

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Madison, WI, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 16-0870
Issued: October 5, 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 March 18, 2016¹ appellant filed a timely appeal of a September 21, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed since the last merit decision dated July 28, 2015 to the filing of this appeal, pursuant

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from September 21, 2015, the date of OWCP's last decision was March 19, 2016, a Saturday; consequently, the period for filing the appeal ran to the next business day, Monday March 21, 2016. *See* 20 C.F.R. § 501.3(f)(2). Since using March 22, 2016, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 18, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.³

ISSUE

The issue is whether OWCP abused its discretion in denying appellant's request for a review of the written record by an OWCP hearing representative.

FACTUAL HISTORY

On May 20, 2015 appellant, a 39-year-old mail clerk, filed a claim for a traumatic injury (Form CA-1) alleging that she injured her right shoulder when she lifted a bag of papers weighing approximately 50 to 60 pounds.

By letter to appellant dated June 23, 2015, OWCP advised that it required additional factual and medical evidence to determine whether she was eligible for compensation benefits. It asked her to submit a comprehensive medical report from her treating physician describing her symptoms and a medical opinion explaining the cause of any diagnosed condition. Appellant was afforded 30 days to submit the additional evidence.

In a June 1, 2015 report, received by OWCP on July 13, 2015, Dr. Frank Walter, a specialist in orthopedic surgery, advised that appellant felt a pop in her right shoulder while lifting a bag weighing 50 to 70 pounds on May 20, 2015. He reported that she was able to raise her arm but felt pain, pulling and clicking in the deltoid area. Dr. Walter noted that she had continued to work but had been avoiding lifting heavy objects. He related that she had been undergoing physical therapy.

On June 29, 2015 Dr. Walter reported that appellant's right shoulder was slowly improving and advised that physical therapy seems to be helping her. He noted that she still experienced pain with elevation and overhead use. Dr. Walter administered an injection into appellant's right subacromial space. He noted that appellant experienced 80 percent relief of symptoms five minutes after the injection was completed.

By decision dated July 28, 2015, OWCP denied the claim, finding that appellant failed to provide medical evidence sufficient to establish that she sustained a right shoulder injury causally related to the accepted May 20, 2015 work incident.

On September 2, 2015 OWCP received appellant's request for review of the written record by an OWCP hearing representative. The request was postmarked August 28, 2015.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence to the record following OWCP's September 21, 2015 decision. The Board's jurisdiction however is limited to a review of evidence which was before OWCP at the time of its final review. As such, the Board has no jurisdiction to review the additional evidence. 20 C.F.R. § 501.2(c)(1).

In a decision dated September 21, 2015, OWCP denied appellant's request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124, as it was not made within 30 days of the July 28, 2015 decision. It informed her that her 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 equally 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 claim before a representative of the Secretary.⁴ 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.⁵ 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.⁶ 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.⁷ 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.⁸ A claimant is not entitled to a hearing if the request is not made within 30 days of the date of the decision.⁹ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.¹⁰ In such a case, it will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.¹¹

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.¹²

⁴ 5 U.S.C. § 8124(b)(1).

⁵ 20 C.F.R. § 10.615.

⁶ *Id.* at § 10.616(a).

⁷ *Supra* note 5.

⁸ *Supra* note 6.

⁹ *James Smith*, 53 ECAB 188 (2001).

¹⁰ 20 C.F.R. § 10.616(b).

¹¹ *Supra* note 9.

¹² *See id.*; *Cora L. Falcon*, 43 ECAB 915 (1992); *Mary B. Moss*; 40 ECAB 640 (1989); *Rudolph Bermann*, 26 ECAB 354 (1975).

ANALYSIS

OWCP issued a merit decision on July 28, 2015 denying appellant's claim for traumatic injury. On September 2, 2016 it received her request for a review of the written record by an OWCP hearing representative; the request was postmarked August 28, 2015. The 30th day following July 28, 2015 was August 27, 2015. Because appellant did not request the hearing within 30 days of the July 28, 2015 decision, she 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 correctly advised appellant that her case had been considered in relation to the issue involved and that the request was further denied for the reason that the issue in the case could equally be addressed by requesting reconsideration from the district office and submitting evidence not previously considered. The Board, therefore, finds that OWCP properly denied appellant's request for a hearing before an OWCP hearing representative.

CONCLUSION

OWCP did not abuse its discretion in denying appellant's request for a review of the written record by an OWCP hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 5, 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