

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

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<b>W.B., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 18-0878</b>
	)	<b>Issued: October 12, 2018</b>
<b>U.S. POSTAL SERVICE, NETWORK</b>	)	
<b>DISTRIBUTION CENTER, Atlanta, GA,</b>	)	
<b>Employer</b>	)	
_____	)	

*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 March 19, 2018 appellant filed a timely appeal from an October 20, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated August 31, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 has abused its discretion when it denied appellant's October 5, 2017 request for review of the written record as untimely filed under 5 U.S.C. § 8124(b).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On July 4, 2017 appellant, then a 52-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left shoulder contusion earlier that morning when he was thrown from a riding pallet jack. He allegedly fell from the pallet jack to the floor, striking his left shoulder and left knee. Appellant was seen at a hospital emergency department on the date of injury.<sup>2</sup> A left shoulder x-ray was normal and Dr. Kevin Washington, an emergency medicine specialist, discharged appellant later that same day with a diagnosis of left shoulder and left knee contusions.

In a July 19, 2017 development letter, OWCP requested that appellant submit additional medical evidence in support of his claim. It afforded him 30 days to submit the requested medical evidence.

OWCP subsequently received a July 13, 2017 report from Dr. Sohaib A. Khalid, a Board-certified family practitioner, who diagnosed left shoulder joint pain, left knee joint pain, and knee ligament sprain. Dr. Khalid referred appellant for physical therapy.

By decision dated August 31, 2017, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish a medical diagnosis in connection with the July 4, 2017 employment incident.

By appeal request form dated October 3, 2017, and postmarked October 5, 2017, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. He also submitted medical evidence dated July 4 and 13, 2017, and physical therapy treatment records dated August 4 through October 4, 2017.

By decision dated October 20, 2017, OWCP denied appellant's request for a review of the written record, finding that his request was untimely because it was not made within 30 days of its August 31, 2017 decision. It further indicated that it had exercised its discretion and denied the request for the reason that the relevant issue of the case could be addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.

## **LEGAL PRECEDENT**

Section 8124(b)(1) of FECA provides: "Before review under section 8128(a) of this title [relating to reconsideration], 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."<sup>3</sup>

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<sup>2</sup> On July 17, 2017 OWCP received a completed authorization for examination and/or treatment (Form CA-16) dated July 4, 2017.

<sup>3</sup> 5 U.S.C. § 8124(b)(1).

Section 10.615 of Title 20 of the Code of Federal Regulations provides, “A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record.”<sup>4</sup> The hearing 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.<sup>5</sup> OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>6</sup> In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.<sup>7</sup>

### ANALYSIS

Appellant had 30 days from OWCP’s August 31, 2017 merit decision to request a hearing before the Branch of Hearings and Review. Appellant submitted a request for a review of the written record by appeal request form dated October 3, 2017, and postmarked October 5, 2017. As the postmark date was more than 30 days after the August 31, 2017 decision, appellant was not entitled to a review of the written record as a matter of right.<sup>8</sup> Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.<sup>9</sup>

Although appellant was not entitled to a review of the written record as a matter of right, OWCP’s Branch of Hearings and Review exercised its discretion in determining whether to grant appellant’s request despite its untimely nature. In denying a discretionary hearing, the hearing representative found that the issue in the case could be equally well addressed by requesting reconsideration before OWCP and submitting new evidence establishing that appellant sustained an injury as defined under FECA. Because reconsideration exists as an alternative appeal right to address the issues raised by OWCP’s August 31, 2017 decision, the Board finds that OWCP did not abuse its discretion in denying appellant’s untimely request for review of the written record.<sup>10</sup>

### CONCLUSION

The Board finds that OWCP has not abused its discretion when it denied appellant’s October 5, 2017 request for review of the written record as untimely filed under 5 U.S.C. § 8124(b).

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<sup>4</sup> 20 C.F.R. § 10.615.

<sup>5</sup> *Id.* at § 10.616.

<sup>6</sup> *See G.W.*, Docket No. 10-782 (issued April 23, 2010); *see also Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>7</sup> *Id.*; *see also Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>8</sup> Under OWCP regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4a (October 2011). If the postmark is not legible, the request will be deemed timely unless OWCP has kept evidence of date of delivery on the record reflecting that the request is untimely. *Id.*

<sup>9</sup> *See William F. Osborne*, 46 ECAB 198 (1994).

<sup>10</sup> *See Gerard F. Workinger*, 56 ECAB 259 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 20, 2017 decision of the Office of Workers' Compensation Programs is affirmed.<sup>11</sup>

Issued: October 12, 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

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<sup>11</sup> The record contains a Form CA-16 dated July 4, 2017 and signed by the employing establishment. A properly executed CA-16 form can be the basis of a contractual agreement for payment of medical expense, even if the claim is not accepted. Upon return of the case record, OWCP should address this issue. *See* 20 C.F.R. § 10.300; *Val D. Wynn*, 40 ECAB 666 (1989); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Authorizing Examination and Treatment*, Chapter 3.300.3(a)(3) (February 2012).