

<sup>1</sup> Appellant has also requested an appeal of a September 23, 2010 “decision.” No final decision was issued on that date. On that date a letter was sent to appellant regarding the procedure for conducting an oral hearing or a review of the written record. This letter was purely informational in nature and not a final OWCP decision from which appellant may properly file an appeal. See e.g., *Ernesto L. Montoya*, 35 ECAB 205 (1983); 20 C.F.R. § 10.126.

the merits of this case pursuant to the Federal Employees' Compensation Act (FECA)<sup>2</sup> and 20 C.F.R. §§ 501.2(c) and 501.3.<sup>3</sup>

### **ISSUE**

The issue is whether OWCP properly denied appellant's request for a review of the written record as untimely.

On appeal, appellant contends that modification of the July 30, 2007 wage-earning capacity determination was warranted based on a material change in her accepted medical conditions.

### **FACTUAL HISTORY**

On March 14, 2001 appellant, then a 42-year-old sign painter/letterer clerk, filed an occupational disease claim alleging that on January 1, 1991 she first became aware of her bilateral carpal tunnel syndrome and tendinitis. On February 12, 1991 she realized that her conditions were caused by repetitive work activities, particularly work performed on flat letter sorter machines. By letter dated June 13, 2001, OWCP accepted appellant's claim for bilateral medial neuropathy and brachial plexopathy.

On October 25, 2006 appellant accepted the employing establishment's job offer for a part-time modified sign painter/letterer position based on an October 23, 2006 medical opinion of Dr. Scott M. Fried, an attending osteopath.

By decision dated July 30, 2007, OWCP reduced appellant's wage-loss compensation finding that her actual earnings as a modified sign painter/letterer fairly and reasonably represented her wage-earning capacity. In an attached statement of appeal rights, it notified her that any hearing request must be made in writing within 30-calendar days after the date of the decision, as determined by the postmark of her letter.

In an appeal request form dated and postmarked September 7, 2010, appellant requested a review of the written record by OWCP's hearing representative.<sup>4</sup>

In a decision dated September 30, 2010, OWCP's Branch of Hearings and Review found that appellant's request was untimely and that she was not entitled to a review of the written record as a matter of right. It advised her that she could appeal this decision to the Board.

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

<sup>4</sup> Appellant's September 7, 2010 request actually sought review of the written record regarding a "September 10, 2010" OWCP decision. The Board notes, however, that the record does not contain a decision issued by OWCP on this date. Moreover, the Board notes that appellant's request was dated prior to the alleged decision.

### **LEGAL PRECEDENT**

Section 8124(b)(1) of FECA<sup>5</sup> provides that a claimant not satisfied with OWCP's decision is entitled to a hearing before OWCP's hearing representative when the request is made within 30 days after issuance of OWCP's decision.<sup>6</sup> Under the implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to a hearing or a review of the written record within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision.<sup>7</sup> If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.<sup>8</sup> However, when the request is not timely filed or when reconsideration has previously been requested, OWCP may within its discretion, grant a hearing or review of the written record and must exercise this discretion.<sup>9</sup>

### **ANALYSIS**

Appellant had 30-calendar days from OWCP's July 30, 2007 decision or until August 29, 2007, to request a review of the written record before OWCP's hearing representative. Because her request was dated and postmarked September 7, 2010, her request was untimely. Appellant was not entitled to a review of the written record as a matter of right under section 8124(b)(1) of FECA.

However, OWCP's regulations provide that it has the discretionary authority to grant a review of the written record even though a claimant is not entitled to one as a matter of right.<sup>10</sup> The Board finds that it abused its discretion by failing to set forth its reasons for failing to grant a discretionary review of the written record. Thus, the case will be remanded to OWCP to properly exercise its discretion in determining whether to grant appellant a discretionary review of the written record.<sup>11</sup>

### **CONCLUSION**

The Board finds that OWCP properly found that appellant was not entitled to a review of the written record as a matter of right. The Board finds, however, that it did not properly exercise its discretion in denying appellant a discretionary review of the written record. The case will be remanded to OWCP for a proper exercise of its discretionary authority.

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<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> *Id.* at § 8124(b)(1).

<sup>7</sup> *Id.*; 20 C.F.R. § 10.616(a).

<sup>8</sup> *Teresa Valle*, 57 ECAB 542 (2006).

<sup>9</sup> *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

<sup>10</sup>; 20 C.F.R. § 10.616(b); *Joseph R. Giallanza*, 55 ECAB 16 (2003); *W.A.*, Docket No. 06-1452 (issued November 27, 2006).

<sup>11</sup> *Leona B. Jacobs*, 55 ECAB 753 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 30, 2010 decision of the Office of Workers' Compensation Programs is affirmed in part, set aside in part and the case is remanded for further action consistent with this decision.

Issued: November 17, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board