

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY -- CLAIM NO. xxxxxx204

This claim has previously been before the Board. In a May 18, 2010 decision, the Board affirmed a December 19, 2008 decision which denied appellant's claim for an attendant's allowance and a March 20, 2009 decision which denied his request for reconsideration.² In a July 26, 2006 decision, the Board affirmed an October 11, 2005 OWCP decision which found his reconsideration request as untimely and failed to establish clear evidence of error.³ The facts of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

On August 13, 2010 appellant requested reconsideration of the denial of an attendant allowance for the period prior to 1999. Appellant noted that, prior to January 4, 1999, OWCP regulations did not require that personal care services be provided by a licensed practical nurse or similarly trained individual.

Appellant submitted an August 2, 2006 report from Dr. Coates who treated appellant since 1991 for paranoid schizophrenia. Dr. Coates noted that appellant's wife was unable to work outside the home as she attended to his needs. He requested that appellant be provided an attendant's allowance due to his ongoing paranoia and inability to function in simple activities of daily living without the care and direction of his spouse.

In a decision dated November 10, 2011, OWCP denied appellant's reconsideration request on the grounds that the evidence submitted was insufficient to warrant further merit review.

In an appeal request form dated November 15, 2011, appellant requested a review of the written record and reconsideration.

In a letter dated December 8, 2011, OWCP informed appellant that his appeal request form selected two avenues of appeal and instructed him to select one review option. In an appeal request form received on December 19, 2011, appellant requested a review of the written record.⁴

In a decision dated July 26, 2012, OWCP denied appellant's request for a review of the written record. It found that, since appellant had previously requested reconsideration on the

² Docket No. 09-1947 (issued May 18, 2010).

³ Docket No. 06-201 (issued July 26, 2006). OWCP accepted appellant's claim for neck strain, herniated disc at C5-6 and later accepted a permanent aggravation of paranoid schizophrenia. It authorized a cervical laminectomy fusion which was performed on February 17, 1984. Appellant was granted disability retirement on February 28, 1985. He later elected to receive benefits under FECA.

⁴ On June 4, 2012 appellant submitted an appeal request form and requested reconsideration. No decision date was noted on the form.

In a July 17, 2012 letter, OWCP noted appellant's June 4, 2012 request for reconsideration and advised that it was unclear which decision or issues he was requesting reconsideration. It advised that no further action would be taken on his request until appellant provided clarification of the issues and decisions for which he sought reconsideration.

same issue, he was not entitled to a review of the written record as a matter of right. 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 issues in this case could be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

FACTUAL HISTORY -- CLAIM NO. xxxxxx616

This claim has previously been before the Board. In an April 26, 2010 decision, the Board affirmed a September 11, 2008 decision which denied appellant's claim for compensation as it was untimely filed. The Board also affirmed an OWCP decision dated October 7, 2008 which denied appellant's request for reconsideration.⁵ The facts of the case are set forth in the Board's prior decisions and are incorporated herein by reference.⁶

By letter dated August 12, 2010, appellant requested reconsideration. He asserted that his emotional condition claim was timely filed as his supervisor had knowledge of the injury within 30 days.

In a decision dated November 8, 2010, OWCP denied appellant's application for reconsideration without conducting a merit review.

On November 15, 2011 appellant requested a review of the written record.

In a decision dated May 9, 2012, OWCP denied appellant's request for a review of the written record. It found that, since appellant had previously requested reconsideration on the same issue, he was not entitled to a review of the written record as a matter of right. 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 issues in this case could be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

LEGAL PRECEDENT -- CLAIM NOS. xxxxxx204 & xxxxxx616

Section 8124(b)(1) of FECA provides that "before review under section 8128(a) of this title, 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."⁷ Section 10.615 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.⁸ OWCP's regulations provide that the request must be

⁵ Docket No. 09-1499 (issued April 26, 2010).

⁶ On September 15, 2007 appellant, then a 53-year-old retired accounting technician, filed an occupational disease claim alleging that he had a nervous breakdown at work and developed paranoid schizophrenia. He first became aware of his condition and realized it was caused or aggravated by his employment in March 1994. Appellant's employer noted that he last worked on May 6, 1994 and had been off the employment rolls since being granted disability retirement on July 25, 1994.

⁷ 5 U.S.C. § 8124(b)(1).

⁸ 20 C.F.R. § 10.615.

sent within 30 days of the date of the decision for which a hearing is sought and also that “the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.”⁹

Additionally, the Board has held that OWCP, in its broad discretionary authority in the administration of FECA,¹⁰ has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.¹¹ OWCP procedures, which require OWCP to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.¹²

ANALYSIS -- CLAIM NO. xxxxxx204

Appellant’s request for a review of the written record dated November 15, 2011 was denied on the grounds that he had previously requested reconsideration pursuant to 5 U.S.C. § 8128(a).¹³ In its July 26, 2012 decision, OWCP noted that, while he was not entitled to a review of the written record as a matter of right, it had considered the matter in relation to the issue involved and, under its discretionary authority, denied the request as appellant could pursue his claim further by requesting reconsideration and submitting rationalized medical evidence in support of his claim.

In the instant case, appellant’s request for a review of the written record, dated November 15, 2011, was made after OWCP issued its November 10, 2011 decision on his request for reconsideration made pursuant to 5 U.S.C. § 8128. Hence, OWCP correctly found that appellant was not entitled to a review of the written record before an OWCP hearing representative as a matter of right as he had previously requested reconsideration.

In its July 26, 2012 decision, OWCP acknowledged that, although there was no entitlement to an oral hearing or a review of the written record, it could allow such an oral hearing or review of the written record within its discretion. It properly exercised its discretion by indicating that it had also denied appellant’s hearing request on the basis that the case could be equally well addressed by requesting reconsideration and submitting additional medical evidence. There is no evidence of an abuse of discretion in this case.¹⁴

⁹ *Id.* at § 10.616(a).

¹⁰ 5 U.S.C. §§ 8101-8193.

¹¹ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹² *Teresa M. Valle*, 57 ECAB 542 (2006). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

¹³ See *Peggy R. Lee*, 46 ECAB 527 (1995) (where the Board found that appellant’s request for an oral hearing was made after OWCP issued its decision on his request for reconsideration made pursuant to 5 U.S.C. § 8128 and therefore appellant was not entitled to an oral hearing before an OWCP hearing representative as a matter of right).

¹⁴ See *Daniel J. Perea*, 42 ECAB 214 (1990).

ANALYSIS -- CLAIM NO. xxxxxx616

Appellant's request for a review of the written record dated November 15, 2011 was denied on the grounds that he had previously requested reconsideration pursuant to 5 U.S.C. § 8128(a).¹⁵ In its May 9, 2012 decision, OWCP noted that, while he was not entitled to a review of the written record as a matter of right, it had considered the matter in relation to the issue involved and, under its discretionary authority, denied the request as he could pursue his claim further by requesting reconsideration and submitting rationalized medical evidence in support of his claim.

In the instant case, appellant's request for a review of the written record, dated November 15, 2011, was made after OWCP issued its November 8, 2010 decision on his request for reconsideration made pursuant to 5 U.S.C. § 8128. Hence, OWCP correctly found that appellant was not entitled to an oral hearing or a review of the written record before an OWCP hearing representative as a matter of right as he had previously requested reconsideration.

In its May 9, 2012 decision, OWCP acknowledged that, although there was no entitlement to an oral hearing or a review of the written record, it could allow such an oral hearing or review of the written record within its discretion. It properly exercised its discretion by indicating that it had also denied appellant's hearing request on the basis that the case could be equally well addressed by requesting reconsideration and submitting additional medical evidence. There is no evidence of an abuse of discretion in this case.¹⁶

On appeal in claim numbers xxxxxx204 and xxxxxx616 appellant asserts that he was entitled to compensation and an attendant allowance since 1994. As explained, the Board does not have jurisdiction over the merits of his claims. Instead, it only has jurisdiction to consider whether OWCP properly denied appellant's request for a review of the written record. As noted above, OWCP correctly found that he was not entitled to a review of the written record before an OWCP hearing representative.

CONCLUSION

The Board therefore finds that OWCP properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b)(1) in claim numbers xxxxxx204 and xxxxxx616.

¹⁵ See *supra* note 13.

¹⁶ See *Perea, supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the July 26, 2012 Office of Workers' Compensation Programs' decision in claim number xxxxxx204 and the May 9, 2012 OWCP decision in claim number xxxxxx616 are affirmed.

Issued: February 13, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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