

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

_____)	
L.N., Appellant)	
)	
and)	Docket No. 19-1820
)	Issued: June 12, 2020
U.S. POSTAL SERVICE, KEDZIE GRACE)	
POST OFFICE, Chicago, IL, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 22, 2019 appellant filed a timely appeal from a May 29, 2019 merit decision and a July 23, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the July 23, 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.*

ISSUES

The issues are: (1) whether 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(b); and (2) whether OWCP abused its discretion in denying authorization for a compounded medication.

FACTUAL HISTORY

On August 18, 1988 appellant, then a 40-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on the previous day, he sprained his left ankle when he fell through a gate while being chased by a dog while in the performance of duty. He listed his street address with a zip code of 60643, but indicated that his mailing address was a Post Office Box with a zip code of 60680. Appellant provided both addresses on the form. OWCP accepted the claim for localized primary osteoarthritis of the left ankle and foot, a closed fracture of the medial malleolus of the left ankle, dermatophytosis of the left foot, left flat foot, and arthropathy of the left ankle and foot. Appellant stopped work in July 2013.

On April 8, 2019 Dr. Larry Weisman, a podiatrist, certified that he last examined appellant on April 5, 2019. He requested authorization for a compounded medication identified as "triamcinolone base, coal tar, salicylic acid." Dr. Weisman noted that this medication was necessary to treat appellant's foot dermatophytosis. He indicated that appellant had tried and failed to obtain relief through other products, that there were commercially-available U.S. Food and Drug Administration (FDA) approved drugs appropriate for this diagnosis. Dr. Weisman related that all the active ingredients of the compounded drug were FDA-approved for this diagnosis. He further explained that the compound medication was medically necessary for its intended use and would be used to alleviate appellant's psoriatic symptoms including scaling, peeling, itchiness, and redness of skin, and to prevent possible skin lesions from becoming sore and infected.

On April 10, 2019 OWCP referred the matter, along with a statement of accepted facts and the medical record, to Nakia Shaw, PharmD, and Dr. Nathan Hammel, a Board-certified orthopedic surgeon and OWCP district medical adviser (DMA), for determination as to whether the requested compounded medication was medically necessary for appellant's accepted condition(s). It noted that OWCP's procedures require that consideration be given to whether there is justification for a prescription for a compounded medication and whether its use is consistent with the medical evidence of record.

In a joint report dated April 24, 2019, Dr. Shaw indicated, and the DMA concurred, that the medical history did not justify use of the compound of medications, as over-the-counter methods could be used. The DMA stated that, while topical medications could have demonstrable clinical utility, the admixture of all the components had not been clinically proven. He explained that the clinical efficacy of topical medications had been shown using preparations with a uniform dispersion and particle size, which had been shown to be critical for transdermal absorption. The DMA noted that, in this case, the requested components were to be custom compounded, which resulted in far less control over particle size and thus less reliable clinical efficacy. He concluded that the medical necessity of the compounded cream had not been demonstrated.

By development letter dated April 29, 2019, OWCP informed appellant that the evidence of record was insufficient to establish that the compounded medication was necessary to treat the effects of his accepted employment-related conditions. It requested that he provide a narrative explanation from his physician explaining why the compounded medication was medically necessary, including an explanation as to why a commercially-available drug was insufficient. OWCP afforded appellant 30 days to submit the necessary evidence. The mailing address utilized by OWCP listed appellant's street address as well as his Post Office Box with the zip code associated only with the Post Office Box. Appellant did not respond within the time allotted.

By decision dated May 29, 2019, OWCP denied authorization for a compounded medication, as it determined that the evidence of record did not support that this medication was medically necessary to treat the effects of appellant's work-related injury. The decision advised appellant of his appeal rights and included an appeal request form. The decision was mailed to the same address as the development letter.

By letter dated June 2, 2019, appellant noted that he received OWCP's April 29, 2019 development letter on that day. He indicated that "with receipt of this letter [he was] appealing [OWCP's] decision denying [his] much needed medication." On June 20, 2019 OWCP requested that appellant specify which appeal option from the decision of May 29, 2019 he wanted to pursue. The enclosed appeal request form indicated that if he wished to request a review of the written record or oral hearing before a representative of OWCP's Branch of Hearings and Review, the form must be submitted within 30 calendar days of the decision.

By letter dated June 29, 2019, appellant advised that, prior to June 20, 2019, he had not received the appeal request form with the April 29, 2019 "decision." He stated that he had only received two letters from OWCP, dated April 29 and June 20, 2019; that he had only received the May 29, 2019 decision as an attachment to the June 20, 2019 letter and not as "a stand-alone mailing"; and that he had not received appeal rights with the decision dated May 29, 2019. By appeal request form dated June 29, 2019 and postmarked July 2, 2019, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated July 23, 2019, OWCP's hearing representative denied appellant's request for an oral hearing, as the request was untimely filed. The hearing representative informed appellant that his case had been considered in relation to the issues involved, and that the issues could be equally well addressed by requesting reconsideration and submitting evidence not previously considered establishing that he was "entitled to the compound mixture" due to his accepted injury of August 17, 1988.

LEGAL PRECEDENT -- ISSUE 1

Section 8124 of FECA, concerning a claimant's entitlement to a hearing before an OWCP hearing representative, provides that a claimant is entitled to a hearing before an OWCP representative when a request is made 30 days after issuance of an OWCP final decision.³

³ 5 U.S.C. § 8124(b)(1).

A hearing is a review by an OWCP hearing representative of a final adverse decision issued by an OWCP district office.⁴ Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.⁵ A request for either an oral hearing or a review of the written record must be sent, in writing, within 30 days of the date of the decision for which the hearing is sought.⁶ A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision.⁷

ANALYSIS -- ISSUE 1

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

OWCP's regulations provide that the request for a hearing or review of the written record must be sent within 30 days of the date of the decision for which a hearing is sought. Appellant, therefore, had 30 days after issuance of OWCP's May 29, 2019 decision to timely request an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Under the mailbox rule, it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.⁸ When issuing its May 29, 2019 decision, OWCP utilized a combination of appellant's street address as well as his Post Office Box with the zip code associated only with the Post Office Box. Appellant advised OWCP by a June 29, 2019 letter that he had only received its April 29, 2019 development letter and June 20, 2019 letter asking him to clarify which appeal option he was selecting; that he had received the May 29, 2019 decision as an attachment to OWCP's June 20, 2019 letter and not as a "stand-alone mailing"; and that he had not received the appeal rights which OWCP advised him had accompanied the May 29, 2019 decision. Following his receipt of the appeal rights attached to the June 20, 2019 OWCP correspondence, in an appeal request form postmarked July 2, 2019, appellant requested an oral hearing before an OWCP hearing representative, which was more than 30 days following the issuance of the May 29, 2019 OWCP decision.

OWCP did not utilize the address of record that appellant included on his claim form when he designated his mailing address as a Post Office Box with a zip code of 60680 to mail its May 29, 2019 decision. As OWCP utilized a combination of appellant's street address and mailing address when issuing its May 29, 2019 decision, as he consistently maintained that he did not receive it as a "stand-alone mailing," and as he has provided evidence that he received the decision and appeal rights as an attachment, the presumption that appellant received the OWCP May 29, 2019 decision

⁴ 20 C.F.R. § 10.616.

⁵ *Id.* at § 10.615.

⁶ *Id.* at § 10.616(a); *T.C.*, Docket No. 20-0090 (issued February 13, 2020); *M.H.*, Docket No. 19-1087 (issued October 17, 2019); *B.V.*, Docket No. 18-1473 (issued April 23, 2019).

⁷ *T.C.*, *id.*; *K.L.*, Docket No. 19-0480 (issued August 23, 2019).

⁸ *See D.R.*, Docket No. 18-0232 (issued October 2, 2018); *A.C. Clyburn*, 47 ECAB 153 (1995).

when it issued is rebutted. Accordingly, the Board finds that OWCP improperly denied his request for an oral hearing as untimely filed. The case will be remanded for a hearing before an OWCP hearing representative, to be followed by any necessary further development and a *de novo* decision.

CONCLUSION

The Board finds that that OWCP improperly denied appellant’s request for an oral hearing before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).⁹

ORDER

IT IS HEREBY ORDERED THAT the July 23 and May 29, 2019 decisions of the Office of Workers’ Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 12, 2020
Washington, DC

Janice B. Askin, Judge
Employees’ Compensation Appeals Board

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

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

⁹ In view of the Board’s disposition of Issue 1, adjudication of Issue 2 regarding authorization for a compound medication is premature. When a claimant is entitled to a hearing before an OWCP hearing representative, the Board will not address the underlying merit decision. The merits are subject to further adjudication pursuant to the hearing before an OWCP hearing representative, and therefore are not in posture for review by the Board. *See P.H. (R.H.)*, Docket No. 17-0978 (issued August 29, 2017); *Gary W. Cooper*, Docket No. 97-0518 (issued March 5, 1999); *see also* 20 C.F.R. § 501.2(c)(2) (“There will be no appeal with respect to any interlocutory matter decided (or not decided) by OWCP during the pendency of a case”).