

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

S.B., Appellant

and

**DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE, Asheville, NC,
Employer**

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**Docket No. 08-2511
Issued: March 6, 2006**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 22, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 26, 2008 decision, denying his request for an oral hearing as untimely filed. Because more than one year has elapsed between the last merit decision dated June 21, 2006 and his appeal filed on September 22, 2008, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for a review of the written record under 5 U.S.C. § 8124(b) as untimely filed.

FACTUAL HISTORY

On July 15, 1987 appellant, then a 29-year-old laborer, sustained injury to his neck and head when a tree limb struck him. He stopped work July 16, 1987. The Office accepted a cervical strain and dislocation of both knees as a result of the work-related incident. The record

reflects that appellant has a previously approved claim for bilateral knee strain and left knee medial meniscus tear for a July 22, 1985 injury incurred while working as a firefighter with the U.S. Department of Agriculture.¹ He received medical and wage-loss benefits. In 1991, appellant was referred to the vocational rehabilitation program. However, he eventually had to stop due to pain from his accepted injuries.

In January 2005, appellant was again referred to the vocational rehabilitation program. By decision dated June 21, 2006, the Office reduced his compensation benefits under section 8113(b) based on his failure to cooperate with vocational rehabilitation.

On August 6, 2008 appellant requested a review of the written record before an Office hearing representative. In an August 5, 2008 letter, he stated that he had previously sent letters to the Office and the rehabilitation specialist explaining that his medical condition had deteriorated such that he could not participate in vocational rehabilitation. Appellant advised that he needed to have double knee replacement and surgery to his cervical spine as a result of his work-related conditions. He submitted additional medical evidence.²

By decision dated August 26, 2008, the Office denied appellant's hearing request as it was not filed within 30 days of the June 21, 2006 decision. It further denied his request as it found that the issue in the case could equally well be addressed by requesting reconsideration from the Office and submitting evidence not previously considered.

LEGAL PRECEDENT

Section 8124(b)(1) of the Federal Employees' Compensation Act 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.³ Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.⁴ The Office's regulations provide that the request must be 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.⁵

¹ Appellant stopped working for the U.S. Department of Agriculture on July 26, 1986 and began working for the current employing establishment on April 12, 1987.

² The Board may not consider this evidence on appeal as the Office has not considered it in reaching a final decision. *See* 20 C.F.R. § 501.2(c).

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. § 10.615.

⁵ *Id.* at § 10.616(a).

The Board has held that the Office, in its broad discretionary authority in the administration of the Act,⁶ has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁷ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.⁸

ANALYSIS

The Office issued its decision concerning appellant's reduction in compensation as a result of his refusal to participate in vocational rehabilitation on June 21, 2006. Appellant requested a review of the written record before the Office's Branch of Hearings and Review on August 6, 2008. As his request for a review was filed more than 30 days after the June 21, 2006 decision, the Board finds that the Office properly found that the request was untimely.

Although the Office determined that appellant's request was untimely, it nevertheless exercised its discretion by further considering his request for review. It determined that appellant could equally well pursue his claim by submission of a request for reconsideration along with new evidence which established that he did participate in the rehabilitation process. The Board finds that the Office also properly exercised its discretion in denying appellant's request for review.⁹

CONCLUSION

The Board finds the Office properly denied appellant's request for a review of the written record as untimely filed.

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

⁸ *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).

⁹ See *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the August 26, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 6, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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