

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

M.S., Appellant)

and)

DEPARTMENT OF THE ARMY,)
INSTALLATION MANAGEMENT)
COMMAND, FORT MEADE, MD, Employer)

**Docket No. 17-0012
Issued: March 16, 2018**

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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 5, 2016 appellant filed a timely appeal from an April 25, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated February 11, 2016 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 to review the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for review of the written record as untimely filed under 5 U.S.C. § 8124(b).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 29, 2015 appellant, then a 49-year-old supervisor at the Soldier and Family Assistance Center, filed a traumatic injury claim (Form CA-1) alleging that, on June 25, 2015, he was bitten by a tick while taking trash outside. He stopped work on December 1, 2015.

In a December 16, 2015 note, Dr. Swati M. Desai, an internist, diagnosed appellant's condition as Lyme disease with third nerve palsy.

In a development letter dated January 6, 2016, OWCP advised appellant of the deficiencies in his claim and requested additional factual and medical evidence. Appellant was provided a development questionnaire for his completion and was afforded 30 days to submit the requested information.

In response to its request, OWCP received appellant's completed development questionnaire, 39 pages of a chronological record of medical care, a January 29, 2016 report from Captain Jennifer H. Masel, M.D., an internist, laboratory and blood test results, and a February 3, 2016 statement from a coworker.

By decision dated February 11, 2016, OWCP denied appellant's claim, finding that the medical evidence of record failed to establish that her diagnosed Lyme disease, a tick born infection, was causally related to the accepted June 25, 2015 employment incident. Appeal rights were enclosed with the decision, which was addressed to appellant's last known address.

In a March 23, 2016 telephone report, appellant called OWCP to inquire about the status of his claim. He indicated that he had not received a denial decision. A copy of OWCP's February 11, 2016 decision was resent to appellant's home address.

On April 15, 2016 OWCP received appellant's appeal request form dated April 13, 2016 and postmarked April 14, 2016, in which he requested a review of the written record by an OWCP hearing representative. An envelope from OWCP containing the postmark date of March 24, 2016 was attached.

OWCP continued to receive medical evidence.

By decision dated April 25, 2016, OWCP's Branch of Hearings and Review denied appellant's request for review of the written record. It found that as the request was not made within 30 days, it was untimely filed and appellant was not entitled to a review of the written record as a matter of right. However, in its discretion, OWCP considered his request, but found that the issue in the case could be addressed equally well through a request for reconsideration and the submission of evidence showing that he has a condition causally related to the established employment incident.

LEGAL PRECEDENT

Section 8124(b) 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.² 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.³ 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.⁴ A claimant is entitled to a hearing or review of the written record as a matter of right if the request is filed within 30 days.⁵

While a claimant may not be entitled to a hearing or review of the written record 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.⁶

ANALYSIS

The Board finds that OWCP properly determined that appellant's April 14, 2016 request for a review of the written record was untimely as it was filed more than 30 days after the issuance of OWCP's February 11, 2016 decision.

By decision dated February 11, 2016, OWCP denied appellant's claim for compensation. The record indicates that appeal rights accompanied the decision, which was sent to appellant's last known address of record. A copy of OWCP's February 11, 2016 decision was resent to appellant on March 24, 2016 per appellant's telephonic request. OWCP's regulations provide that a copy of the decision shall be mailed to the employee's last known address.⁷ The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of OWCP's daily activities, is presumed to have arrived at the mailing address in due course.⁸ This is known as the "mailbox rule." Appellant did not submit evidence to rebut the presumption of receipt.⁹ The record does not contain written notice of a change of address from appellant.

² 5 U.S.C. § 8124(b)(1).

³ 20 C.F.R. § 10.615.

⁴ *Id.* at § 10.616(a).

⁵ See *Leona B. Jacobs*, 55 ECAB 753 (2004).

⁶ 20 C.F.R. § 10.616(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

⁷ 20 C.F.R. § 10.127. A copy of the decision shall be mailed to the employee's last known address.

⁸ See *Shakeer Davis*, 52 ECAB 448 (2001). Where OWCP mailed a copy of the preliminary decision to both appellant and counsel at their addresses of record. No evidence had been presented to rebut the presumption of receipt. Thus, it is presumed that the preliminary decision reached both appellant and her attorney.

⁹ *E.T.*, Docket No. 17-1201 (issued August 11, 2017).

Thus, appellant had 30 days to request a review of the written record from the February 11, 2016 decision.¹⁰ As appellant's request for a review of the written record was postmarked April 14, 2016 it was not made within 30 days of February 11, 2016 and appellant was not entitled to a hearing/review of the written record as a matter of right.¹¹

OWCP has the discretion to grant an oral hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right. It properly exercised its discretion in this case by noting that it had considered the matter in relation to the issue involved and denied appellant's request for review on the basis that the case could be resolved by submitting additional evidence to OWCP with a reconsideration request. The Board has held that the only limitation on OWCP's discretionary authority is that of reasonableness. 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.¹² In this case, the evidence of record does not establish that OWCP committed any action in connection with its denial of appellant's request for review of the record which could be found to be an abuse of discretion. Consequently, OWCP properly denied his request for a review of the written record as untimely under section 8124(b) of FECA.

CONCLUSION

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

¹⁰ *Supra* note 4. This regulation provides that the hearing request must be sent within 30 days ... of the date of the decision for which a hearing is sought.

¹¹ OWCP erroneously found that the postmark date of appellant's request for review of the written record was March 24, 2016. As noted, *infra*, March 24, 2016 refers to the date OWCP sent appellant a duplicative copy of its February 11, 2016 decision.

¹² *See L.W.*, 59 ECAB 471 (2008).

ORDER

IT IS HEREBY ORDERED THAT the April 25, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 16, 2018
Washington, DC

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

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

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