

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

W.C., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Jamaica, NY, Employer)

**Docket No. 11-1906
Issued: March 14, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 16, 2011 appellant filed a timely appeal from the March 22, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days has elapsed from the most recent OWCP merit decision of December 13, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's case 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 a review of the written record as untimely.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 29, 2010 appellant, then a 58-year-old transportation security inspector, filed a traumatic injury claim Form CA-1 alleging that on October 19, 2010 he sustained a left lower back and cervical sprain while in the performance of duty.

By decision dated December 13, 2010, OWCP denied appellant's claim on the basis that the evidence submitted did not establish that the incident occurred as alleged.

By appeal form postmarked January 19, 2011, appellant requested a review of the written record by an OWCP hearing representative.

By decision dated March 22, 2011, OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record as it was untimely. It exercised its discretion and 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 he sustained an injury as defined by FECA.²

LEGAL PRECEDENT

Section 8124(b)(1) of FECA provides: "Before review under section 8128(a) of this title [relating to reconsideration], a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on [his] claim before a representative of the Secretary."³

Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."⁴ The 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.⁵ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.⁶ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.⁷

² The Board notes that, following the issuance of the March 22, 2011 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. § 10.615.

⁵ *Id.* at § 10.616(a).

⁶ *G.W.*, Docket No. 10-782 (issued April 23, 2010). See also *Herbert C. Holley*, 33 ECAB 140 (1981).

⁷ *Id.* See also *Rudolph Bermann*, 26 ECAB 354 (1975).

ANALYSIS

Appellant had 30-calendar days from OWCP's December 13, 2010 merit decision or until January 12, 2011, to request a review of the written record. Because his request was postmarked January 19, 2011, his request was untimely. Appellant was not entitled to a review of the written record as a matter of right under section 8124(b)(1) of FECA. Exercising its discretion to grant a review of the written record, OWCP denied his request on the grounds that he could equally well address any issues in his case by requesting reconsideration. 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.⁸ Because OWCP considered the request despite its untimeliness and advised appellant of his right to address the issues raised by OWCP's December 13, 2010 decision through another avenue, the Board finds that OWCP did not abuse its discretion in denying appellant's untimely request for a review of the written record.⁹

On appeal, appellant argues the merits of his case. The Board noted above that it only has jurisdiction over OWCP's March 22, 2011 decision which denied his request for a review of the written record and therefore is precluded from conducting a merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a review of the written record.

⁸ See *Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).

⁹ See *D.F.*, Docket No. 11-42 (issued August 1, 2011); *Gerard F. Workinger*, 56 ECAB 259 (2005).

ORDER

IT IS HEREBY ORDERED THAT the March 22, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 14, 2012
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