

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

D.R., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Jackson, TN, Employer)
_____)

**Docket No. 19-1899
Issued: April 15, 2020**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On September 13, 2019 appellant filed a timely appeal from a May 6, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated July 31, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

FACTUAL HISTORY

On March 28, 2018 appellant, then a 47-year-old general expeditor, filed a traumatic injury claim (Form CA-1) alleging that on March 27, 2018 she injured her right shoulder while in the

¹ 5 U.S.C. § 8101 *et seq.*

performance of duty. She explained that her injury was caused by pulling and that her left shoulder also had begun to hurt. Appellant stopped work on March 28, 2018.

In a March 28, 2018 report, Dr. Gary McBride, Board-certified in internal medicine, noted that appellant presented with right shoulder pain. Appellant informed him that she was pulling on something at work and felt a pop and pain in her right shoulder that radiated down into her hand. She further informed Dr. McBride that, as she was driving home with her left hand, her left shoulder began to hurt as well. On evaluation Dr. McBride found tenderness to palpation in her right shoulder and noted that she had difficulty extending her right arm straight out and lifting it over her head. He indicated that there was full range of motion in the left shoulder. Dr. McBride diagnosed a right shoulder strain. In an accompanying note and duty status report (Form CA-17), Dr. McBride again noted appellant's diagnosis of a right shoulder strain and recommended work restrictions. In a diagnostic report of even date, Dr. John Crocker, a Board-certified diagnostic radiologist, noted that an x-ray of her right shoulder demonstrated minimal inferior bony hypertrophy at the acromioclavicular (AC) joint and no fractures.

In an April 10, 2018 medical report and work status report of even date, Dr. Nicholas Vance, a Board-certified orthopedic surgeon, recorded appellant's history of right shoulder pain related to a March 27, 2018 employment incident. Upon evaluation, he diagnosed right shoulder pain and a sprain of her right AC joint. Dr. Vance ordered a magnetic resonance imaging (MRI) scan of appellant's right shoulder to confirm the diagnosis.

In an April 19, 2018 diagnostic report, Dr. Jeffrey Simon, a Board-certified radiologist, performed a right shoulder MRI scan and found mild supraspinatus tendinosis with a distal low grade 20 percent interstitial split of the supraspinatus tendon, low lying acromion with AC arthrosis and mild subacromial/subdeltoid bursitis. In a medical report of even date, Dr. Vance reviewed her diagnostic report and diagnosed a sprain of the right rotator cuff capsule and a small interstitial supraspinatus tear with signs of impingement. He administered an injection to reduce her pain and swelling and referred her to physical therapy.

In an April 23, 2018 medical report, Dr. Vance noted appellant's complaints of continued and constant right shoulder pain. He found on physical examination that appellant demonstrated some tenderness on palpation and discomfort with above shoulder range of motion (ROM). Dr. Vance further found that she had good strength in her right rotator cuff and full strength in her right shoulder. He again noted that the right shoulder MRI scan showed a small interstitial tear of the supraspinatus and subacromial bursitis with low acromion. Dr. Vance diagnosed impingement syndrome of the right shoulder, recommended physical therapy, and held appellant off of work for one month.

OWCP received physical therapy notes dated from May 23 to June 15, 2018 from Teri Grim, a physical therapist, detailing treatment of appellant's right shoulder.

In a development letter dated June 26, 2018, OWCP informed appellant of the deficiencies of her claim and advised her of the type of factual and medical evidence needed to establish her claim. It asked her to complete a questionnaire to provide further details regarding the circumstances of the claimed March 27, 2018 employment incident, including the immediate

effects of the injury and a detailed description as to how her injury occurred. OWCP afforded appellant 30 days to submit the necessary evidence. No response was received.

In a June 14, 2018 report, Dr. Vance noted that appellant's condition had improved with the injection and physical therapy and recommended that she follow up again after one month.

In physical therapy notes dated from June 6 to July 16, 2018, Ms. Grim again provided treatment notes.

In a July 17, 2018 report, Dr. Vance found that appellant's symptoms were improving and that she had full ROM in her right shoulder with good strength. He advised her to continue her physical therapy and to follow up in one month.

By decision dated July 31, 2018, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the injury and/or events occurred as described. It noted that she failed to submit clarifying information in response to OWCP's June 26, 2018 development questionnaire.

OWCP continued to receive evidence. In reports dated August 21 and November 29, 2018, Dr. Vance noted that appellant was back at work full duty with only intermittent soreness.

In a March 25, 2019 report of telephone call (Form CA-110), OWCP noted that it had contacted appellant by telephone in reply to a voicemail message that she left regarding "case closure." It advised her that her claim was denied, by decision on July 31, 2018, and that she would have to appeal that decision. Appellant informed the claims examiner that she never received either the June 26, 2018 development letter or the July 31, 2018 notice of decision and requested copies of the documents. OWCP provided copies of those documents on that same date.

On an appeal request form dated April 1, 2019 and postmarked April 8, 2019, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated May 6, 2019, the Branch of Hearings and Review denied appellant's request, finding that it was untimely, noting that it was postmarked on April 8, 2019 more than 30 days after OWCP had issued its July 31, 2018 decision. The hearing representative found that appellant was not entitled to a hearing as a matter of right as the request was submitted more than 30 days after OWCP's decision. The hearing representative also considered whether to grant appellant a discretionary hearing, but determined that the issue in this case could be equally well 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."² Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide

² 5 U.S.C. § 8124(b)(1).

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.³ 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.⁴ Although there is no right to a review of the written record or an oral hearing, if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.

ANALYSIS

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

OWCP's regulations provide that the request for an oral hearing must be made within 30 days of the date of the decision for which a review is sought. Because appellant's April 1, 2019 hearing request was postmarked April 8, 2019, it postdated OWCP's July 31, 2018 decision by more than 30 days and, therefore, untimely. Appellant was therefore not entitled to an oral hearing as a matter of right.⁵

OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.⁶ The Board finds that, in the May 6, 2019 decision, OWCP's hearing representative properly exercised discretion by determining that the issue in the case could be equally well addressed through a request for reconsideration before OWCP, along with the submission of additional evidence.

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.⁷ In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for an oral hearing. It was noted in the March 25, 2019 report of contact that appellant indicated that she never received OWCP's June 26, 2018 development letter nor its July 31, 2018 notice of decision; however, the documents were mailed to her address of record. Absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received.⁸ Appellant did not submit evidence of nondelivery of OWCP's development letter or its decision such that the presumption

³ 20 C.F.R. §§ 10.616, 10.617.

⁴ *Id.* at § 10.616(a).

⁵ *See P.C.*, Docket No. 19-1003 (issued December 4, 2019).

⁶ *Id.*

⁷ *Id.*

⁸ This is known as the mailbox rule. *See C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

of receipt would be rebutted. Accordingly, the Board finds that OWCP properly denied her request for an oral hearing pursuant to 5 U.S.C. § 8124(b).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 15, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board