

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

C.B., Appellant)	
)	
and)	Docket No. 12-296
)	Issued: August 13, 2012
DEPARTMENT OF THE ARMY, HEALTH)	
SERVICES COMMAND, Fort Knox, KY,)	
Employer)	

Appearances: *Case Submitted on the Record*
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 28, 2011 appellant filed a timely appeal from an October 20, 2011 decision of the Office of Workers' Compensation Programs (OWCP) which denied her request for an oral hearing. Because more than 180 days elapsed since the most recent merit decision dated January 13, 2011 and the filing of this appeal on November 28, 2011, the Board lacks jurisdiction to review the merits of the claim 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 pursuant to 5 U.S.C. § 8124(b)(1).

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On September 22, 1993 appellant, then a 39-year-old secretary, injured her right shoulder when she was struck by a car as she was crossing a pedestrian cross walk at work. She stopped work on September 22, 1993 and returned to regular duty on January 10, 1994. OWCP accepted the claim for comminuted fracture of the right proximal humerus and authorized surgery. It later expanded appellant's claim to include post-traumatic osteoarthritis of the right glenohumeral joint, mild acromioclavicular joint arthritis of the right shoulder, chronic thinning of the right supraspinatus and infraspinatus tendons, malunion of the right proximal humerus and deformity of the humeral head. On December 14, 1994 OWCP issued her a schedule award for 35 percent impairment of the right arm and, on April 8, 2010, it granted her a schedule award for an additional eight percent right arm impairment, finding that she had total right arm impairment of 43 percent.

In an August 24, 2010 report, Dr. Raymond G. Shea, a Board-certified orthopedist and appellant's treating physician, prescribed a king size Tempur-Pedic sleep bed. He opined that appellant had difficulty sleeping due to a total shoulder replacement which prevented her from lying flat in bed.

On September 24, 2010 OWCP requested Dr. Shea provide a detailed narrative medical report addressing whether the bed was medically necessary for treatment of the work-related injury of September 22, 1993. It specifically requested that he address whether the bed would likely cure, give relief or lessen the degree of disability.

In a report dated November 8, 2010, Dr. Shea noted treating appellant for pain and stiffness in her shoulder and back. He recommended a magnetic resonance imaging (MRI) scan of the lumbar spine. In a November 19, 2010 report, Dr. Shea noted appellant's complaints of progressive low back pain and opined that her back condition was causally related to her accepted work injury. Also submitted was a December 20, 2010 MRI scan of the lumbar spine which revealed degenerative changes.

In a decision dated January 13, 2011, OWCP denied appellant's request for an orthopedic mattress. It determined that she failed to provide a report from her treating physician explaining why the Tempur-Pedic mattress was likely to cure, give relief and reduce the degree or period of disability.²

On January 27, 2011 OWCP expanded appellant's claim to include aggravation of degenerative disc disease of the lumbosacral spine and degenerative disc disease of the cervical spine, spinal stenosis at L3-4 and L4-5.

In an appeal request form dated September 6, 2011, appellant requested a telephonic oral hearing. She submitted a September 12, 2011 statement requesting the mattress be authorized

² Subsequent to this decision, OWCP received a January 11, 2011 report indicating that appellant needed a special bed due to her work injury. On August 19, 2011 OWCP's medical adviser opined that the requested mattress was not medical necessary to treat appellant's accepted conditions. On August 23, 2011 OWCP provided appellant with a copy of its January 13, 2011 decision and informed her that, if she disagreed with the decision, she pursue one of the appeal rights that accompanied the January 13, 2011 decision.

and asserting that it was medically necessary to treat her work-related injury. Appellant submitted reports from Dr. Shea dated January 11 to September 1, 2011.

In a decision dated October 20, 2011, OWCP denied appellant's request for an oral hearing. It found that the request was not timely filed. Appellant was informed that her 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

Section 8124(b)(1) 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 her claim before a representative of the Secretary."³ Section 10.617 and 10.618 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 by a representative of the Secretary.⁴ 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 marking and before the claimant has requested reconsideration.⁵ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.⁶ OWCP's procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under 5 U.S.C. § 8128(a).⁷

ANALYSIS

Appellant requested a hearing in an appeal form dated September 6, 2011. As the hearing request was made more than 30 days after issuance of the January 13, 2011 OWCP decision, her request for an oral hearing was untimely filed and she is not entitled to an oral hearing as a matter of right.

OWCP also notified appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. OWCP has broad administrative discretion in choosing means to achieve its general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. §§ 10.616, 10.617.

⁵ *Id.* at § 10.616(a).

⁶ *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

⁷ See *R.T.*, Docket No. 08-408 (issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

which are contrary to both logic and probable deductions from established facts.⁸ There is no indication that OWCP abused its discretion in this case in finding that appellant could further pursue the matter through the reconsideration process.

Consequently, OWCP properly denied appellant's request for an oral hearing.

On appeal, appellant asserted that the requested bed should be approved and she submitted additional medical evidence in support of her assertions. As noted, the Board lacks jurisdiction to consider the merits of the claim. The Board also cannot consider new evidence for the first time on appeal.⁹

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 13, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁸ *Samuel R. Johnson*, 51 ECAB 612 (2000).

⁹ *See* 20 C.F.R. § 501.2(c).