

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

K.S., Appellant)	
)	
and)	Docket No. 18-0996
)	Issued: January 23, 2019
DEPARTMENT OF THE AIR FORCE,)	
99th MEDICAL SUPPORT SQUADRON,)	
NELLIS AIR FORCE BASE, NV, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 3, 2018 appellant filed a timely appeal from an October 10, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days elapsed from the last merit decision, dated July 27, 2017, to the filing of this appeal, pursuant to

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the last OWCP decision. 20 C.F.R. § 501.3(e). An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *Id.* at § 501.3(f). One hundred and eighty days from October 10, 2017, the date of OWCP's latest decision, was Sunday, April 8, 2018. Because the last day of the 180-day filing period fell on a weekend, appellant had until the close of the next business day, Monday, April 9, 2018, to timely file an appeal. *Id.* § 501.3(f)(2). The Clerk of the Appellate Boards received the appeal on April 16, 2018. However, when the date of receipt would result in the loss of appeal rights, the date of the U.S. Postal Service postmark (or other carriers' date markings) is considered the date of filing. *Id.* at § 501.3(f)(1). In this instance, the date of the U.S. Postal Service postmark is April 3, 2018, which renders the appeal timely filed. *Id.*

the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the case.³

ISSUE

The issue is whether OWCP abused its discretion when it denied appellant's September 7, 2017 request for a hearing as untimely filed under 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On February 3, 2017 appellant, then a 45-year-old secretary, filed a traumatic injury claim (Form CA-1) alleging that, on January 27, 2017, she fractured her left foot while in the performance of duty. She stated that she was in the employee parking lot, walking from the warehouse to the main hospital, when a truck drove past her. As she stepped onto the curb to move out of the truck's path, appellant twisted her foot. She stopped work on January 30, 2017.

OWCP received hospital emergency department treatment records from January 31, 2017, including a left lower extremity diagnostic study that revealed a possible Lisfranc fracture. It also received podiatric treatment records covering the period February 1 through 27, 2017, which included a February 23, 2017 operative report.⁴

In a June 19, 2017 development letter, OWCP requested that appellant submit additional factual and medical evidence to support her claim. It noted, that the evidence submitted was insufficient to establish that she actually experienced the incident alleged to have caused her claimed left foot injury. OWCP also advised that the evidence received thus far was insufficient to support that appellant was injured while performing her employment duties, noting that she was in the parking lot at the time of the alleged injury. It afforded her 30 days to submit the requested information.

OWCP subsequently received additional medical evidence.

By decision dated July 27, 2017, OWCP denied appellant's traumatic injury claim. It found that she had not submitted sufficient factual evidence to establish the occurrence of the alleged January 27, 2017 employment incident. OWCP noted that appellant had not responded to its June 19, 2017 factual questionnaire. Consequently, appellant had failed to meet her burden of proof to establish fact of injury.

Appellant subsequently requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. She utilized the appeal request form that accompanied the

² 5 U.S.C. § 8101 *et seq.*

³ 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.*

⁴ Appellant underwent an open reduction internal fixation to repair a left foot Lisfranc dislocation.

July 27, 2017 decision. Although signed and dated August 22, 2017, appellant's hearing request was postmarked September 7, 2017.

By decision dated October 10, 2017, the hearing representative determined that appellant was not entitled to a hearing as a matter of right because her request was postmarked September 7, 2017, which was more than 30 days after OWCP's July 27, 2017 decision. It was further indicated that OWCP had exercised its discretion and further denied the request as the relevant issue of the case could equally well 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."⁵

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."⁶ 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.⁷ However, OWCP has discretion to grant or deny a request that is made after this 30-day period.⁸ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.⁹

ANALYSIS

The Board finds that OWCP did not abuse its discretion when it denied appellant's September 7, 2017 hearing request as untimely filed pursuant to 5 U.S.C. § 8124(b).

Appellant had 30 days from OWCP's July 27, 2017 merit decision to request a hearing before OWCP's Branch of Hearings and Review. She requested an oral hearing by appeal request form dated August 22, 2017, and postmarked September 7, 2017. As the postmark date was more than 30 days after OWCP's July 27, 2017 decision, appellant was not entitled to an oral hearing as

⁵ 5 U.S.C. § 8124(b)(1).

⁶ 20 C.F.R. § 10.615.

⁷ *Id.* at § 10.616(a).

⁸ *G.W.*, Docket No. 10-0782 (issued April 23, 2010); *James Smith*, 53 ECAB 188, 191-92 (2001).

⁹ *James Smith*, *id.*

a matter of right.¹⁰ Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.¹¹

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 appellant's 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 establishing that she had sustained an injury in the performance of duty. Because reconsideration exists as an alternative appeal right to address the issue(s) raised by OWCP's July 27, 2017 decision, the Board finds that OWCP did not abuse its discretion in denying appellant's untimely hearing request.¹²

CONCLUSION

The Board finds that OWCP did not abuse its discretion when it denied appellant's September 7, 2017 hearing request as untimely filed pursuant to 5 U.S.C. § 8124(b).

ORDER

IT IS HEREBY ORDERED THAT the October 10, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 23, 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

¹⁰ 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).

¹¹ 5 U.S.C. § 8124(b)(1); see *William F. Osborne*, 46 ECAB 198 (1994).

¹² See *Gerard F. Workinger*, 56 ECAB 259 (2005).