

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

_____)	
E.S., Appellant)	
)	
and)	Docket No. 19-1144
)	Issued: August 3, 2020
DEPARTMENT OF JUSTICE, BUREAU OF)	
PRISONS, FEDERAL CORRECTIONAL)	
INSTITUTION-MIAMI, Miami, FL, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 22, 2019 appellant filed a timely appeal from an April 5, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed from OWCP's last merit decision, dated February 15, 2017, to the filing of this appeal, pursuant

¹ Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated July 31, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-1144 (issued July 31, 2020). The Board's *Rules of Procedure* provide that an appeal in which a request for oral argument is denied by the Board will proceed to a decision based on the case record and the pleadings submitted. 20 C.F.R. § 501.5(b).

to the Federal Employees' Compensation Act (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP abused its discretion in denying appellant's request for a review of the written record following his reconsideration request

FACTUAL HISTORY

On December 29, 2016 appellant, then a 42-year-old senior officer, filed an occupational disease claim (Form CA-2) alleging that he was exposed to influenza, causing symptoms of sore throat, cough, fever, headache, nasal congestion, runny nose, and fatigue, which he attributed to factors of his federal employment that included working in a visiting room around inmates, visitors, and employees following an influenza pandemic. He indicated that he first became aware of his condition and first realized that his condition was caused or aggravated by factors of his federal employment on December 26, 2016. Appellant did not stop work.

In a January 3, 2017 development letter, OWCP advised appellant of the deficiencies of his claim and requested factual and medical evidence in support of his claim for exposure. It afforded him 30 days to submit the requested evidence. OWCP did not receive any additional evidence.

By decision dated February 15, 2017, OWCP denied appellant's occupational disease claim finding that the medical evidence of record failed to establish a diagnosis in connection with the accepted employment factors. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On May 12, 2017 appellant requested reconsideration and attached a copy of OWCP's February 15, 2017 merit decision along with a copy of an American Federation of Government Employees, Local 3690 memorandum dated May 9, 2017, which stated that "[t]his memorandum and attachments should be enough to substantiate" his occupational disease claim. He also provided e-mails from coworkers. In a May 8, 2017 e-mail, L.P., a coworker, indicated that he recalled appellant being sick towards the end of December 2016. In a May 1, 2017 e-mail, J.L. also recalled appellant's sickness as he indicated that he was sick as well due to a flu outbreak at the employing establishment.

By decision dated May 19, 2017, OWCP denied appellant's request for reconsideration, finding that he failed to raise substantive legal questions or include new and relevant evidence.

² The Board notes that, following the April 5, 2019 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.*

In an appeal request form dated March 8, 2019, postmarked March 12, 2019, appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

By decision dated April 5, 2019, OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record, noting that he had previously requested reconsideration under 5 U.S.C. § 8128 and, therefore, he was not entitled to a review of the written record on the same issue as a matter of right. It also considered whether to grant a discretionary hearing, and found that the issue could equally well be addressed by requesting reconsideration and submitting evidence not previously considered which established that he sustained an injury in the performance of duty.

LEGAL PRECEDENT

A claimant dissatisfied with an OWCP decision shall be afforded an opportunity for either an oral hearing or a review of the written record.³ A request for a hearing or review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.⁴ OWCP regulations further provide that the claimant must have not previously submitted a reconsideration request (whether or not it was granted) on the same decision.⁵ Although a claimant who has previously sought reconsideration is not, as a matter of right, entitled to a hearing or review of the written record, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing following reconsideration.⁶ Similarly, the Branch of Hearings and Review may exercise its discretion to conduct a hearing or review of the written record where a claimant requests a second hearing or review of the written record on the same issue.⁷

ANALYSIS

The Board finds that OWCP did not abuse its discretion in denying appellant's request for a review of the written record.

OWCP initially denied appellant's occupational disease claim by decision dated February 15, 2017. Appellant timely requested reconsideration, which OWCP denied by its May 19, 2017 nonmerit decision. He then requested a review of the written record with the Branch of Hearings and Review.

³ 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.615.

⁴ *Id.* at § 10.616(a).

⁵ *Id.*

⁶ *T.M.*, Docket No. 18-1418 (issued February 7, 2019); *M.W.*, Docket No. 16-1560 (issued May 8, 2017); *D.E.*, 59 ECAB 438 (2008); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

⁷ *S.H.*, Docket No. 17-1447 (issued January 11, 2018).

As appellant had previously requested reconsideration of OWCP's February 15, 2017 merit decision under section 8128 of FECA,⁸ he was not entitled to a review of the written record as a matter of right under section 8124(b)(1).⁹ OWCP properly exercised its discretion and determined that the issue in the case could be resolved equally well through a request for reconsideration and the submission of additional evidence.¹⁰ Therefore, the Board finds that OWCP did not abuse its discretion, by its April 5, 2019 decision, in denying appellant's request for a review of the written record following his reconsideration request.

CONCLUSION

The Board finds that OWCP did not abuse its discretion in denying appellant's request for a review of the written record following his reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 3, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

⁸ 5 U.S.C. § 8128.

⁹ *Id.* at § 8124(b)(1); *J.C.*, Docket No. 19-1293 (issued December 16, 2019).

¹⁰ *Id.*