



Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.<sup>4</sup>

### **ISSUE**

The issue is whether OWCP has abused its discretion when it denied appellant's August 14, 2017 request for a hearing as untimely filed under 5 U.S.C. § 8124(b).

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>5</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 21, 1993 appellant, then a 56-year-old electronics technician, filed a traumatic injury claim (Form CA-1) alleging that he sustained a hernia and lumbar strain while climbing an 80-foot tower to perform an annual antenna check on April 2, 1993. He stopped work that day.

OWCP initially accepted appellant's claim for a lumbosacral strain and aggravation of an inguinal hernia.<sup>6</sup> In December 1993, it expanded his accepted conditions to include an L4-5 herniated nucleus pulposus. OWCP also authorized appellant's December 8, 1993 lumbar surgery. Effective June 1, 1994, appellant retired due to disability. In March 1995, OWCP placed him on the periodic compensation rolls.

In January 2017, appellant contacted OWCP regarding his eligibility to receive attendant services. In a January 25, 2017 development letter, it informed him of the requirement(s) for attendant services and requested additional information from both him and his treating physician.

In an April 10, 2017 report, Dr. Jeffrey S. Lindaberry, a family practitioner, advised that appellant's chronic back pain was due to his work injury and subsequent lumbar surgery.<sup>7</sup> He opined that appellant's current findings included chronic back pain and mild dementia which would require "lifelong" assistance with activities of daily living and his medications.

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that appellant submitted additional evidence on appeal. 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.*

<sup>5</sup> Docket No. 05-0954 (issued August 15, 2005).

<sup>6</sup> On August 11, 1993 appellant underwent surgery to repair his hernia.

<sup>7</sup> The report was initially submitted on February 7, 2017 by Jessica Thasitis, a family nurse practitioner. Dr. Lindaberry subsequently reviewed the report and countersigned it on April 10, 2017.

OWCP's district medical adviser (DMA) reviewed the request for attendant services and, in a May 25, 2017 report, advised that an attendant was not medically necessary to assist with daily personal needs. He noted that with respect to appellant's accepted lumbar conditions, the attendant was not medically necessary, but that he may need the services of an attendant due to his mental conditions. The DMA noted that there was no objective evidence that appellant's accepted condition would require a specific attendant to be paid for on a work-related basis. He recommended against approving appellant's request for an attendant because the medical problems creating any such need for an attendant were not work related.

By decision dated July 6, 2017, OWCP denied authorization for attendant services. It noted that the DMA report of May 25, 2017 concluded that appellant had multiple nonwork-related medical problems and that these problems were more likely to be the cause of his need for an attendant, and that, as such, the DMA recommended against approval of attendant services. OWCP found that the evidence of record was insufficient to establish that the services of an attendant were necessary within the meaning of FECA.

By form dated July 17, 2017, appellant requested an oral hearing before an OWCP hearing representative. The envelope containing the form was postmarked August 14, 2017.

By decision dated January 2, 2018, OWCP's Branch of Hearings and Review denied appellant's hearing request as untimely filed. The hearing representative noted that OWCP had issued its decision on July 6, 2017, while appellant's hearing request was postmarked August 14, 2017, more than 30 days after OWCP's decision. He found that appellant was not entitled to a hearing as a matter of right. The hearing representative also considered whether to grant appellant a discretionary hearing, but determined that the issue in this case could equally well be addressed by a requesting reconsideration before 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>8</sup>

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>9</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 the hearing is sought.<sup>10</sup> However, OWCP has discretion to grant or

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<sup>8</sup> 5 U.S.C. § 8124(b)(1).

<sup>9</sup> 20 C.F.R. § 10.615.

<sup>10</sup> *Id.* at § 10.616(a).

deny a request that is made after this 30-day period.<sup>11</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>12</sup>

### ANALYSIS

The Board finds that OWCP did not abuse its discretion by denying appellant's August 14, 2017 request for a hearing as untimely filed under 5 U.S.C. § 8124(b).

Appellant had 30 days from OWCP's July 6, 2017 merit decision to request a hearing before the Branch of Hearings and Review. He requested an oral hearing by appeal request form dated July 17, 2017 and postmarked August 14, 2017. As the postmark date was more than 30 days after OWCP's July 6, 2017 decision, appellant was not entitled to an oral hearing as a matter of right.<sup>13</sup> Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.<sup>14</sup>

Although appellant was not entitled to an oral hearing as a matter of right, OWCP's Branch of Hearings and Review exercised its discretion in determining whether to grant his request, despite its untimely nature. In denying a discretionary hearing, the hearing representative found that the issue in the case could equally well be addressed by requesting reconsideration before OWCP and submitting new evidence. Because reconsideration exists as an alternative appeal right to address the issue raised by OWCP's July 6, 2017 decision, the Board finds that OWCP did not abuse its discretion in denying appellant's untimely hearing request.<sup>15</sup>

### CONCLUSION

The Board finds that OWCP has not abused its discretion when it denied appellant's August 14, 2017 hearing request as untimely filed pursuant to 5 U.S.C. § 8124(b).

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<sup>11</sup> *G.W.*, Docket No. 10-0782 (issued April 23, 2010); *James Smith*, 53 ECAB 188, 191-92 (2001).

<sup>12</sup> *James Smith, id.*

<sup>13</sup> Under OWCP's 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).

<sup>14</sup> *Supra* note 8; see *William F. Osborne*, 46 ECAB 198 (1994).

<sup>15</sup> See *Gerard F. Workinger*, 56 ECAB 259 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 28, 2019  
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