

ISSUE

The issue is whether the Branch of Hearings and Review properly denied appellant's June 1, 2011 hearing request.

FACTUAL HISTORY

Appellant, a 32-year-old former nursing assistant, injured his back and right lower extremity in the performance of duty on April 13, 2010.³ OWCP accepted appellant's traumatic injury claim for right knee sprain and lumbar intervertebral disc (L5-S1) displacement without myelopathy. Appellant received continuation of pay and he returned to work in a full-time, limited-duty capacity on or about May 4, 2010. The employing establishment dismissed appellant for cause, effective October 2, 2010, but later reinstated him.⁴ Appellant filed a claim for wage-loss compensation (Form CA-7) beginning October 2, 2010.

By decision dated December 17, 2010, OWCP denied the claim because appellant's October 2, 2010 work stoppage was unrelated to his April 13, 2010 injury. Moreover, the medical evidence did not establish that appellant was unable to perform his limited-duty assignment on or after October 2, 2010.

On June 1, 2011 appellant requested a hearing before the Branch of Hearings and Review. He submitted the appeal request form that accompanied the December 17, 2010 decision. The hearing request was postmarked June 1, 2011, and it was time-stamped as having been received on June 6, 2011.

In a decision dated June 28, 2011, the Branch of Hearings and Review denied appellant's hearing request as untimely. He filed the request more than 30 days after the December 17, 2010 decision. The Branch of Hearings and Review also considered whether to grant a discretionary hearing, but declined to do so on the basis that appellant could alternatively request reconsideration before OWCP regarding his claim for wage-loss compensation beginning October 2, 2010.

The Board received the instant appeal on July 18, 2011. In his application for review (AB-1), appellant argued that he was entitled to back pay from October 2, 2010 until his reinstatement on April 25, 2011. The Board does not have jurisdiction over the issue of whether appellant is entitled to wage-loss compensation on or after October 2, 2010. That particular issue was addressed in the December 17, 2010 merit decision, which as previously noted is not currently before the Board.

³ At the time of injury, appellant was cleaning Broda chairs on the loading dock when he slipped in a puddle of water and fell.

⁴ According to an October 2, 2010 Notification of Personnel Action (Standard Form 50), appellant was removed for "Conduct Unbecoming a VA Employee." In August 2010, he was involved in a verbal altercation with a coworker and, in a separate August 2010 incident, appellant reportedly borrowed money from a VA patient. The employing establishment placed him on administrative leave, effective August 16, 2010, and removed him effective October 2, 2010. The employing establishment later reinstated appellant as a full-time security clerk effective April 25, 2011.

LEGAL PRECEDENT

Any claimant dissatisfied with an OWCP decision shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.⁵ If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. OWCP's regulations further provide that the "claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision."⁶ Although a claimant may not be entitled to a hearing as a matter of right, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing.⁷

ANALYSIS

Appellant's request for a hearing was postmarked June 1, 2011, which is more than 30 days after OWCP issued its December 17, 2010 decision. The regulations clearly specify that "[t]he hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."⁸ Appellant's June 1, 2011 request was untimely and, therefore, he was not entitled to a hearing as a matter of right. The Branch of Hearings and Review also denied appellant's request on the basis that his claim for wage-loss compensation could be addressed by requesting reconsideration before OWCP. The Board finds that the hearing representative properly exercised his discretionary authority in denying appellant's request for a hearing.⁹

CONCLUSION

The Board finds that the Branch of Hearings and Review properly denied appellant's June 1, 2011 hearing request.

⁵ 20 C.F.R. § 10.616(a).

⁶ *Id.*

⁷ 5 U.S.C. §§ 8124(b)(1) and 8128(a); 20 C.F.R. § 10.616(a); *Hubert Jones, Jr.*, 57 ECAB 467, 472-73 (2006); *Herbert C. Holley*, 33 ECAB 140 (1981).

⁸ 20 C.F.R. § 10.616(a).

⁹ *Mary B. Moss*, 40 ECAB 640, 647 (1989).

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 11, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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