

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

J.H., Appellant

and

**DEPARTMENT OF AGRICULTURE, FOREST
SERVICE, Quemado, NM, Employer**

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**Docket No. 17-0029
Issued: March 2, 2017**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

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 October 10, 2016 appellant, through counsel, filed a timely appeal of a September 12, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed from the last merit decision, dated March 3, 2016, to the filing of this appeal, pursuant 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 this case.

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 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124.

FACTUAL HISTORY

On September 4, 2012 appellant, then a 65-year-old forestry technician filed a traumatic injury claim (Form CA-1) alleging that on September 3, 2012, after spraying down the bathroom area at Quemado Lake Recreation Area, he rolled up a hose, put it away, reached for water, felt pain in the left shoulder, and heard a popping sound. He did not stop work.

By decision dated November 7, 2012, OWCP denied appellant's claim because the evidence was insufficient to establish a medical condition causally related to the accepted work events.

On December 26, 2012 appellant requested reconsideration of the November 7, 2012 OWCP decision. By decision dated February 6, 2013, OWCP denied modification of its prior decision.

On February 9, 2016 appellant, through counsel, filed a motion to rescind the decision dated February 6, 2013. Counsel asserted that a new detailed medical narrative report from a Dr. Demitri A. Adarnes provided an explanation of causation in appellant's claim.

By decision dated March 3, 2016, OWCP denied modification of the decision dated February 6, 2013.

On March 10, 2016 appellant, through counsel, requested a telephone hearing before a hearing representative.

By decision dated September 12, 2016, an OWCP hearing representative denied appellant's request for an oral hearing as he was not entitled to a hearing as a matter of right because he had previously requested reconsideration on the same decision. OWCP exercised its discretion and further determined that the issue in the case could equally well be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

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 claim before a representative of the Secretary.³ Section 10.615 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral

³ 5 U.S.C. § 8124(b)(1).

hearing or a review of the written record.⁴ OWCP's regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.⁵

Additionally, the Board has held that OWCP, in its broad discretionary authority in the administration of FECA,⁶ 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.⁷ 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.⁸

ANALYSIS

Appellant's request for an oral hearing before a hearing representative dated March 9, 2016 was denied as he had previously requested reconsideration pursuant to 5 U.S.C. § 8128(a).⁹ In its September 12, 2016 decision, OWCP noted that, while he was not entitled to an oral hearing as a matter of right, it had considered the matter in relation to the issue involved and, under its discretionary authority, denied the request as appellant could pursue his claim further by requesting reconsideration and submitting evidence in support of his claim.

Appellant had previously requested reconsideration on December 17, 2012 and February 9, 2016 and OWCP had issued its reconsideration decisions on February 6, 2013 and on March 3, 2016. In the instant case, appellant's request for an oral hearing, received March 10, 2016, was made following requests for reconsideration under 5 U.S.C. § 8128. Hence, OWCP correctly found that appellant was not entitled to an oral hearing before an OWCP hearing representative as a matter of right under section 8124(b)(1) of FECA as he had previously requested reconsideration.¹⁰

OWCP then exercised its discretion and determined that appellant's hearing request could equally well be addressed by requesting reconsideration and submitting additional evidence to address the issue in this case. The Board finds that there is no evidence of record that OWCP

⁴ 20 C.F.R. § 10.615.

⁵ *Id.* at § 10.616(a).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

⁸ *Teresa M. Valle*, 57 ECAB 542 (2006). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(1) (October 2011).

⁹ See *Peggy R. Lee*, 46 ECAB 527 (1995) (where the Board found that appellant's request for an oral hearing was made after OWCP issued its decision on his request for reconsideration made pursuant to 5 U.S.C. § 8128 and therefore appellant was not entitled to an oral hearing before an OWCP hearing representative as a matter of right).

¹⁰ *Supra* note 3.

abused its discretion in denying appellant's hearing request.¹¹ Thus, the Board finds that OWCP's September 12, 2016 decision denying appellant's request for an oral hearing was proper under the law and facts of this case.

On appeal, appellant, through counsel, argued the merits of his claim and asserted that he submitted sufficient evidence to establish that he sustained a left shoulder injury in the performance of duty. As explained, the Board does not have jurisdiction over the merits of the case.

CONCLUSION

The Board therefore finds that OWCP properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b)(1).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 12, 2016 is affirmed.

Issued: March 2, 2017
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

¹¹ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).