

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

M.W., Appellant

and

**DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF PRISONS, Washington, DC,
Employer**

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**Docket No. 13-167
Issued: March 12, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 31, 2012 appellant filed a timely appeal from a May 10, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from the last merit decision in this case, dated February 17, 2012, and the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 11, 1998 appellant, then a 46-year-old building management specialist, filed a traumatic injury claim alleging that on June 5, 1998 he injured his upper back and shoulder picking up a stack of chairs. OWCP accepted the claim for lumbar sprain, cervical sprain, left shoulder sprain, cervical disc displacement and cervical spondylolisthesis. Appellant underwent an anterior cervical discectomy and fusion at C5-6 and C6-7 on May 10, 1999 and a revision of the fusion at C4-5 and C5-6 on January 12, 2004.

By decision dated October 23, 2007, OWCP reduced appellant's compensation to zero based on its finding that his actual earnings as a building manager effective August 20, 2007 fairly and reasonably represented his wage-earning capacity.

In a decision dated February 17, 2012, OWCP denied appellant's claim for compensation for intermittent disability from September 3, 2007 through September 30, 2011. It determined that the medical evidence was insufficient to show that he was unable to work during the claimed periods due to his June 5, 1998 employment injury.

On March 20, 2012 appellant requested a telephone hearing. In a decision dated May 10, 2012, OWCP's Branch of Hearings and Review denied his request for an oral hearing under section 8124 as it was made more than 30 days after the February 17, 2012 decision. It exercised its discretion and considered appellant's request but determined that the question of whether he had employment-related disability from September 3, 2007 through September 30, 2011 could be addressed equally well through the reconsideration process.

On appeal appellant raises arguments regarding a 2007 medical report from a second opinion physician. He asserts that he worked until May 2011 in extreme pain. Appellant relates that he is unable to walk without assistance. He attributes his time missed from work to his employment injury and requests approval for back surgery.

LEGAL PRECEDENT

Section 8124(b) of FECA provides that 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 or her claim before a representative of the Secretary.² 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.³ The 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 A claimant is entitled to a hearing or review of the written record as a matter of right if the request is filed within 30 days.⁵

² 5 U.S.C. § 8124(b)(1).

³ 20 C.F.R. § 10.615.

⁴ *Id.* at § 10.616(a).

⁵ See *Leona B. Jacobs*, 55 ECAB 753 (2004).

While a claimant may not be entitled to a hearing or review of the written record as a matter of right if the request is untimely, OWCP has the discretionary authority to grant the request and must properly exercise such discretion.⁶

ANALYSIS

In its February 17, 2012 decision, OWCP denied appellant's claim for compensation for intermittent dates from September 3, 2007 through September 30, 2011. On March 20, 2012 he requested a telephone hearing. Appellant's request was made more than 30 days after the February 17, 2012 decision. Consequently, his hearing request was not timely and he was not entitled to an oral hearing as a matter of right.⁷

OWCP has the discretionary authority to grant a hearing even though a claimant is not entitled to such as a matter of right. In its May 10, 2012 decision, it properly exercised its discretion by notifying appellant that it had considered the matter in relation to the issue involved and determined that additional argument and evidence could be submitted with a request for reconsideration. The Board has held that 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.⁸ The Board finds that OWCP did not abuse its discretion in this case by denying a discretionary hearing.

On appeal appellant argued the merits of his case. As previously noted, however, the Board does not have jurisdiction over the merits. The only issue before the Board is whether OWCP properly denied his hearing request under section 8124.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely under section 8124.

⁶ 20 C.F.R. § 10.616(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

⁷ 20 C.F.R. § 10.616(a).

⁸ See *Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 10, 2012 is affirmed.

Issued: March 12, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board