

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

D.E., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Chattanooga, TN, Employer)

**Docket No. 14-1686
Issued: December 12, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 14, 2014 appellant filed a timely appeal of a May 6, 2014 decision of the Office of Workers' Compensation Programs (OWCP), denying his request for a hearing. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the May 6, 2014 decision. Since more than 180 days has elapsed from the last merit decision of June 24, 2013 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. § 501.3(e).

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The case was before the Board on a prior appeal. By decision dated June 8, 2012, the Board affirmed a May 5, 2011 OWCP decision denying appellant's request for a lump-sum payment of a schedule award.² As the Board noted, OWCP accepted that appellant sustained a left knee anterior cruciate ligament (ACL) tear and left knee patellofemoral arthritis in the performance of duty on July 2, 1992. Appellant received schedule awards for a 67 percent left leg permanent impairment.

By decision dated June 24, 2013, OWCP determined that appellant was not entitled to further compensation as of June 11, 2013. It found that he had pleaded guilty to fraud in receipt of his compensation benefits, and pursuant to 5 U.S.C. § 8148 was not entitled to further compensation.

The record contains an appeal request form from the June 24, 2013 decision postmarked August 14, 2013 that has checkmarks beside review of the written record and an ECAB appeal. In addition to the appeal request form, there is a letter dated August 10, 2013 from appellant, addressed to OWCP's London, Kentucky address, stating that he still had left knee problems and wanted to "appeal the decision on the medical treatment...."

The appeal request form and letter was forwarded by ECAB to OWCP's Branch of Hearings and Review and stamped as received on August 26, 2013. By letter dated August 26, 2013, the Branch of Hearings and Review acknowledged receipt of appellant's request and indicated a hearing representative would be assigned to the case.

By decision dated May 6, 2014, OWCP found the request for a review of the written record as untimely filed. It noted that appellant had 30 days to timely file a request following the June 24, 2013 decision. In addition, OWCP stated that it had considered a request and determined the issue could equally well be addressed by requesting reconsideration and submitting new evidence.

LEGAL PRECEDENT

The statutory right to a hearing under 5 U.S.C. § 8124(b)(1) follows the initial final merit decision of OWCP. Section 8124(b)(1) provides as follows: "Before review under section 8128(a) of this title, 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 issuance of the decision, to a hearing on his claim before a representative of the Secretary...." Pursuant to 20 C.F.R. § 10.615, a claimant may choose between an oral hearing and a review of the written record. The request must be sent within 30 days (as determined by the postmark or other carrier's date marking) of the date of OWCP's decision.³ If the request for a review of the written record is not made within 30 days, appellant is not entitled to a review of the written

² Docket No. 12-158 (issued June 8, 2012).

³ 20 C.F.R. § 10.616(a).

record as a matter of right.⁴ Although not entitled to a review of the written record as a matter of right, OWCP has discretionary authority to grant the request and must exercise this discretionary authority.⁵

ANALYSIS

In the present case, an OWCP decision was dated June 24, 2013. The request for a review of the written record was dated August 10, 2013 and postmarked August 14, 2013. Since this is more than 30 days after the June 24, 2013 decision, it is untimely filed.

As noted above, OWCP has the discretionary authority to grant a request for a review of the written record even if untimely filed. In the May 6, 2014 decision, it determined that appellant's claim could equally well be addressed by requesting reconsideration and submitting new evidence.

The record establishes that OWCP's Branch of Hearings and Review received appellant's request on August 26, 2013; but the decision finding the request was untimely was not issued until May 6, 2014, over eight months after the request was filed. A similar situation was presented in *S.C.*, where the claimant had requested an oral hearing of a December 3, 2004 OWCP schedule award decision on March 14, 2005, and OWCP did not issue a decision finding the request untimely until January 27, 2006.⁶ The Board found this delay compromised appellant's appeal rights, including the right to timely file an appeal with the Board. The case was remanded to OWCP to properly issue a decision on the merits of the claim.

Under Board procedure, a claimant has 180 days to file a timely appeal before the Board.⁷ By delaying the decision with respect to a request for a review of the written record for over eight months, appellant was precluded from timely filing an appeal with the Board. Consistent with the *S.C.* case, the present case will be remanded to OWCP to properly issue a decision on the merits of the claim.

CONCLUSION

The Board finds the delay in issuing a decision with respect to appellant's request for a review of the written record compromised appellant's appeal rights.

⁴ See *N.M.*, Docket No. 14-1189 (issued October 7, 2014).

⁵ *Id.*

⁶ Docket No. 06-837 (issued August 28, 2006). See also *R.M.*, Docket No. 06-2162 (issued March 14, 2007) (delay of over six months in issuing decision denying an oral hearing request as untimely compromised appellant's appeal rights and required a merit review).

⁷ 20 C.F.R. § 501.3(e).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 6, 2014 is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: December 12, 2014
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