

ISSUE

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

FACTUAL HISTORY

On November 1, 2011 appellant, then a 62-year-old maritime examiner and identifier, filed an occupational disease claim alleging that he sustained swelling and strain in his joints as a result of heavy lifting, climbing, pushing and pulling at work. He did not stop work.

On November 29, 2011 OWCP advised appellant that no evidence was received in support of his claim. It requested additional evidence specifically a medical report from a physician with a diagnosis and explanation of how appellant's injury resulted from his employment.

Appellant submitted a description of his position as an identifier and various personnel records.

In an October 20, 2011 discharge summary report, Dr. Sean Wang, Board-certified in emergency medicine listed instructions for a muscle strain and prescribed narcotic medication.

In a decision dated January 26, 2012, OWCP denied appellant's claim finding insufficient medical evidence to establish that he sustained a diagnosed medical condition as a result of his employment.

In an appeal request form dated April 24, 2013 and received on April 29, 2013, appellant requested a review of the written record.³ He submitted diagnostic reports dated June 26, 2012 for complaints of abdominal pain and the April 3 and May 24, 2013 reports of Dr. Bala Viswanathan, a Board-certified surgeon.

By decision dated May 30, 2013, OWCP's hearing representative denied appellant's request for a review of the written record as untimely filed. She found that his request was postmarked April 24, 2013, more than 30 days after OWCP's decision issued on January 26, 2012. 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.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA provides that a claimant for compensation 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.⁴

³ The Board notes that appellant placed check marks indicating that he wanted both an oral hearing and a review of the written record, however, he also circled the request for review of the written record.

⁴ 5 U.S.C. § 8124(b)(1).

Sections 10.617 and 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.⁵ A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.⁶ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.⁷ Its procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).⁸

ANALYSIS

On January 26, 2012 OWCP denied appellant's occupational disease claim finding insufficient medical evidence to establish that he sustained a diagnosed condition as a result of his employment. In an appeal form dated and postmarked April 24, 2013, appellant requested a review of the written record. OWCP received the request on April 29, 2013, which was more than 30 days after it issued its January 26, 2012 decision.⁹ Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing or a review of the written record.¹⁰ The Board finds that OWCP properly determined that appellant's request was not timely. Thus, appellant was not entitled to a review of the written record or an oral hearing as a matter of statutory right under section 8124(b)(1) of FECA.

Although appellant's request for review of the written record was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion. In the May 30, 2013 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.¹¹ In this case,

⁵ 20 C.F.R. §§ 10.616, 10.617.

⁶ *Id.* at § 10.616(a).

⁷ *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

⁸ *See R.T.*, Docket No. 08-408 (issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.2(a) (October 2011).

⁹ The 30-day period for determining the timeliness of an employee's request for an oral hearing or review of the written record commences the day after the issuance of OWCP's decision. *See Donna A. Christley*, 41 ECAB 90 (1989). The Board notes that appellant did not submit a written request for a review of the written record by February 25, 2012, within 30 calendar days after OWCP's March 23, 2012 decision.

¹⁰ *William F. Osborne*, 46 ECAB 198 (1994).

¹¹ *Samuel R. Johnson*, 51 ECAB 612 (2000).

the evidence of record does not indicate that OWCP abused its discretion in its denial of appellant's request. Accordingly, the Board finds that it properly denied appellant's request for a review of the written record.

On appeal, appellant stated that his symptoms were reaggravated due to the work required in his current position and that he needed an operation as soon as possible. The Board notes that it does not have jurisdiction to review the merits of his claim but may only review the May 30, 2013 nonmerit decision denying his request for a review of the written record. Because appellant's request was not filed within 30 days, the Board finds that OWCP properly denied his request as untimely filed.

CONCLUSION

The Board further finds that OWCP properly denied appellant's request for a review of the written record pursuant to 5 U.S.C. § 8124(b)(1).

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2013 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 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