

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

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C.A., Appellant )

and )

**DEPARTMENT OF HOMELAND SECURITY,** )  
**CUSTOMS & BORDER PATROL,** )  
**San Diego, CA, Employer** )

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**Docket No. 16-1442**  
**Issued: December 8, 2016**

*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  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 1, 2016 appellant filed a timely appeal of a June 6, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated December 29, 2015 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

OWCP accepted that on April 9, 2015 appellant, then a 42-year-old supervisory border patrol agent, sustained a neck sprain while lifting weights during a required exercise program. It authorized medical treatment (Form CA-16) on April 17, 2015.

Dr. Mark T. Selecky, an attending Board-certified orthopedic surgeon, provided periodic reports from April 17 to September 16, 2015 diagnosing a cervical spine sprain/strain related to the April 9, 2015 incident. He prescribed physical therapy.

On September 30, 2015 appellant claimed a schedule award (Form CA-7). In an October 5, 2015 letter, OWCP advised appellant of the type of evidence needed to establish his schedule award claim, including a report from his attending physician diagnosing an impairment of a scheduled member caused by the accepted injury, and establishing that such impairment was ratable under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*). Appellant was afforded 30 days to submit such evidence.

In response, appellant submitted a September 16, 2015 report from Dr. Selecky, finding that he had reached maximum medical improvement. Dr. Selecky opined that appellant had two percent impairment of the whole person due to impairment of the cervical spine.

OWCP advised appellant by November 6, 2015 letter that the spine was not a scheduled member under FECA, but that occupationally-related extremity impairments originating in the spine were compensable. It afforded appellant 30 days to submit additional medical evidence regarding whether the accepted injury caused a ratable impairment of a scheduled member.<sup>2</sup>

By decision dated December 29, 2015, OWCP denied appellant's schedule award claim as the medical evidence of record did not establish that he sustained ratable impairment of a scheduled member of the body.

In a letter postmarked May 18, 2016, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated June 6, 2016, OWCP's hearing representative denied appellant's request for an oral hearing, finding that it was not timely filed within 30 days of OWCP's December 29, 2015 decision. He exercised its discretion and performed a limited review of the evidence following the December 29, 2015 decision. The hearing representative further denied the claim as the issue in the case could be addressed equally well by submitting new, relevant evidence, or argument accompanying a valid request for reconsideration.

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<sup>2</sup> In a December 3, 2015 letter, appellant requested an additional 30 days to submit evidence, as it was "the holiday season" and his physician was not readily available.

## 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 or her claim before a representative of the Secretary.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> OWCP procedures, which require it 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.<sup>7</sup>

## ANALYSIS

OWCP denied appellant's schedule award claim by decision issued December 29, 2015, finding that he had not established that he sustained ratable impairment of a scheduled member of the body. Appellant requested an oral hearing by letter postmarked May 18, 2016, which was more than 30 days after the date of OWCP's December 29, 2015 merit decision. Therefore, OWCP properly found in its June 6, 2016 decision that appellant had not timely requested an oral hearing as a matter of right.<sup>8</sup>

OWCP then properly exercised its discretion when it considered the matter, but denied appellant's request for a hearing because the schedule award issue could be addressed through a request for reconsideration.<sup>9</sup> The Board has held that the only limitation on OWCP's authority is

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<sup>3</sup> 5 U.S.C. § 8124(b)(1).

<sup>4</sup> 20 C.F.R. § 10.615.

<sup>5</sup> *James Smith*, 53 ECAB 188 (2001).

<sup>6</sup> *Marilyn F. Wilson*, 52 ECAB 347 (2001).

<sup>7</sup> *Teresa M. Valle*, 57 ECAB 542 (2006).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

<sup>9</sup> *M.H.*, Docket No. 15-0774 (issued June 19, 2015).

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.<sup>10</sup> In this case, the evidence of record does not indicate that OWCP abused its discretion in its denial of appellant's request for an oral hearing. Accordingly, the Board finds that OWCP properly denied his request.<sup>11</sup>

On appeal appellant requests that the Board review the schedule award issue. However, as explained above, the Board has no jurisdiction to review the schedule award issue.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 6, 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

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

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

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<sup>10</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

<sup>11</sup> *D.P.*, Docket No. 14-308 (issued April 21, 2014); *D.J.*, Docket No. 12-1332 (issued June 21, 2013).