



## ISSUE

The issue is whether OWCP properly denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124.

## FACTUAL HISTORY

This case was previously before the Board. In a nonmerit decision dated September 8, 2010, the Board affirmed an October 26, 1999 OWCP decision which found that appellant had filed an untimely request for an oral hearing from an April 22, 2009 decision.<sup>3</sup> By decision dated April 22, 2009, OWCP terminated appellant's compensation benefits and modified his August 25, 1999 loss of wage-earning capacity decision to zero effective April 22, 2009. The Board noted that it did not have jurisdiction over the April 22, 2009 OWCP decision. The facts of the case as set forth in the Board's September 8, 2010 decision are incorporated herein by reference.

In an appeal request form dated September 22, 2011 and postmarked September 23, 2011, appellant requested an oral hearing before a hearing representative of OWCP's Branch of Hearings and Review.

By decision dated October 20, 2011, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that it was untimely. It exercised its discretion and further denied his request on the basis that the issue in the case could be addressed by requesting reconsideration before OWCP and submitting evidence not previously considered.<sup>4</sup>

## 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 his claim before a representative of the Secretary.<sup>5</sup> Section 10.615 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record.<sup>6</sup> The request must be sent within 30 days (as determined by postmark or other carrier's date marking)

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<sup>3</sup> Docket No. 10-315 (issued September 8, 2010).

<sup>4</sup> Subsequent to appellant filing his appeal with the Board, OWCP issued nonmerit decisions dated May 8 and June 8, 2012 denying appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124. As appellant filed his appeal with the Board on April 12, 2012, OWCP's May 8 and June 8, 2012 decisions are null and void as they pertain to the same issue over which the Board has jurisdiction; see *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

<sup>5</sup> 5 U.S.C. § 8124(b)(1).

<sup>6</sup> 20 C.F.R. § 10.615.

of the date of the decision for which a hearing is sought.<sup>7</sup> A claimant is entitled to a hearing or review of the written record as a matter of right if the request is filed within 30 days.<sup>8</sup>

While a claimant may not be entitled to a hearing or review of the written record as a matter of right if the request is untimely, OWCP has the discretionary authority to grant the request and must properly exercise such discretion.<sup>9</sup>

### ANALYSIS

The record shows that the last merit decision of OWCP was rendered on April 22, 2009. In that decision, OWCP terminated appellant's compensation benefits and modified his loss of wage-earning capacity dated August 25, 1999 to zero effective April 22, 2009. Appellant's request for a hearing before an OWCP hearing representative was postmarked September 23, 2011, more than 30 days after the April 22, 2009 decision. Therefore, his hearing request was not timely and appellant was not entitled to an oral hearing as a matter of right.<sup>10</sup>

OWCP has the discretionary authority to grant a hearing even though a claimant is not entitled as a matter of right. In its October 20, 2011 decision, it properly exercised its discretion. OWCP considered the issue and denied appellant's request for an oral hearing on the basis that his claim on the issue of whether he was entitled to compensation benefits could be adequately addressed through the reconsideration process and the submission of additional evidence. The Board has held that the only limitation on OWCP's authority is reasonableness. 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.<sup>11</sup> In the present case, OWCP did not abuse its discretion in denying a discretionary hearing.

On appeal, appellant argues the merits of his case. However, as previously noted, the Board does not have jurisdiction over the merits of this case.<sup>12</sup>

### CONCLUSION

The Board finds that OWCP properly found that appellant had filed an untimely request for an oral hearing.

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<sup>7</sup> *Id.* at § 10.616(a).

<sup>8</sup> *Leona B. Jacobs*, 55 ECAB 753 (2004).

<sup>9</sup> *See id.*; *Cora L. Falcon*, 43 ECAB 915 (1992); *Mary B. Moss*, 40 ECAB 640 (1989); *Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>10</sup> 20 C.F.R. § 10.616(a).

<sup>11</sup> *Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).

<sup>12</sup> Appellant submitted new medical evidence subsequent to OWCP's April 22, 2009 decision. The Board has no jurisdiction to review new evidence on appeal. *See* 20 C.F.R. § 501.2(c). Appellant can resubmit this evidence to OWCP and request reconsideration under 5 U.S.C. § 8128.

**ORDER**

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

Issued: November 7, 2012  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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