

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

S.B., Appellant

and

**DEPARTMENT OF THE NAVY,
Camp Lejeune, NC, Employer**

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**Docket No. 14-1363
Issued: October 2, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 22, 2014 appellant filed a timely appeal from a November 27, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days elapsed from the date of the last merit decision dated May 20, 2013 to the filing of the appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124.

¹ This appeal was received by the Board on May 29, 2014. As the date of receipt would render the appeal untimely filed, pursuant to the Board's *Rules of Procedure* the appeal will be considered to have been filed as of the date of the postmark. *See* 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 53-year-old contract surveillance representative, filed a Form CA-2 claim for benefits on February 27, 2013, alleging that he developed an emotional condition causally related to employment factors.

In a February 28, 2013 report, Dr. Shayna Walker, a specialist in family medicine and a treating psychiatrist, stated that appellant had anxiety symptoms which were exacerbated and worsened by work-related stressors. She diagnosed major depression disorder and panic disorder without agoraphobia. Dr. Walker submitted reports excusing appellant from work on January 25 and February 8, 2013.

In a letter received by OWCP on March 11, 2013, the employing establishment challenged appellant's claim.

By letter dated March 13, 2013, OWCP asked appellant to submit a comprehensive medical report from his treating physician describing his symptoms and the medical reasons for his condition. It requested an opinion as to whether his claimed condition was causally related to his federal employment. OWCP requested that appellant submit the additional evidence within 30 days.

In a March 27, 2013 report, Dr. Walker stated that she initially examined appellant on January 18, 2013, at which time she performed a psychiatric evaluation. She related that he experienced work-related anxiety a few days prior to his first evaluation in mid-January because of harassment at work. Appellant had stressors from work-exacerbated chronic panic symptoms and depressive symptoms. Dr. Walker advised that he displayed symptoms of panic attacks, insomnia, depressed mood, poor interest in things, poor concentration, excessive worries and racing thoughts during his initial evaluation. She opined that appellant's mental health concerns were causally related to work stressors and interpersonal difficulties.

By decision dated May 20, 2013, OWCP denied appellant's claim. It found that he failed to submit sufficient factual evidence to establish a compensable factor of employment.

On June 20, 2013 appellant requested an oral hearing.

In a decision dated November 27, 2013, OWCP denied the request as untimely filed pursuant to 5 U.S.C. § 8124. It informed appellant that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issue in this case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

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 or her claim before a representative of the

Secretary.³ 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.⁴ The 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 A hearing is a review of an adverse decision by an OWCP hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.⁶ A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which the hearing is sought.⁷ A claimant is not entitled to a hearing as a matter of right if the request is not made within 30 days from the date of the decision.⁸ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.⁹ In such a case, it will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.¹⁰

While a claimant may not be entitled to a hearing as a matter of right if the request is untimely, OWCP has the discretionary authority to grant the request and must properly exercise such discretion.¹¹

ANALYSIS

On June 20, 2013 appellant requested an oral hearing. Because he did not request the hearing within 30 days of the May 20, 2013 decision, he was not entitled to a hearing as a matter of right under section 8124(b)(1). OWCP considered whether to grant a discretionary review and properly advised appellant that his case had been considered and denied for the reason that the issue in the case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

When OWCP neglected to issue a decision on appellant's request for oral hearing or review of the written record in a timely fashion, it effectively exhausted his opportunity to obtain a merit review of the May 20, 2013 decision before the Board.¹² Appellant's May 20, 2013

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. § 10.615.

⁵ *Id.* at § 10.616(a).

⁶ *Supra* note 4.

⁷ *Supra* note 5.

⁸ *James Smith*, 53 ECAB 188 (2001).

⁹ 20 C.F.R. § 10.616(b).

¹⁰ *Supra* note 8.

¹¹ *See id.*; *Cora L. Falcon*, 43 ECAB 915 (1992); *Mary B. Moss*; 40 ECAB 640 (1989); *Rudolph Bermann*, 26 ECAB 354 (1975).

¹² *See D.M.*, Docket No. 08-1814 (issued July 16, 2009).

request for review of the written record went unanswered for more than six months. By the time OWCP issued its November 27, 2013 decision denying the request for an oral hearing, he did not have the time to appeal the merits of OWCP's May 20, 2013 decision denying his emotional condition claim to the Board. The Board finds that OWCP abused its discretion by waiting over six months to issue its decision denying appellant's request for hearing. As such, the case will be remanded to OWCP to issue a *de novo* decision on the claim to protect appellant's appeal rights.¹³

CONCLUSION

The Board finds that OWCP abused its discretion by delaying its decision on appellant's request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the November 27, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: October 2, 2014
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹³ *Marilyn F. Wilson*, 51 ECAB 234, 235 (1999); *Brian R. Leonard*, 43 ECAB 255, 259-60 (1991) (the Board held that OWCP's delay in processing the employee's request for a hearing effectively precluded the opportunity to obtain merit review of the claim and constituted an abuse of discretion).