

FACTUAL HISTORY

On August 3, 2009 appellant, then a 43-year-old nursing assistant, filed a traumatic injury claim alleging that on July 28, 2009 he was kicked in his chest by a patient and fell into a wall. OWCP accepted the claim for sprain of back, lumbar region and contusion of back, left side. Appellant experienced no lost time from work, but was assigned light-duty status.

On December 2, 2009 appellant claimed a recurrence of disability commencing November 19, 2009 due to his July 28, 2009 injury. By decision dated February 18, 2010, OWCP denied his recurrence claim.³

In an appeal request form dated March 5, 2010 and postmarked April 5, 2010, appellant requested an oral hearing before OWCP's hearing representative.

By decision dated August 23, 2010, OWCP's Branch of Hearing and Review denied appellant's request for an oral hearing on the grounds that it was untimely. It exercised its discretion and further denied his request on the basis that the issue in the case could be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered which established that the claimed recurrence resulted from the accepted work injury.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA provides in pertinent part as follows:

“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 issuance of the decision, to a hearing on his claim before a representative of the Secretary.”⁴

The claimant can choose between two formats: an oral hearing or a review of the written record.⁵ The requirements are the same for either choice.⁶ The Board has held that section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting hearings or reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking⁷ and before the claimant has requested reconsideration.⁸ However, when the request is not timely filed or when reconsideration has previously been

³ On March 15, 2010 appellant appealed to the Board, which he subsequently requested to be dismissed. In a July 9, 2010 order, the Board dismissed appellant's appeal. Docket No. 10-1091 (issued July 9, 2010).

⁴ 5 U.S.C. §§ 8101-8193, § 8124(b)(1).

⁵ 20 C.F.R. § 10.615.

⁶ *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

⁷ 20 C.F.R. § 10.616(a); *Tammy J. Kenow*, 44 ECAB 619 (1993).

⁸ *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

requested, OWCP may within its discretion, grant a hearing or review of the written record, and must exercise this discretion.⁹

ANALYSIS

OWCP denied appellant's claimed recurrence on February 18, 2010. Appellant's request for an oral hearing before OWCP's hearing representative was dated March 5, 2010 but was postmarked on April 5, 2010. The date of his hearing request is determined by the date of the postmark.¹⁰ Appellant's April 5, 2010 hearing request was made more than 30 days after the date of OWCP's February 18, 2010 decision. Therefore, he was not entitled to a hearing as a matter of right.

OWCP has the discretionary authority to grant a hearing even though a claimant is not entitled as a matter of right. In its August 23, 2010 decision, OWCP properly exercised its discretion. It considered the issue involved and denied appellant's request for an oral hearing on the basis that his claim on the issue of whether the claimed recurrence resulted from the accepted work injury could be adequately addressed through the reconsideration process and the submission of additional evidence. 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.¹¹ In the present case, OWCP did not abuse its discretion in denying a discretionary hearing.

On appeal, appellant argues the merits of his case. The Board notes that it only has jurisdiction over OWCP's August 23, 2010 decision which denied his request for a hearing.

CONCLUSION

The Board finds that OWCP properly found that appellant had filed an untimely request for an oral hearing.

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.616(a). *See N.M.*, 59 ECAB 511 (2008) (a hearing request must be sent within 30 days of the date of the decision for which a hearing is sought as determined by postmark or other carrier's date marking).

¹¹ *Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated August 23, 2010 is affirmed.

Issued: August 1, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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