

FACTUAL HISTORY

This case has previously been before the Board with respect to the denial of appellant's claim for an increased schedule award. In a March 16, 2011 decision,² the Board affirmed OWCP's December 17, 2009 and April 14, 2010 decisions, finding that appellant had no more than 59 percent permanent impairment of the left leg. The Board, however, set aside these decisions and remanded the case to OWCP to select an impartial medical examiner to resolve a conflict in medical opinion regarding whether appellant had more than five percent impairment of the right leg. In an order dated September 28, 2011, the Board denied appellant's petition for reconsideration of the March 16, 2011 decision, finding that he did not establish any error of fact or law warranting further consideration.³ The facts and circumstances outlined in the prior Board decision are incorporated herein by reference. The facts relevant to the present appeal are set forth below.

On July 6, 1981 appellant, then a 27-year-old sheet metal worker, injured his left knee when he fell off a step ladder at the base of a large metal antenna in the performance of duty. OWCP accepted his claim for contusion, traumatic patellar tendinitis, torn medial meniscus, consequential right knee aggravation of osteoarthritis and gait alteration affecting the left ankle, and consequential adjustment disorder with mixed anxiety and depression. Appellant underwent a total left knee replacement on October 4, 2004.

Appellant received schedule awards reflecting 35 percent permanent impairment of his left leg. In a March 24, 2006 decision, OWCP found an additional 15 percent permanent impairment of the left lower extremity. On December 17, 2009 it later found an additional 9 percent permanent impairment to the left leg, totaling 59 percent permanent impairment of the left lower extremity impairment.

Following issuance of the Board's September 28, 2011 order denying petition for reconsideration and further development of the medical evidence OWCP, in a March 28, 2013 decision, denied appellant's claim for an additional schedule award for both lower extremities.

In an appeal request form dated April 21, 2013, received by OWCP on April 25, 2013, appellant requested reconsideration of the March 28, 2013 decision of OWCP.

In an appeal request form dated December 9, 2013 and received by OWCP's Branch of Hearings and Review on December 16, 2013, appellant also requested a review of the written record by an OWCP hearing representative regarding the same decision.

By decision dated April 25, 2014, OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record as it was untimely filed. It found that the request was not made within 30 days of the issuance of the March 28, 2013 OWCP merit decision. After exercising its discretion, the Branch of Hearings and Review further found that the issue in the case could equally well be addressed through the reconsideration process.

² Docket No. 10-1427 (issued March 16, 2011).

³ *Order Denying Petition for Reconsideration*, Docket No. 10-1427 (issued September 28, 2011).

In a June 3, 2014 decision, OWCP granted appellant a schedule award for an additional four percent for loss of use of his right lower extremity, for a total of nine percent permanent impairment based on the medical opinions of Dr. William H. Warden, an attending Board-certified orthopedic surgeon, Dr. Leonard A. Simpson, a Board-certified orthopedic surgeon and an OWCP medical adviser, and Dr. Christopher A. Wills, a Board-certified orthopedic surgeon and an impartial medical specialist.

In an undated letter received by OWCP on June 27, 2014, appellant requested reconsideration of the June 3, 2014 decision. On June 30, 2014 he also requested an oral hearing before an OWCP hearing representative regarding the same decision.

By decision dated April 17, 2015, the OWCP hearing representative affirmed the June 3, 2014 schedule award decision.

In an appeal request form and letter dated and postmarked January 5, 2016, and received by OWCP's Branch of Hearings and Review on January 12, 2016, appellant requested a review of the written record by an OWCP hearing representative regarding the "March 24, 2006" schedule award decision.

Appellant submitted a January 19, 2015 report in which Dr. Warden advised that appellant had developed lumbar disc disease as a result of his industrial lower extremity pathology.

In a March 18, 2016 decision, OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record as it was untimely filed. It found that the request was not postmarked within 30 days of the issuance of the March 24, 2006 OWCP merit decision. After exercising its discretion, the Branch of Hearings and Review further found that the issue in the case could equally well be addressed through the reconsideration process.

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.⁴ 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

⁴ 5 U.S.C. § 8124(b)(1).

⁵ 20 C.F.R. §§ 10.616, 10.617.

⁶ *Id.* at § 10.616(a).

deny appellant's request and must exercise its discretion.⁷ OWCP 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

The Board finds that OWCP properly determined that appellant's request for a review of the written record was untimely filed as it was made more than 30 days after the issuance of OWCP's March 24, 2006 decision. The January 5, 2016 form, on which appellant requested the review, was postmarked on the same date. This was more than 30 days after the March 24, 2006 decision. Section 8124(b)(1) sets an unequivocal time limitation for requesting a review of the written record.⁹ Because the request was not timely filed, appellant was not entitled to a review of the written record as a matter of right under section 8124(b)(1) of FECA.

Although appellant's request for a review of the written record was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion. In its March 18, 2016 decision, it properly exercised its discretion by notifying appellant that it had considered the matter in relation to the issue involved and 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. 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.¹⁰ In this case, there is no evidence of record that OWCP abused its discretion by denying appellant's request for a review of the written record. Accordingly, the Board finds that OWCP properly denied appellant's January 5, 2016 request for a review of the written record.

On appeal, appellant argues the merits of his claim. The Board lacks jurisdiction over the March 24, 2006 schedule award decision.¹¹ The only decision presented in this appeal before the Board is the March 18, 2016 nonmerit decision which denied appellant's request for a review of the written record as untimely filed.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

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).

⁹ *See William F. Osborne*, 46 ECAB 198 (1994).

¹⁰ *Samuel R. Johnson*, 51 ECAB 612 (2000).

¹¹ *Supra* note 1.

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 10, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board