

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

W.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fremont, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 17-1538
Issued: November 15, 2017**

Appearances:
Appellant, pro se
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 6, 2017 appellant filed a timely appeal from a June 1, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since November 8, 2016, the date of the most recent OWCP merit decision, 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 before a representative of the Branch of Hearings and Review as untimely filed pursuant to 5 U.S.C. § 8124.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 8, 2016 appellant, then a 29-year-old city carrier, filed a traumatic injury claim (Form CA-1) asserting that on September 6, 2016 he lifted and moved packages, causing a chest wall and rib muscle strain. He was off work from September 6 to 9, 2016. In a September 9, 2016 letter, appellant alleged that he injured the left side of his rib cage on September 4, 2016 while delivering a heavy package to the second floor of a house.

The employing establishment controverted the claim, contending in a September 12, 2016 letter that appellant had provided a conflicting account of events. It asserted that he reported an injury to his left side on September 6, 2016, complaining of shortness of breath and chest discomfort. Appellant was taken by ambulance to an emergency room, treated, and released.

In a September 6, 2016 report, Dr. Hillary Anne Bassett, Board-certified in emergency medicine, held appellant off work from September 6 to 8, 2016.

Dr. Alan Hsu, an attending physician Board-certified in occupational medicine and family practice, submitted a September 8, 2016 report diagnosing chest wall and rib muscle strains, sustained on September 5, 2016 while lifting many heavy packages at work. He prescribed physical therapy. Dr. Hsu submitted progress notes through September 21, 2016 noting gradual improvement in appellant's symptoms with physical therapy.

In an October 3, 2016 letter, OWCP notified appellant of the additional evidence needed to establish his claim, including a detailed description of the September 6, 2016 incident, and his physician's opinion explaining how that incident would cause the claimed left chest wall and rib muscle strain. It afforded him 30 days to submit such evidence.

In response, appellant submitted September 30 and October 21, 2016 chart notes from Dr. Hsu, noting that physical therapy was successful in reducing appellant's symptoms.

By decision dated November 8, 2016, OWCP denied appellant's claim, finding that fact of injury had not been established. It found that he submitted insufficient evidence to establish that the claimed September 6, 2016 incident occurred at the time, place, and in the manner alleged. OWCP noted that appellant variously asserted that the causative incident occurred on September 4, 5, and 6, 2016.

In an appeal request form dated May 2, 2017 and postmarked May 9, 2017, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. He submitted a factual statement regarding a September 5, 2016 incident.

By decision dated June 1, 2017, OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record as a matter of right as it was untimely filed. It noted that OWCP had issued its decision on November 8, 2016, while his request was postmarked May 9, 2017. The Branch of Hearings and Review found that appellant's request was submitted more than 30 days after OWCP's merit decision. After exercising its discretion, it further found that the issue in the case could equally well be addressed through the reconsideration process.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP hearing representative, provide: 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.² A hearing is a review of an adverse decision by an OWCP's 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.⁵

OWCP has discretion to grant or deny a request that is made after the 30-day period for requesting a hearing. In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.⁶

ANALYSIS

The Board lacks jurisdiction to review the merits of the underlying issue of whether appellant sustained a traumatic injury in the performance of duty. The Board's jurisdiction is strictly limited to determining whether OWCP properly denied his request for a review of the written record.

By decision dated November 8, 2016, OWCP denied appellant's traumatic injury claim. In an appeal request form dated May 2, 2017 and postmarked May 9, 2017, appellant requested a review of the written record. A request for a review of the written record must, as noted above, be made within 30 days after the date of the issuance of OWCP's final decision. The Board finds that OWCP properly determined, in its June 1, 2017 decision, that appellant's request for a review of the written record was untimely as it was filed more than 30 days after the issuance of OWCP's November 8, 2016 decision.

The Board further finds that OWCP properly exercised its discretion in denying appellant's request for a review of the written record by determining that the issue in the case could be addressed equally as well by requesting reconsideration and submitting new evidence

² 5 U.S.C. § 8124(b)(1).

³ 20 C.F.R. § 10.615.

⁴ *James Smith*, 53 ECAB 188 (2001); *id.*, at § 10.616(a).

⁵ *See R.T.*, Docket No. 08-0408 (issued December 16, 2008).

⁶ *G.W.*, Docket No. 10-0782 (issued April 23, 2010).

relevant to the issue at hand.⁷ The Board has held that the only limitation on OWCP's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to logic and probable deduction from established facts.⁸ In this case, the evidence of record does not indicate that OWCP abused its discretion in denying appellant's request for a review of the written record under these circumstances. Accordingly, the Board finds that OWCP properly denied appellant's request for a review of the written record.

On appeal appellant contends that the medical evidence of record is sufficient to establish his claim. This argument pertains to the merits of the claim, which are not before the Board on the present appeal.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a review of the written record before a representative of the Branch of Hearings and Review as untimely filed under 5 U.S.C. § 8124(b).

⁷ *D.P.*, Docket No. 14-0308 (issued April 21, 2014); *D.J.*, Docket No. 12-1332 (issued June 21, 2013); *Mary B. Moss*, 40 ECAB 640, 647 (1989).

⁸ *See R.G.*, Docket No. 16-0994 (issued September 9, 2016); *Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 1, 2017 is affirmed.

Issued: November 15, 2017
Washington, DC

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

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

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