

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

V.W., Appellant)	
)	
and)	Docket No. 14-1487
)	Issued: November 14, 2014
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 19, 2014 appellant filed a timely appeal from an April 2, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for an oral hearing by the Branch of Hearings and Review. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision. The last merit decision of record was OWCP's October 25, 2012 decision. Because more than 180 days elapsed from issuance of the October 25, 2012 decision to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.

ISSUE

The issue is whether OWCP abused its discretion in denying appellant's request for an oral hearing.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 1, 2012 appellant, then a 50-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she developed cervical radiculopathy with muscle dystonia as a result of her repetitive employment duties. She first became aware of her condition on April 21, 2011. In support of her claim, she submitted a March 11, 2012 medical report from Dr. Gary Starkman, a Board-certified neurologist. By letter dated August 29, 2012, the employing establishment controverted the claim.

By letter dated September 19, 2012, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised of the medical and factual evidence needed and asked to respond within 30 days.

On October 3, 2012 appellant submitted a narrative statement describing her employment duties, injury and need for treatment. She stated that she was off work due to a May 16, 2007 traumatic injury. Although appellant was not working, her injury was caused by her repetitive employment duties. She stated that her physician only recently informed her that her traumatic injury was actually an exacerbation of a condition caused by her repetitive employment duties. Diagnostic reports dated July 24 and 25, 2012 were also submitted.

By decision dated October 25, 2012, OWCP denied appellant's claim. It found that the evidence submitted was not sufficient to establish that she was injured in the performance of duty. The evidence of record failed to establish that her medical condition was causally related to her duties as a mail handler.

On an appeal request form dated November 24, 2012, received by OWCP on December 3, 2012, appellant requested an oral hearing before the Branch of Hearings and Review. The request for hearing was postmarked November 28, 2012.

By decision dated April 2, 2014, the Branch of Hearings and Review denied appellant's request for an oral hearing finding that her request was not made within 30 days of the October 25, 2012 OWCP decision. The Branch of Hearings and Review further determined that the issue in the case could equally well be addressed by requesting reconsideration before OWCP and submitting evidence not previously considered.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA provides that before review under section 8128(a) of this title, 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 or her claim before a representative of the Secretary.² Section 10.615 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.³ OWCP regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the

² *Id.* at § 8124(b)(1).

³ 20 C.F.R. § 10.615.

claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.⁴

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA,⁵ has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.⁶ OWCP procedures, which require OWCP to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.⁷

ANALYSIS

In the present case, appellant requested an oral hearing on November 24, 2012. OWCP found that the request was postmarked on November 28, 2012. Appellant's request was made more than 30 days after the date of issuance of OWCP's prior October 25, 2012 merit decision. Therefore, OWCP properly found in its April 2, 2014 decision that appellant was not entitled to an oral hearing or examination of the written record as a matter of right because her request for a hearing was not made within 30 days of its October 25, 2012 decision.⁸

OWCP has the discretionary authority to grant a hearing if the request was not timely filed. In its April 2, 2014 decision, it considered the issue involved and exercised its discretion when it denied appellant's hearing request and determined that she could equally well address the issue by requesting reconsideration and submitting new evidence.

The Board finds that OWCP abused its discretion by denying appellant's request for an oral hearing. Appellant requested an oral hearing on November 28, 2012, 34 days after OWCP's October 25, 2012 merit decision. OWCP did not issue a decision denying appellant's hearing request until April 2, 2014, a delay of more than 15 months.⁹ The April 2, 2014 decision incorrectly stated that appellant could equally address the issue in the case by requesting reconsideration, as any reconsideration, but the delay in issuing a decision on appellant's request denied her the opportunity to appeal the October 25, 2012 merit decision to the Board. When OWCP delays a decision and such delay jeopardizes the claimant's right for review of the merits by the Board, it should conduct a merit review.¹⁰ By issuing a nonmerit decision denying appellant's request for an oral hearing on April 2, 2014, OWCP effectively denied appellant an

⁴ *Id.* at § 10.616(a).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

⁷ *Teresa M. Valle*, 57 ECAB 542 (2006).

⁸ 20 C.F.R. § 10.616(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

⁹ *M.P.*, Docket No. 09-1916 (issued March 12, 2010).

¹⁰ *D.M.*, Docket No. 08-1814 (issued January 16, 2009); *W.H.* Docket No. 06-1515 (issued April 9, 2007); *R.M.*, Docket No. 06-2162 (issued March 14, 2007); *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7a (October 2011).

opportunity to obtain a merit review of OWCP's October 25, 2012 decision.¹¹ Given that such delay precluded appellant from seeking a merit review, the Board will remand the case to OWCP for further merit review in order to protect her appeal rights.¹² Following such other development of the record as it deems necessary, OWCP shall issue an appropriate merit decision.¹³

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: November 14, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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

¹¹ *A.M.*, Docket No. 08-2153 (issued May 12, 2009).

¹² *C.J.*, Docket No. 09-2103 (issued June 1, 2010).

¹³ *Janice M. Hatcher*, 55 ECAB 155 (2003); *Joseph L. Cabral*, 44 ECAB 152 (1992).