

FACTUAL HISTORY

On October 4, 2008 appellant, a 53-year-old clerk, sustained a traumatic injury in the performance of duty while unloading an all-purpose carrier and carrying a tray of mail. OWCP accepted his claim for left knee sprain and a tear of the left medial meniscus.

In a June 20, 2011 decision, OWCP denied compensation for 261.57 hours of wage loss from February 28 through June 3, 2011. On July 20, 2011 appellant completed an Appeal Request Form requesting a review of the written record. OWCP granted that request, as it was postmarked on July 20, 2011. On September 20, 2011 an OWCP hearing representative reviewed the written record and vacated the June 20, 2011 decision, remanding the case to OWCP for further action.

In a September 23, 2011 decision, OWCP again denied compensation for 261.57 hours of wage loss from February 28 through June 3, 2011. Attached appeal rights advised: "Any hearing request must also be made in writing, within 30-calendar days after the date of this decision, as determined by the postmark of your letter."

On October 24, 2012 OWCP received an October 10, 2012 letter from appellant. He stated:

"On July of 2011 I submitted an Appeal Request Form indicating a review of the written record for LWOP of two hundred sixteen hours.

"The reason I'm writing is to find out the status of my appeal, for it has been over a year."

On October 23, 2012 OWCP replied that on September 20, 2011 the hearing representative remanded the case. It issued a new decision with additional appeal rights on September 23, 2011. OWCP sent appellant a copy of its September 23, 2011 decision to his address of record.

On November 26, 2012 appellant wrote OWCP's Branch of Hearings and Review and stated that he exercised appeal rights attached to the September 23, 2011 decision. "As stated previously in the letter dated October 10, 2012 could you inform me of the status of my appeal."

On February 15, 2013 OWCP received an Appeal Request Form, dated October 22, 2011, requesting a review of the written record. In a letter dated February 12, 2013, appellant explained that he mailed the Appeal Request Form on October 22, 2011 in response to OWCP's September 23, 2011 decision. He stated that OWCP did not respond to his correspondence. On October 10 and November 26, 2012 he wrote to ask about the status of his appeal. The October 22, 2011 Appeal Request Form was postmarked February 12, 2013.

In a decision dated March 14, 2013, OWCP denied appellant's request for a review of the written record. It found that his request was untimely, as determined by the postmark, and therefore appellant was not entitled to a review of the written record as a matter of right. OWCP considered the request and also denied it on the grounds that appellant could address the issue in his case by requesting reconsideration and submitting evidence not previously submitted to

establish that he was entitled to compensation benefits for 261.57 hours from February 28 to June 3, 2011.

On appeal, appellant contends that he met all of the requirements of the procedures and guidelines to the best of his understanding.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA provides:

“Before review under section 8128(a) of this title [relating to reconsiderations], 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

Initially, the claimant can choose between two hearing 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 a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.⁷

ANALYSIS

On September 23, 2011 OWCP denied appellant’s claim for compensation for 261.57 hours of wage loss from February 28 through June 3, 2011. Appellant had 30 days from the date of that decision, or until October 24, 2011 to send any request for a review of the written record.⁸

The Board has carefully reviewed the record and can find no such request. The Appeal Request Form dated October 22, 2011 first appears in the record as part of appellant’s February 12, 2013 correspondence to OWCP. The postmark of this correspondence is February 12, 2013.

It is the postmark or other carrier’s date marking, and not the date appearing on the request, that determines timeliness. Appellant stated that he mailed this Appeal Request Form on October 22, 2011, but the record provides no evidence to support his assertion.

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. § 10.615.

⁵ *Id.* at § 10.616(a).

⁶ *Herbert C. Holley*, 33 ECAB 140 (1981).

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

⁸ The 30th day landed on Sunday, October 23, 2011.

As the Appeal Request Form in question first appears in the record with a February 12, 2013 postmark, the Board finds the request untimely. Accordingly, appellant is not entitled to a review of the written record as a matter of right.

OWCP nonetheless has discretion to grant such a review. It exercised its discretion in this case by denying appellant's request on the grounds that he could further address the issue through an alternative appeal right. Appellant could request reconsideration and submit evidence not previously submitted in support of his contention that he was entitled to compensation benefits for 261.57 hours from February 28 to June 3, 2011.

The Board finds that OWCP properly exercised its discretion in denying a discretionary review of the written record. The Board will therefore affirm the March 4, 2013 decision.

With regard to appellant's October 10, 2012 correspondence, it does not relate to OWCP's September 23, 2011 decision. The October 10, 2012 correspondence instead refers specifically to appellant's July 20, 2011 request for review of the written record, which OWCP granted. OWCP appropriately replied to appellant's October 10, 2012 correspondence by advising that the hearing representative remanded the case on September 20, 2011 for further consideration. It issued a new decision with additional appeal rights on September 23, 2011. Thus, appellant's October 10, 2012 correspondence is irrelevant to whether he sent a timely request for a review of the written record following OWCP's September 23, 2011 decision.

It was on November 26, 2012 that appellant for the first time documented that he had exercised one of the appeal rights following OWCP's September 23, 2011 decision. He then asked: "As stated previously in the letter dated October 10, 2012 could you inform me of the status of my appeal."

Although appellant's November 26, 2012 letter is the first indication in the record that he requested a hearing following OWCP's September 23, 2011 decision, the letter itself is untimely and does not establish that appellant is entitled to a review of the written record as a matter of right.

The Board notes that appellant sent his July 20, 2011 Appeal Request Form by certified mail. He states on appeal that he also sent his October 10 and November 26, 2012 letters by certified mail. In the absence of any such evidence, however, his request postmarked February 12, 2013 must be considered untimely.

CONCLUSION

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

ORDER

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

Issued: September 13, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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