

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

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| <p>R.L., Appellant</p> <p>and</p> <p>DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, LIHUE AIRPORT, Lihue, HI, Employer</p> | <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> | <p>Docket No. 13-1224</p> <p>Issued: November 6, 2013</p> |
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Appearances:
Appellant, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
 ALEC J. KOROMILAS, Alternate Judge
 MICHAEL E. GROOM, Alternate Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 23, 2013 appellant filed a timely appeal from a March 14, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying a hearing. As the most recent merit decision of OWCP was issued on September 16, 2010, more than 180 days from the date of the appeal, the Board has no jurisdiction over the merits of the claim.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the nonmerit decision.

¹ For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for an oral hearing.

On appeal, appellant explained that financial hardship previously prevented him from obtaining the medical evidence needed to meet his burden of proof.

FACTUAL HISTORY

OWCP accepted that on January 29, 2003 appellant, then a 49-year-old security screener, sustained a lumbar sprain when he lifted a heavy bag. He stopped work on February 2, 2003.

Dr. Dennis R. Scheppers, an attending Board-certified family practitioner, submitted reports from February 1 to 20, 2003 diagnosing a lumbar strain with radiculopathy. He released appellant to restricted duty as of February 20, 2003. Dr. Scheppers noted continued improvement in reports through April 15, 2003, relating that appellant felt he was "back to normal again and nearly 100 percent." On April 21, 2003 he found that appellant's examination was negative, the low back pain had resolved and that he would close appellant's case. Dr. Scheppers stated on a June 2, 2003 report that appellant required no further treatment.

In a May 28, 2010 letter, appellant requested that OWCP reopen his compensation claim as he was experiencing chronic pain which he attributed to the accepted injury.

In a June 3, 2010 letter, OWCP advised appellant of the additional evidence needed to establish his claim for a recurrence of disability. It noted that Dr. Scheppers found that his condition resolved as of April 21, 2003. OWCP requested that appellant provide a comprehensive medical report from his physician explaining how and why his current condition was related to the accepted lumbar sprain. It afforded him 30 days to submit such evidence.

Appellant submitted a July 3, 2013 letter to Dr. John Mason, an attending physician, asking him to perform the evaluation as requested by OWCP. Dr. Mason's office administrator stated in a July 27, 2010 letter that the evaluation would need to be scheduled at a later date as it would take more time than allotted for his appointment.

In a July 22, 2010 letter, Dr. Scheppers opined that, on review of unspecified medical reports, it seemed reasonable to attribute appellant's current lumbar symptoms to the accepted injury.

In a July 23, 2010 statement, appellant noted that, from 2003 to 2008, he performed sedentary tasks as a social worker. He did not seek treatment for a back condition or to reopen his claim until 2010 as he felt this would reduce his chances of promotion.³

By decision dated September 16, 2010, OWCP denied appellant's claim for recurrence of disability on the grounds that causal relationship was not established. It found that the medical

³ Appellant submitted grievance documents and requests for an investigation from 2004 and 2005.

evidence submitted was insufficient to establish that the accepted lumbar strain caused or aggravated any medical condition in 2010.

In a letter dated and postmarked on November 28, 2012, appellant requested a hearing before the Branch of Hearings and Review. He asserted that financial hardship and a relative's death rendered him unable to pay for the medical report needed to establish his claim. Appellant submitted a claim (Form CA-2a) for a recurrence of disability commencing February 10, 2003, and lumbar imaging studies performed on January 11, 2010 and October 12 and 22, 2012. In a December 16, 2012 letter, he asserted that his back pain had not ceased since 2003, and that he received ongoing treatment from nine physicians. In a February 8, 2013 letter, appellant advised OWCP that he had an orthopedic appointment scheduled for that day to discuss lumbar surgery.

By decision dated March 14, 2013, OWCP denied appellant's November 28, 2012 request for a hearing on the grounds that it was not timely filed within 30 days of the September 16, 2010 decision. It exercised its discretion by performing a limited review of the evidence and denied his request as the issue in the case could be addressed equally well pursuant to a valid request for reconsideration.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA states unequivocally that a claimant not satisfied with a decision of OWCP has a right, upon timely request, to a hearing before an OWCP representative.⁴ Section 10.615 of Title 20 of the Code of Federal Regulations provide that a hearing is a review of an adverse decision by an OWCP hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record.⁵

A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark or other carrier's date marking of the request.⁶ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.⁷ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.⁸

ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain on January 29, 2003. Dr. Scheppers, an attending Board-certified family practitioner, found the accepted injury resolved completely as of April 21, 2003 and that no further treatment was necessary. On May 28, 2010 appellant requested that OWCP reopen his claim, asserting that he had an ongoing

⁴ 5 U.S.C. § 8124(b)(1). See *A.B.*, 58 ECAB 546 (2007); *Joe Brewer*, 48 ECAB 411 (1997).

⁵ 20 C.F.R. § 10.615.

⁶ *Id.* at § 10.616(a).

⁷ *G.W.*, Docket No. 10-782 (issued April 23, 2010). See also *Herbert C. Holley*, 33 ECAB 140 (1981).

⁸ *Id.* See also *Rudolph Bermann*, 26 ECAB 354 (1975).

lumbar condition caused by the accepted lumbar strain. OWCP developed this request as a claim for recurrence of disability. Appellant submitted a July 22, 2010 letter from Dr. Scheppers finding appellant's contentions reasonable. OWCP denied the recurrence claim by decision dated September 16, 2010, finding the medical evidence inadequate to establish causal relationship.

Appellant's letter requesting a hearing was postmarked on November 28, 2012, more than 30 days after issuance of the September 16, 2010 decision. The Board finds that OWCP properly found that his request for an oral hearing was not timely filed under section 8124(b)(1) of FECA and that he was not entitled to a hearing as a matter of right.

OWCP then exercised its discretion and denied appellant's request for a hearing on the additional grounds that he could address the causal relationship issue in his case equally well by submitting relevant evidence accompanying a valid request for reconsideration. Because reconsideration exists as an alternative appeal right to address the issues raised by OWCP's decision, the Board finds that OWCP did not abuse its discretion in denying appellant's untimely request for an oral hearing.⁹

On appeal, appellant submitted new medical evidence. He asserts that this evidence is sufficient to meet his burden of proof. As stated above, the Board does not have jurisdiction over the merits of the case on the present appeal. Therefore, the Board is addressing only the March 14, 2013 decision denying appellant's request for a hearing, but not the September 16, 2010 decision denying the claim for recurrence of disability. Also, the Board may not consider new evidence for the first time on appeal that was not before OWCP at the time it issued the final merit decision in the case.¹⁰ As applied to this case, the Board may not consider the medical evidence appellant submitted pursuant to his appeal. Appellant may submit this evidence to OWCP accompanying a valid request for reconsideration.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a hearing as untimely.

⁹ See *Gerard F. Workinger*, 56 ECAB 259 (2005).

¹⁰ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 14, 2013 is affirmed.

Issued: November 6, 2013
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

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