again that he did not experience a recurrence of disability. He advised that he has not sought medical treatment for his condition since 1998 because the Office closed his compensation file. Appellant advised that his pain and discomfort has continued since the original injury of September 9, 1994.

By letter dated September 8, 2003, the Office advised appellant that on February 18, 1997 the Office formally denied appellant's claim for a recurrence of disability and appellant did not appeal his case and that the time limit for all appeals had expired.

By letter dated September 19, 2003 and postmarked October 7, 2003, appellant requested an oral hearing before an Office hearing representative.

By decision dated November 10, 2003, the Office denied appellant's request for an oral hearing. 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 issue in the case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

LEGAL PRECEDENT

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 either an oral

hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which a hearing is sought.¹ However, the Office has discretion to grant or deny a request that was made after this 30-day period.² 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.³

ANALYSIS

In the present case, appellant requested a hearing in a letter dated September 19, 2003 and postmarked October 7, 2003. Section 10.616 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.”⁴ As the postmark date of the request was more than 30 days after issuance of the February 18, 1997 Office decision, appellant’s request for a hearing was untimely filed. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant of the opportunity to request reconsideration.⁵ Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant’s request for a hearing.

CONCLUSION

The Board finds that the Office properly denied appellant’s request for a hearing as untimely.

¹ 20 C.F.R. § 10.616(a) (1999).

² *Herbert C. Holley*, 33 ECAB 140 (1981).

³ *Rudolph Bermann*, 26 ECAB 354 (1975).

⁴ 20 C.F.R. § 10.616(a) (1999).

⁵ The Board has held that a denial of review on this basis is a proper exercise of the Office’s discretion. *E.g.*, *Jeff Micono*, 39 ECAB 617 (1988).

ORDER

IT IS HEREBY ORDERED THAT the November 10, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 18, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member