

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

P.C., Appellant	)	
	)	
and	)	<b>Docket No. 19-1003</b>
	)	<b>Issued: December 4, 2019</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Dallas, TX, Employer	)	
	)	

*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  
JANICE B. ASKIN, Judge

**JURISDICTION**

On April 8, 2019 appellant filed a timely appeal from a December 19, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated October 9, 2013, 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.<sup>2</sup>

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

<sup>2</sup> The Board notes that, following the December 19, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## ISSUE

The issue is whether OWCP properly denied appellant's request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

## FACTUAL HISTORY

On June 28, 2013 appellant, then a 50-year-old city mail carrier, filed an occupational disease claim (Form CA-2) for a right shoulder condition, which he attributed to 15 years of carrying a 35-pound mail pouch over his shoulder while walking and delivering mail in the performance of duty. He noted that he first became aware of his condition on October 1, 2010 and realized its relation to his federal employment on December 1, 2013.<sup>3</sup> On the reverse side of the claim form the employing establishment indicated that appellant stopped work on June 22, 2011 and that he was receiving wage-loss compensation on the periodic rolls due to an employment-related traumatic injury under OWCP File No. xxxxxx483.<sup>4</sup>

In a January 31, 2013 report, Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon, noted that appellant sustained an occupational injury to his right shoulder on December 13, 2012. He diagnosed right shoulder impingement syndrome and right shoulder acromioclavicular (AC) joint osteoarthritis.<sup>5</sup> Dr. Shade further indicated that appellant's diagnosed conditions were causally related to his December 13, 2012 injury.

After efforts to further develop the factual and medical record, OWCP issued an October 9, 2013 decision denying appellant's occupational disease claim. It found that the medical evidence of record was insufficient to establish that appellant's right shoulder condition was causally related to the accepted factors of his federal employment.

After an almost five-year period of inactivity following the October 9, 2013 decision, the record indicates that appellant telephoned OWCP on September 13, 2018 to inquire about the status of the present claim. OWCP advised that the claim had been denied on October 9, 2013 because there was no evidence for causal relationship. A Form CA-110 memorandum of telephone call indicated that "[n]o mail was returned as undeliverable."

Appellant telephoned OWCP again on October 3, 2018 to inquire about the status of his case. OWCP advised him that his case was closed and that benefits had been denied (Case Status Code: C3).

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<sup>3</sup> The December 2013 date appellant identified on the Form CA-2 was, without explanation, approximately five months in the future.

<sup>4</sup> Appellant has an accepted traumatic injury claim for a left foot/heel condition that arose in the performance of duty on January 31, 2011.

<sup>5</sup> Dr. Shade also diagnosed right foot plantar fasciitis.

On October 10, 2018 OWCP received additional right shoulder treatment records from Dr. Shade covering the period December 13 to 20, 2012, January 10 through March 29, 2013, April 16 to 23, 2015, June 14, 2017, and February 13 and October 4, 2018.

On November 2, 2018 appellant again telephoned OWCP inquiring about the status of his claim. OWCP reiterated that the claim had been denied.

On November 28, 2018 OWCP received additional medical evidence, which included a June 26, 2017 right shoulder magnetic resonance (MR) arthrogram, and reports from Dr. Shade dated December 13, 2012, January 31, 2013, and November 12, 2018. In his latest report, Dr. Shade identified October 1, 2010 as appellant's date of injury and also noted that the June 26, 2017 MR arthrogram revealed a full-thickness tear of the supraspinatus tendon and AC joint degenerative joint disease. He diagnosed right shoulder impingement syndrome, right shoulder bursitis, right shoulder primary osteoarthritis, and right shoulder complete rotator cuff tear/rupture. Dr. Shade further noted that appellant was off work under his foot case, and reported limitations of no prolonged overhead use and no lifting in excess of 25 pounds.

On December 11, 2018 OWCP received appellant's November 29, 2018 request for review of the written record with respect to the October 9, 2013 merit decision.

By decision dated December 19, 2018, a representative of OWCP's Branch of Hearings and Review denied appellant's November 29, 2018 request for review of the written record, finding that it was untimely filed as it was not postmarked within 30 days of the issuance of the October 9, 2013 decision. After exercising its discretion, the Branch of Hearings and Review further found that the merits of the claim could equally well be addressed through the reconsideration process.

### **LEGAL PRECEDENT**

Section 8124(b)(1) 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 [or her] claim before a representative of the Secretary."<sup>6</sup> Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.<sup>7</sup> A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.<sup>8</sup> Although there is no right to a review of the written record or an oral hearing, if not requested

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<sup>6</sup> 5 U.S.C. § 8124(b)(1).

<sup>7</sup> 20 C.F.R. §§ 10.616, 10.617.

<sup>8</sup> *Id.* at § 10.616(a).

within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.<sup>9</sup>

### **ANALYSIS**

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

OWCP's regulations provide that the request for review of the written record must be made within 30 days of the date of the decision for which a review is sought. Because appellant's November 29, 2018 hearing request postdated OWCP's October 9, 2013 decision by more than 30 days, it was untimely and he was not entitled to a review of the written record as a matter of right.<sup>10</sup>

Although appellant's November 29, 2018 request for a review of the written record was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion.<sup>11</sup> The Board finds that in the December 19, 2018 decision, OWCP's hearing representative properly exercised discretion by determining that the issue in the case could be equally well addressed by a request for reconsideration before OWCP along with the submission of new evidence establishing that appellant's condition was causally related to factors of his federal employment.

The Board has held that the only limitation on OWCP's 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 both logic and probable deductions from established facts.<sup>12</sup> In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for a review of the written record. Accordingly, the Board finds that OWCP properly denied appellant's request for a review of the written record.

### **CONCLUSION**

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

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<sup>9</sup> *M.G.*, Docket No. 17-1831 (issued February 6, 2018); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *M.G.*, *supra* note 9; *Samuel R. Johnson*, 51 ECAB 612 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 19, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 4, 2019  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board