

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

D.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Edmonds, WA, Employer**

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**Docket No. 12-1332
Issued: June 21, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On June 6, 2012 appellant filed a timely appeal of January 30 and April 5, 2012 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was issued on October 4, 2011, more than 180 days prior to the filing of this instant appeal. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for a review of the written record as untimely; and (2) whether it properly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² The record also contains a January 30, 2012 merit decision. However, in light of the Board's findings in this case, the January 30, 2012 merit decision is not in posture for decision.

FACTUAL HISTORY

On August 22, 2011 appellant, then a 62-year-old letter carrier, filed a traumatic injury claim alleging that on July 5, 2011 he sustained an injury to his left knee/leg and back of his left ankle when hit by another vehicle in the performance of duty.

By decision dated October 4, 2011, OWCP denied appellant's claim on the grounds that he did not establish an injury as alleged. It found that the evidence was insufficient to establish that the events occurred as alleged.

On January 10, 2012 OWCP received both a request for a review of the written record by an OWCP hearing representative and a request for reconsideration along with additional evidence.

By decision dated January 30, 2012, OWCP affirmed its October 4, 2011 denial, but modified the decision to accept fact of injury. It found that appellant had not established causal relationship.

In a separate decision also dated January 30, 2012, OWCP's hearing representative found that appellant was not entitled to a review of the written record. The hearing representative found that the request was received more than 30 days after OWCP's decision of October 4, 2011. OWCP exercised its discretion by considering appellant's request and further denied it as the issue involved could be addressed equally well pursuant to a valid request for reconsideration and submitting evidence not previously considered to support his claim.

OWCP received a request for reconsideration of the denial of his claim on March 19, 2012.

OWCP subsequently received a report dated March 1, 2012 from Dr. Howard B. Barker, a Board-certified orthopedic surgeon, who stated that, prior to the July 5, 2011 incident, appellant had no posterior heel pain. Dr. Barker noted that, after the incident, appellant's left posterior heel pain began and has persisted. He explained that this was a well-documented injury for which "a sudden dorsiflexion of his ankle, where he felt his foot was 'caught underneath,' could cause this injury." This report was received by OWCP on April 4, 2012.

In a decision dated April 5, 2012, OWCP denied appellant's request for reconsideration without a review of the merits on the grounds that his request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision. It specifically noted that he had submitted no new medical evidence.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of FECA provides that a claimant 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.³ Sections 10.617 and

³ 5 U.S.C. § 8124(b)(1).

10.618 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 by a representative of the Secretary.⁴ OWCP's procedures, which require OWCP to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.⁵ Although a claimant may not be entitled to a hearing as a matter of right, OWCP has discretionary authority with respect to granting a hearing and OWCP must exercise such discretion.⁶

ANALYSIS -- ISSUE 1

Appellant requested a review of the written record in a January 3, 2012 appeal form that was stamped as received by OWCP on January 10, 2012. OWCP determined that his request was made more than 30 days after the date of issuance of OWCP's October 4, 2011 decision. Accordingly, it found that appellant's request was untimely filed and he was not entitled to a review of the written record as a matter of right. The Board finds that OWCP properly found that appellant's request was not timely filed.

Because appellant did not submit a timely request for review of the written record, his request was untimely. OWCP, therefore, properly found that he was not entitled to an oral hearing or examination of the written record as a matter of right.

OWCP also has the discretionary authority to grant a request for hearing or review of the written record when a claimant is not entitled to such as a matter of right. In its January 30, 2012 decision, it properly exercised its discretion by notifying 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. The Board has held that the only limitation on OWCP's authority is reasonableness and an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.⁷ In this case, the evidence of record does not indicate that OWCP abused its discretion in finding that appellant could further pursue the matter through the reconsideration process. Consequently, OWCP properly denied his request for a review of the written record.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,⁸ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written

⁴ 20 C.F.R. §§ 10.616-17.

⁵ *Claudio Vasquez*, 52 ECAB 496 (2002).

⁶ See *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994); *Herbert C. Holley*, 35 ECAB 140 (1981).

⁷ *Samuel R. Johnson*, 51 ECAB 612 (2000).

⁸ 5 U.S.C. § 8128(a).

application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

- “(1) Shows that OWCP erroneously applied or interpreted a specific point of law;
or
- (2) Advances a relevant legal argument not previously considered by OWCP; or
- (3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”⁹

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.¹⁰

ANALYSIS -- ISSUE 2

Appellant disagreed with OWCP’s January 30, 2012 decision denying his traumatic injury claim. The underlying issue on reconsideration is medical in nature. The Board notes that OWCP denied appellant’s traumatic injury claim finding that he did not submit sufficient medical evidence to establish causal relationship. In support of his claim for reconsideration, appellant submitted a report dated March 1, 2012 from Dr. Barker, who stated that his report was in response to OWCP’s decision which was submitted to provide rationale for his opinion on causal relationship. This report was received by OWCP on April 4, 2012. In its April 5, 2012 decision, OWCP denied appellant’s reconsideration request without conducting a merit review of the claim. It advised that he had not submitted new medical evidence. OWCP did not note receipt or consideration of the March 1, 2012 report from Dr. Barker.

The Board has duly considered the matter and finds that the case is not in posture for a decision and must be remanded to OWCP. In the case of *William A. Couch*,¹¹ the Board held that when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. In this case, in a decision dated January 30, 2012, OWCP denied appellant’s traumatic injury claim finding that he did not submit sufficient medical evidence to establish causal relationship. As the Board found in *Linda Johnson*,¹² when OWCP receives relevant evidence, it must be properly reviewed by OWCP. This principle applies whether OWCP receives evidence on the date that it issues the decision¹³ or several days prior to the issuance of the decision.¹⁴

⁹ 20 C.F.R. § 10.606(b).

¹⁰ *Id.* at § 10.608(b).

¹¹ 41 ECAB 548 (1990).

¹² 45 ECAB 439 (1994).

¹³ *Id.*

¹⁴ *Supra* note 11.

The Board finds that OWCP, in its April 5, 2012 decision, did not review the March 1, 2012 report from Dr. Barker that was received by OWCP on April 4, 2012. For this reason, the case will be remanded to OWCP to enable it to properly consider all the evidence submitted at the time of the April 5, 2012 decision. Following such further development as OWCP deems necessary, it shall issue an appropriate merit decision on the claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a review of the written record as untimely. The Board also finds that it improperly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2012 decision denying appellant's request for a review of the written record as untimely is affirmed. The April 5, 2012 decision of OWCP is set aside and remanded to OWCP for further proceedings consistent with this decision.

Issued: June 21, 2013
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