

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

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<b>L.D., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 14-319</b>
	)	<b>Issued: April 24, 2014</b>
<b>DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Arlington, VA, Employer</b>	)	
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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On November 26, 2013 appellant filed a timely appeal from the July 25, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied her request for review of the written record. As more than 180 days elapsed from issuance of the most recent merit decision by OWCP on May 2, 2013, denying appellant's claim for a schedule award, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board only has jurisdiction to review this nonmerit decision.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly denied appellant's request for review of the written record as untimely.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

## **FACTUAL HISTORY**

On September 18, 2007 appellant, a 47-year-old special agent, sustained a traumatic injury in the performance of duty when she slipped and fell onto her left knee in the restroom. OWCP accepted her claim for a closed fracture of the left patella and for osteoarthritis, unspecified, of the left lower extremity.

In a decision dated May 2, 2013, OWCP denied appellant's schedule award claim. Appeal rights attached to the decision notified her that any hearing request must be made in writing within 30 calendar days after the date of the decision as determined by the postmark of her letter.

Appellant requested a review of the written record by an OWCP hearing representative. Her letter was postmarked June 7, 2013.

OWCP denied appellant's hearing request in a decision dated July 25, 2013. It found that her request was untimely and that she was therefore not entitled to a hearing as a matter of right. OWCP considered appellant's request nonetheless but denied a discretionary hearing on the grounds that she could equally well pursue her schedule award claim through the reconsideration process.

Appellant concedes that her request was untimely but asks the Board to consider that the delay was due largely to OWCP's failure to authorize payment for her physician to prepare an impairment rating. When she paid the money herself, the physician did not prepare the rating until June 6, 2013. Appellant contends that the delay was beyond her control.

## **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 [her] claim before a representative of the Secretary.”<sup>3</sup>

Initially, the claimant can choose between an oral hearing or a review of the written record.<sup>4</sup> 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.<sup>5</sup> OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>6</sup> In such a

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<sup>3</sup> 5 U.S.C. § 8124(b)(1).

<sup>4</sup> 20 C.F.R. § 10.615.

<sup>5</sup> *Id.* at § 10.616(a).

<sup>6</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

case, it will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.<sup>7</sup>

### **ANALYSIS**

Appellant had 30 days from the date of OWCP's May 2, 2013 decision, or until June 3, 2013, to postmark her request for a review of the written record. Her request, postmarked on June 7, 2013, was therefore untimely. By law, appellant is not entitled to a hearing, or review of the written record, as a matter of right.

Although appellant's request was untimely, OWCP still had discretion to grant a review of the written record. It exercised its discretion and decided that a review of the written record was unnecessary because she could simply submit her evidence and argument to OWCP with a request for reconsideration.

The Board has held that the denial of a hearing on these grounds is a proper exercise of OWCP's discretion.<sup>8</sup> Accordingly, the Board finds that OWCP properly denied appellant's untimely request. The Board will affirm OWCP's July 25, 2013 decision denying a review of the written record.

Appellant explained that the delay in her request was due to attempts to secure authorization from OWCP and her physician's failure to prepare an impairment rating until a few days after the deadline. The Board notes that the circumstances for the delay are immaterial. A claimant has a right to a hearing under the statute only if the request is timely. If for any reason it is untimely, it becomes a matter of OWCP's discretion whether to grant or deny the request. On appeal, the Board can only review whether OWCP properly exercised its discretion. The Board cannot substitute its discretion on whether a review of the written record should be performed. OWCP properly exercised its discretion.

### **CONCLUSION**

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

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<sup>7</sup> *Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>8</sup> *E.g., Jeff Micono*, 39 ECAB 617 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 25, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 24, 2014  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

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

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