

On appeal appellant, through her attorney, argues that she is still disabled, noting that she has severe chronic pain and that the government doctors who filed reports on her saw her only one time and did not base their conclusions on objective tests or adequate physical examination.²

FACTUAL HISTORY

On June 30, 1992 appellant, then a 28-year-old telephone operator, filed a traumatic injury claim alleging that she fell in a hallway on that date and sustained injuries to her neck, back and wrist. OWCP accepted her claim for sprains of the lumbar cervical and thoracic regions with lumbosacral neuritis or radiculitis. On May 9, 2007 it proposed terminating appellant's wage-loss and medical benefits. On June 22, 2007 OWCP finalized the proposed termination of benefits effective July 7, 2007. By decision dated May 7, 2009, OWCP's hearing representative affirmed the termination of benefits effective July 7, 2007, but returned the case to OWCP for referral of the case to an impartial medical examiner as there was a conflict on whether appellant had any residuals due to her employment-related conditions after July 7, 2007. In a September 18, 2009 decision, OWCP denied appellant's claim for benefits after July 7, 2007.

On September 15, 2010 appellant requested an oral hearing. By decision dated September 30, 2010, OWCP denied her request for an oral hearing as it was not timely filed. It advised that appellant could appeal this decision to the Board.

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.³ According to 20 C.F.R. § 10.615, a claimant shall be afforded a choice of an oral hearing or a review of the written record.⁴ The regulations provide that a request for a hearing or review of the written record must be made within 30 days as determined by the postmark or other carrier's date marking, of the date of the decision.⁵ A claimant is not entitled to a hearing or a review of the written record as a matter of right if the request is not made within 30 days of the date of OWCP's decision.⁶ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.⁷ In such a case, it will

² The Board notes that appellant submitted additional evidence after OWCP issued its last merit decision on September 18, 2009. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision and therefore, this additional evidence cannot be considered on appeal. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. § 10.615.

⁵ *Id.* at § 10.616(a).

⁶ See *James Smith*, 53 ECAB 188 (2001).

⁷ *Rudolph Bermann*, 26 ECAB 354 (1975); *G.W. Docket No. 10-78* (April 23, 2010).

determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.⁸

ANALYSIS

OWCP's last merit decision was the September 18, 2009 decision. It denied appellant's claim for compensation after July 7, 2007. The Board does not have jurisdiction over this decision as it was issued over 180 days prior to the filing of this appeal. Appellant's argument pertain to the merits of the claim and the Board lacks jurisdiction over the merits.

Appellant requested an oral hearing on September 15, 2010. OWCP denied her hearing request as untimely by decision dated September 30, 2010. As appellant's request for a hearing was dated September 15, 2010, more than 30 days after OWCP issued its September 18, 2009 decision, she was not entitled to a hearing as a matter of right.

However, OWCP's regulations provide that a request received more than 30 days after its decision is subject to a discretion any hearing. The Board has held that it must exercise its discretion when a hearing request is untimely.⁹ The September 30, 2010 decision failed to set forth its reasons for refusing to grant a discretionary oral hearing. The case will be remanded to OWCP to properly exercise its discretion in determining whether to grant appellant a discretionary hearing.¹⁰

CONCLUSION

The Board finds that OWCP properly found that appellant was not entitled to a hearing as a matter of right. The Board further finds that it did not exercise its discretion in denying a discretionary hearing. The case will be remanded to OWCP for a proper exercise of its discretionary authority.

⁸ *Id.*

⁹ 20 C.F.R. § 10.616(b); W.A., Docket No. 06-1452 (issued November 27, 2006); *Joseph R. Giallanza*, 55 ECAB 186 (2003).

¹⁰ *Leona B. Jacobs*, 55 ECAB 753 (2004).

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 30, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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