

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

M.B., Appellant

and

**DEFENSE AGENCIES, DLA DISTRIBUTION
REGION EAST, Fort Belvoir, VA, Employer**

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**Docket No. 16-1302
Issued: March 7, 2017**

Appearances:
*Robert Boutselis, for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 6, 2016 appellant, through his representative, filed a timely appeal from a February 1, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days elapsed from the last merit decision, dated November 24, 2015 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA)

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The Board notes that appellant submitted additional evidence after OWCP rendered its February 1, 2016 decision. The Board's jurisdiction, however, is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered on appeal. 20 C.F.R. §510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

³ 5 U.S.C. § 8101 *et seq.*

and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.⁴

ISSUE

The issue is whether OWCP abused its discretion in denying appellant's request for an oral hearing as untimely filed.

FACTUAL HISTORY

This case has previously been before the Board.⁵ The facts and circumstances outlined in the Board's prior decision are incorporated herein by reference. The relevant facts follow.

On April 10, 2013 appellant, then a 32-year-old distribution process worker, filed a traumatic injury claim (Form CA-1) alleging that on March 29, 2013 he sustained a right Achilles strain while participating in an employing establishment wellness program at an employing establishment fitness center. By decision dated November 26, 2013, OWCP denied appellant's claim finding that the evidence of record failed to demonstrate an injury on March 29, 2013 in the performance of duty as alleged. It indicated that appellant was not performing regular duties or activities incidental to his job and had failed to provide documentation reflecting authorization to participate in the employing establishment's optional Wellness/Fitness Program. Appellant appealed to the Board on May 9, 2014. By decision dated July 27, 2015, the Board remanded the case for further development of the factual evidence with regard to whether appellant was authorized to participate in the Wellness/Fitness Program at the time of his injury on March 29, 2013.

By decision dated November 24, 2015, OWCP denied appellant's claim, finding that the evidence of record failed to demonstrate that he sustained an injury in the performance of duty. It noted that appellant had not established that his injury arose during the course of employment and within the scope of compensable work factors. The November 24, 2015 decision was addressed to appellant's address of record. His representative was copied on the decision.⁶

On December 8, 2015 the U.S. Post Office returned OWCP's November 24, 2015 decision as undeliverable.⁷ A handwritten note on the envelope reflected that the November 24, 2015 decision was resent by certified mail receipt number 7014 2120 0000 4050 5977 on December 8, 2015.

⁴ Appellant, through his representative, submitted a timely request for oral argument. By order dated February 9, 2017, the Board exercised its discretion and denied appellant's request for oral argument as the Board does not have jurisdiction over the merits of this case and the arguments on appeal can adequately be addressed in a decision based on the case record. *Order Denying Request for Oral Argument*, Docket No. 16-1302 (issued February 9, 2017).

⁵ Docket No. 14-1265 (issued July 27, 2015).

⁶ On April 23, 2013 appellant authorized Robert Boutselis to serve as his authorized representative.

⁷ C.C., Docket No. 14-745 (issued July 29, 2014).

In an appeal request form dated January 4, 2016, appellant requested an oral hearing before OWCP's Branch of Hearings and Review. He reported a new address in the same city. The appeal was postmarked on January 8 and received by OWCP on January 12, 2016.

By decision dated February 1, 2016, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing finding that his request had not been filed within 30 days of the November 24, 2015 decision. The Branch of Hearings and Review further determined that the issue in the case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered. The February 1, 2016 decision was addressed to the previous address of record. Appellant's representative was not copied on that decision.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA provides that before review under section 8128(a) of this title, 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.⁸ 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.⁹ OWCP regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought, as determined by postmark or other carrier's date marking, and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.¹⁰

20 C.F.R. § 10.127 provides that a copy of the decision shall be mailed to the employee's last known address. If the employee has a designated representative before OWCP, a copy of the decision shall also be mailed to the representative.¹¹ A copy of the decision shall also be sent to the employing establishment.

ANALYSIS

The Board has considered the matter and finds that the February 1, 2016 Branch of Hearings and Review's decision must be set aside.

By decision dated November 24, 2015, OWCP denied appellant's traumatic injury claim, finding that the evidence of record failed to demonstrate that he sustained an injury in the performance of duty. Appellant's representative was copied on the decision.

⁸ 5 U.S.C. § 8124(b)(1).

⁹ 20 C.F.R. § 10.615.

¹⁰ *Id.* at § 10.616(a).

¹¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Representatives' Services*, Chapter 2.1200.3(b)(2) (June 2012).

In an appeal request form dated January 4, 2016 and postmarked January 8, 2016, appellant requested an oral hearing before OWCP's Branch of Hearings and Review. He recorded a new address.

By decision dated February 1, 2016, the Branch of Hearings and Review denied appellant's request for an oral hearing, finding that the request was not made within 30 days of the November 24, 2015 decision. This decision was sent to appellant's former address. Appellant's representative was not copied on that decision.

The record shows that appellant had advised OWCP of the name and address of his designated representative who had been acknowledged by OWCP and copied on prior decisions. However, OWCP's Branch of Hearings and Review failed to send a copy of the February 1, 2016 decision to the authorized representative.

OWCP's regulations and Board case law require OWCP to send a copy of its decisions to the employee's last known address and to the authorized representative.¹² The Board has held that decisions under FECA¹³ are not properly issued unless both appellant and the authorized representative have been sent copies of the decision.¹⁴ As the February 1, 2016 decision was not sent to appellant's representative, and was not mailed to his updated address of record, the Board finds that the decision was not properly issued.¹⁵ The presumption of receipt does not apply where a notice is sent to an incorrect address.¹⁶

For the reasons noted above, the Board finds that the February 1, 2016 decision was not properly issued.¹⁷ The Board will set aside the decision and remand the case for an appropriate and properly issued merit decision on the relevant issues.¹⁸

¹² 20 C.F.R. § 10.127 provides: a copy of the decision shall be mailed to the employee's last known address. If the employee has a designated representative before OWCP, a copy of the decision will also be mailed to the representative. *See also M.R.*, Docket No. 11-632 (issued September 28, 2011). In *George R. Bryant*, Docket No. 03-2241 (issued April 19, 2005), the Board found that OWCP did not properly issue its June 18, 2003 decision when it did not send a copy of that decision to the authorized representative on that date; OWCP conceded a procedural error and advised that a merit review would be provided on remand to preserve appellant's rights. In *James Consentino*, Docket No. 04-1774 (issued October 21, 2004), the Board found that OWCP improperly issued a decision terminating compensation because it did not mail the decision to appellant's representative and declared the termination decision null and void. Although OWCP subsequently denied modification of the termination, the Board found that the merit reviews did not resuscitate the termination as OWCP had prejudiced appellant by denying his representative the opportunity to assist in post-deprivation remedies, including a timely hearing under 5 U.S.C. § 8124.

¹³ *Supra* note 3.

¹⁴ *See R.J.*, Docket No. 12-174 (issued June 25, 2012); *Travis L. Chambers*, 55 ECAB 138 (2003).

¹⁵ *See Clara T. Norga*, 46 ECAB 473 (1995); *W.A.*, Docket No. 06-1452 (issued November 27, 2006).

¹⁶ *R.W.*, Docket No. 15-1886 (issued February 4, 2016).

¹⁷ *W.S.*, Docket No. 14-842 (issued July 29, 2014).

¹⁸ *George R. Bryant*, Docket No. 03-2241, (issued April 19, 2005).

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: March 7, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board