



review of the written record. Citing its procedure manual<sup>2</sup> and its regulations,<sup>3</sup> OWCP found that the requirement for OWCP to offer a discretionary hearing is no longer mandated and therefore the legal precedent cited by previous Board decisions is no longer valid. “Therefore a discretionary hearing is denied for above-stated reasons.”

The Board finds that OWCP has again failed to exercise its discretion. The Board has held that OWCP, in its broad discretionary authority to administer the Federal Employees’ Compensation Act (FECA), has the power to hold hearings in circumstances where no legal provision is made for such hearings and has further held that OWCP must exercise its discretionary authority.<sup>4</sup> This power to hold hearings did not derive from an OWCP procedure or regulation. Indeed, OWCP had this authority prior to the 1966 amendments that provided a right to a hearing. The Board held that there was nothing in the legislative history of the 1966 amendments to indicate that Congress was revoking OWCP’s discretionary authority to hold a hearing even if the request was not timely made.<sup>5</sup>

When OWCP procedures later required the exercise of discretion if a hearing request was untimely or made after reconsideration, the Board found that the procedure was a proper interpretation of both FECA and Board precedent.<sup>6</sup> That the procedure no longer addresses the matter in no way diminishes OWCP’s power to hold discretionary hearings.

On remand, OWCP shall exercise its discretion whether to grant appellant’s untimely request, and if not, shall so advise appellant with reasons.

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<sup>2</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4.a (October 2011).

<sup>3</sup> 20 C.F.R. § 10.616(a).

<sup>4</sup> *Mary B. Moss*, 40 ECAB 640 (1989) (untimely request for hearing); *Shirley A. Jackson*, 39 ECAB 540 (1988) (hearing request made after request for reconsideration); *Johnny S. Henderson*, 34 ECAB 216 (1982) (request for a second hearing); *Rudolph Bermann*, 26 ECAB 354 (1975) (injury occurring prior to effective date of the statutory amendments providing right to hearing).

<sup>5</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>6</sup> *Jeff Micono*, 39 ECAB 617 (1988).

**IT IS HEREBY ORDERED THAT** the November 3, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this order of the Board.

Issued: August 13, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board