

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

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M.E., Appellant

and

DEPARTMENT OF THE ARMY, ARMY  
NATIONAL GUARD, Montgomery, AL,  
Employer

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**Docket No. 12-1008  
Issued: November 13, 2012**

*Appearances:*  
*Harold Howell, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On March 27, 2012 appellant, through her attorney, filed a timely appeal from an October 12, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for a hearing. As more than 180 days elapsed from the most recent merit decision of September 18, 2009 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of the case.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for an oral hearing as untimely.

On appeal, appellant, through counsel, contends that her condition continues to deteriorate and submitted new medical evidence.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board. In a September 30, 2011 decision, the Board found that although OWCP properly determined that appellant was not entitled to a hearing as a matter of right as her request was untimely filed, the Board remanded the case as OWCP did not exercise its discretion in denying the hearing.<sup>2</sup> The facts as set forth in the Board's prior decision are hereby incorporated by reference.<sup>3</sup>

By decision dated October 12, 2011, OWCP found that appellant's request for a hearing was not timely filed. It reviewed appellant's request for a hearing under its discretionary authority and denied the hearing. OWCP determined that the issue in the case could be addressed by requesting reconsideration and submitting evidence that had not previously been considered.

## **LEGAL PRECEDENT**

A claimant for compensation not satisfied with a decision by OWCP is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on her claim before a representative of the Secretary.<sup>4</sup> A claimant is not entitled to a hearing as a matter of right if the request is not made within 30 days of the date of OWCP's decision.<sup>5</sup> However, OWCP has discretion to grant or deny a request that is made after this 30-day period.<sup>6</sup> In such a case it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.<sup>7</sup>

## **ANALYSIS**

In the previous decision, the Board affirmed the finding that appellant's request for a hearing was not filed within 30 days and that she was not entitled to a hearing as a matter of right. The Board remanded the case to OWCP to exercise its discretion in denying the hearing. On remand, OWCP exercised its discretionary authority and denied a hearing as the issue in the case could be equally well addressed by submitting new evidence that had not been previously considered.

OWCP has discretionary power to grant a request for a hearing or review of the written record when a claimant is not entitled to such a right.<sup>8</sup> In the October 12, 2011 decision, OWCP

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<sup>2</sup> *Id.*

<sup>3</sup> Docket No. 11-129 (issued September 30, 2011). OWCP accepted that on June 30, 1992 appellant, then a 28-year-old telephone operator, sustained lumbar, cervical and thoracic sprains, as well as lumbosacral neuritis or radiculitis when she fell in a hallway while in the performance of duty.

<sup>4</sup> 5 U.S.C. § 8124(b)(1).

<sup>5</sup> See *James Smith*, 53 ECAB 188 (2001).

<sup>6</sup> *Rudolph Bermann*, 26 ECAB 354 (1975); *G.W.*, Docket No. 10-78 (April 23, 2010).

<sup>7</sup> *Id.*

<sup>8</sup> *H.F.*, Docket No. 12-365 (issued June 19, 2012).

properly exercised its discretion by stating that it had considered the matter with regard to the issue involved and denied the request on the basis that the issue could be addressed through a reconsideration application. The Board has held that, as the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.<sup>9</sup> The evidence of record does not establish that OWCP abused its discretion in its denial of appellant's request for a hearing.

Appellant submitted new evidence on appeal, but the Board lacks jurisdiction to review such evidence for the first time on appeal.<sup>10</sup> The Board notes that counsel further argues the merits of the case. The Board only has jurisdiction over the nonmerit hearing denial.<sup>11</sup>

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 12, 2011 is affirmed.

Issued: November 13, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>9</sup> *Id.*; see also *Mary Poller*, 55 ECAB 483 (2004).

<sup>10</sup> See 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

<sup>11</sup> 20 C.F.R. § 501.3(e).