United States Department of Labor
Employees' Compensation Appeals Board

GERARD F. WORKINGER, Appellant	)	
and	)	**Docket No. 04-1028**
	)	**Issued: January 18, 2005**
DEPARTMENT OF THE ARMY, ABERDEEN PROVING GROUND, Aberdeen, MD, Employer	)	

Appearances:
Gerard F. Workinger, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 9, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated February 13, 2004 denying his request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision.[1]

ISSUE

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

[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2). The record does not contain any final merit decision of the Office which was issued in the year prior to appellant's filing of his appeal on March 9, 2004 and therefore the Board does not have jurisdiction over the merits of the present case.

FACTUAL HISTORY

On June 11, 2001 appellant, then a 60-year-old engineering technician, filed a traumatic injury claim alleging that he sustained a sprained right ankle on June 4, 2001 when he twisted his ankle while walking at work. Appellant did not stop work at the time of the alleged injury. He submitted medical evidence in support of his claim, including several reports of employing establishment physicians.

By decision dated September 21, 2001, the Office denied the claim on the grounds that appellant did not submit sufficient medical evidence to establish that he sustained an employment injury on June 11, 2001.

Appellant submitted additional medical evidence in support of his claim, including a June 4, 2001 report of Dr. John P. O'Hearn, an attending Board-certified orthopedic surgeon.

By decision dated December 11, 2001, the Office vacated the September 21, 2001 decision and accepted that appellant sustained an employment-related right ankle sprain on June 4, 2001. The Office advised appellant that he would be entitled to medical treatment and continuation of pay.[2]

By letter dated February 6, 2002, appellant requested a review of the written record in connection with his claim.[3]

By decision dated February 13, 2004, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record. The Office determined that his request was untimely because it was not made within 30 days of its September 21, 2001 decision. It further indicated that it had exercised its discretion and further denied appellant's request for the reason that the relevant issue of the case could be addressed by requesting reconsideration and submitting additional evidence.

LEGAL PRECEDENT

Section 8124 of the Federal Employees' Compensation Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office final decision.[4]

[2] The Office's September 21 and December 11, 2001 decisions were sent to appellant's home address of record: 406 Oak Street, Edgewood, MD 21040.

[3] In a letter dated December 16, 2003, appellant again indicated that he wished to have a review of the written record in connection with his claim.

[4] 5 U.S.C. § 8124(b)(1).

Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."[5]

Section 10.616(a) of Title 20 of the Code of Federal Regulations further provides, "A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. 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."[6]

ANALYSIS

In the present case, the Office issued a decision on September 21, 2001 denying appellant's claim that he sustained an employment-related injury on June 4, 2001. By decision dated December 11, 2001, the Office vacated its September 21, 2001 decision and accepted that he sustained an employment-related right ankle sprain on June 4, 2001.

By letter dated February 6, 2002, appellant requested a review of the written record in connection with his claim. However, at the time of the request, there was no final adverse decision of record as appellant's claim was accepted and the Office decision which originally denied his claim had been vacated. As noted above, a claimant may only request a review of the written record in connection with a final adverse decision of the Office.[7] Therefore, the Board finds there was no basis to grant appellant's request for a review of the written record.

By decision dated February 13, 2004, the Office denied appellant's request for a review of the written record on the basis that it was untimely. Therefore, although it was proper for the Office to deny appellant's request for a review of the written record, the basis for the denial should be modified to reflect that there was no final adverse decision of the Office.[8]

CONCLUSION

The Board finds that the Office properly denied appellant's request for a review of the written record. The Office's denial should be modified to reflect that appellant's request for a review of the written record is denied due to the absence of a final adverse decision of the Office.

[5] 20 C.F.R. § 10.615.

[6] 20 C.F.R. § 10.616(a).

[7] *See supra* notes 5 and 6 and accompanying text.

[8] Appellant has alleged that he did not receive reimbursement for medical benefits incurred in conjunction with his June 4, 2001 employment injury. The record does not contain any decision of the Office regarding this matter within the Board's jurisdiction and therefore it is not currently before the Board. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2004 decision of the Office of Workers' Compensation Programs is affirmed as modified in conformance with the above decision of the Board.

Issued: January 18, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member