

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

L.M., Appellant)
and) Docket No. 16-1374
DEPARTMENT OF VETERANS AFFAIRS,) Issued: December 8, 2016
VETERANS ADMINISTRATION MEDICAL)
CENTER, Houston, TX, Employer)

)

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 22, 2016 appellant filed a timely appeal from a February 1, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated December 3, 2015 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 20, 2015 appellant, then a 35-year-old nursing assistant, filed an occupational disease claim (Form CA-2) alleging that she sustained clostridium difficile colitis in the performance of duty on or before August 2, 2015. She described diarrhea, nausea, vomiting, profuse sweating, and generalized weakness. Appellant stopped work on or about August 15, 2015, and first reported the condition on October 20, 2015.

By letter dated October 26, 2015, OWCP advised appellant of the evidence needed to establish her claim, including a detailed statement identifying the work factors she believed caused the claimed condition and a report from her attending physician explaining how and why those factors would have resulted in her contracting clostridium difficile. It afforded her 30 days to submit such evidence.

In response, appellant provided a position description describing her assigned duties of collecting fecal samples, catheter and personal hygiene assistance, and colostomy care.

In a November 13, 2015 letter, the employing establishment controverted the claim as appellant did not identify the work factors she believed caused the claimed condition, nor did she provide medical evidence diagnosing clostridium difficile infection.

By decision dated December 3, 2015, OWCP denied the claim, finding that fact of injury had not been established. It found that appellant had not provided sufficient information to identify or corroborate the specific work factors alleged to have caused her condition.

In a letter postmarked January 8, 2016, appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review. She asserted that she was diagnosed with clostridium difficile on August 16, 2015 when she sought care in a hospital emergency room. Appellant described significant weight loss, nausea, abdominal pain, weakness, and profuse sweating. She submitted additional medical evidence.

By decision dated February 1, 2016, OWCP's Branch of Hearings and Review denied appellant's request, finding that her hearing request was not timely filed within 30 days of OWCP's December 3, 2015 decision. OWCP exercised its discretion and performed a limited review of the evidence following the December 3, 2015 decision. It further denied the request as the issue in the case could be addressed equally well by submitting new, relevant evidence or argument accompanying a valid request for reconsideration.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP hearing representative, states: 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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary.² A hearing is a

² 5 U.S.C. § 8124(b)(1).

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.³ A request for either an oral hearing or a review of the written record must be sent, in writing, within 30 days of the date of the decision for which the hearing is sought.⁴ A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision.

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, 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.⁵ 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.⁶

ANALYSIS

OWCP denied appellant's occupational disease claim by decision issued December 3, 2015, finding that she had not established fact of injury as she had not identified the specific work factors or incidents that she believed caused the claimed infection. Appellant requested a review of the written record by letter postmarked January 8, 2016. As her request was made more than 30 days after the date of issuance of OWCP's December 3, 2015 merit decision, OWCP properly found in its February 1, 2016 decision that appellant had not timely requested review of the written record.⁷

OWCP then properly exercised its discretion by stating that it had considered the matter and had denied appellant's request for a review of the written record because the occupational disease claim issue could be addressed through a request for reconsideration.⁸ 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, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.⁹ In this case, the evidence of record does not indicate that OWCP abused its discretion in its denial

³ 20 C.F.R. § 10.615.

⁴ *James Smith*, 53 ECAB 188 (2001); 20 C.F.R. § 10.616(a).

⁵ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

⁶ *Teresa M. Valle*, 57 ECAB 542 (2006).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

⁸ *M.H.*, Docket No. 15-0774 (issued June 19, 2015).

⁹ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

of appellant's request for an oral hearing. Accordingly, the Board finds that OWCP properly denied her request.¹⁰

On appeal, appellant asserts that the employing establishment did not take her illness seriously, leading to a delay in diagnosis. She notes that she won employee awards for excellence and had a successful career. Appellant indicates that she remains unemployed, and describes financial hardships from frequent flare-ups of gastrointestinal systems. As noted, the Board does not have jurisdiction over the merits of the case. Furthermore, these arguments are not otherwise relevant to the denial of appellant's request for a review of the written record.

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.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 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

¹⁰ *D.P.*, Docket No. 14-308 (issued April 21, 2014); *D.J.*, Docket No. 12-1332 (issued June 21, 2013).