

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

R.H., Appellant

and

**DEPARTMENT OF AGRICULTURE, FOOD
SAFETY & INSPECTION SERVICE,
Minneapolis, MN, Employer**

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**Docket No. 19-1488
Issued: February 20, 2020**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 1, 2019 appellant filed a timely appeal from a June 20, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed from the last merit decision dated November 8, 2018 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

¹ On appeal appellant requested an oral argument before the Board. By letter received on August 5, 2019, he explained that he was withdrawing his request for oral argument as it would be a hardship to travel to Washington D.C. and he had mistakenly assumed oral argument before the Board would be held telephonically.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the June 20, 2019 decision, OWCP and the Board 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 evidence for the first time on appeal. *Id.*

ISSUE

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

FACTUAL HISTORY

On January 14, 2016 appellant, then a 60-year-old food inspector, filed a traumatic injury claim (Form CA-1) alleging that on December 9, 2015 he injured his left knee and hip when he slipped and fell down stairs while in the performance of duty. OWCP accepted the claim for left side sciatica and aggravation of lumbar stenosis. Appellant received wage-loss compensation on the supplement rolls as of March 6, 2016 and on the periodic rolls as of October 16, 2016.

On September 12, 2018 OWCP issued a notice of proposed reduction of compensation based on appellant's ability to earn wages as an office helper (Dictionary of Occupational Titles DOT 239.567-010), at the rate of \$422.00 per week.

By decision dated November 8, 2018, OWCP finalized its proposed reduction of compensation benefits, finding that the position of office helper was medically and vocationally suitable, reasonably available and therefore representative of appellant's wage-earning capacity.

On June 4, 2019 OWCP received appellant's November 13, 2018 request for a telephonic hearing before an OWCP hearing representative regarding the November 8, 2018 decision. The request was postmarked May 22, 2019.

By decision dated June 20, 2019, OWCP denied appellant's request for an oral hearing before an OWCP hearing representative, finding that his request was untimely as it was not filed within 30 days of the November 8, 2018 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."⁴

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.⁵ 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

⁴ 5 U.S.C. § 8124(b)(1).

⁵ 20 C.F.R. §§ 10.616, 10.617.

reconsideration.⁶ 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.⁷

ANALYSIS

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

OWCP's regulations provide that a 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 a hearing is sought.⁸ As appellant's request was postmarked May 22, 2019, more than 30 days after OWCP's November 8, 2018 decision, it was untimely filed and he was not entitled to an oral hearing as a matter of right.⁹

Although appellant's May 22, 2019 request for a hearing was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion.¹⁰ The Board finds that, in the June 20, 2019 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 relevant to the issue at hand.

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.¹¹ In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for a telephonic hearing. Accordingly, the Board finds that OWCP properly denied his oral hearing request.¹²

On appeal appellant raises arguments relevant to the merits of this claim. The only issue before the Board, however, is whether OWCP properly denied his request for an oral hearing as untimely filed. As the Board lacks jurisdiction to review the underlying merits of appellant's

⁶ *Id.* at § 10.616(a).

⁷ *P.C.*, Docket No. 19-1003 (issued December 4, 2019); *M.G.*, Docket No. 17-1831 (issued February 6, 2018); *Eddie Franklin*, 51 ECAB 223 (1999).

⁸ *Supra* note 6.

⁹ *Supra* note 7.

¹⁰ *Id.*

¹¹ *P.C.*, *supra* note 7; *M.G.*, *supra* note 7; *Samuel R. Johnson*, 51 ECAB 612 (2000).

¹² *See J.O.*, Docket No. 17-0789 (issued May 15, 2018).

claim, it cannot review his arguments regarding the November 8, 2018 loss of wage-earning capacity determination.¹³

CONCLUSION

The Board finds that OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative as untimely filed under 5 U.S.C. § 8124(b).

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 20, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹³ See *G.S.*, Docket No. 18-0388 (issued July 19, 2018).