

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

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**D.S., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE, TINKER  
AIR FORCE BASE, OK, Employer**

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**Docket No. 19-1764  
Issued: March 13, 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 August 19, 2019 appellant filed a timely appeal from a July 2, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated December 6, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the July 2, 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 evidence for the first time on appeal. *Id.*

## ISSUE

The issue is whether OWCP properly denied appellant's request for a review of the written record before an OWCP hearing representative as untimely filed under 5 U.S.C. § 8124.

## FACTUAL HISTORY

On October 11, 2018 appellant, then a 57-year-old aircraft engine repairer, filed a traumatic injury claim (Form CA-1) alleging that on June 7, 2018 he injured his left shoulder "lifting a disk" and his shoulder popped while in the performance of duty. He did not stop work. The employing establishment controverted appellant's claim.

In a November 1, 2018 development letter, OWCP informed appellant that additional evidence was required in support of his claim. It advised him of the medical evidence necessary to establish his claim and afforded him 30 days to submit the requested evidence.

Emergency department records dated May 30, 2018 indicated that appellant was treated by Dr. Ryan Wilson, an osteopath Board-certified in family medicine. Medication was prescribed for spasms and pain and appellant was provided information about shoulder sprains.

In a May 31, 2018 report, Dr. Carl Lindquist, an osteopath Board-certified in internal medicine, noted that appellant's left shoulder pain had increased over the past week. Appellant had reported that he was unsure of an actual injury to his left shoulder, but that he had undergone previous left shoulder surgery. Dr. Lindquist opined that it appeared that he had some degree of impingement syndrome and noted that appellant could return to work with restrictions.

In a July 30, 2018 report, Dr. Lindquist noted that appellant was involved in a July 27, 2018 car accident which caused pain in his shoulder blades, neck, and back. He noted appellant's February 15, 2006 left shoulder surgery and indicated that he could return to work with restrictions of no lifting, pushing, or pulling over 15 pounds.

OWCP thereafter continued to receive medical reports related to appellant's July 27, 2018 injuries following a car accident.

A September 29, 2018 magnetic resonance imaging (MRI) scan of appellant's left shoulder, interpreted by Dr. Chris Degner, a Board-certified diagnostic radiologist, demonstrated osteoarthritic changes in the acromioclavicular joint and humeral head with narrowing of the glenohumeral joint with a large inferior osteophyte and tendinosis with articular and bursal surface partial-thickness tears of the infraspinatus and supraspinatus tendons with a lesser degree tendinosis of the subscapularis tendon.

In an October 4, 2018 report, Dr. Edmond Hooks, an internist, recounted that on June 7, 2018 appellant was injured at work from overexertion due to repetitive movements. Appellant had stated that he was lifting a disc that weighed over 30 pounds when he heard his left shoulder pop, and he had experienced pain in his shoulder ever since. He noted that the soreness in his shoulder was getting progressively worse and that his September 29, 2018 left shoulder MRI scan displayed a labral tear. Dr. Hooks diagnosed appellant with an unspecified left shoulder strain from overexertion due to repetitive movements and noted that in his previous report he erred when he

attributed appellant's left shoulder pain to his motor vehicle accident because appellant's shoulder was already being treated by his primary care physician prior to the accident. He repeated his previous work restrictions for appellant.

In an October 29, 2018 medical report, Hillarie Kessler, a certified physician assistant, indicated that appellant presented with stabbing and throbbing left shoulder pain from a June 7, 2018 workplace injury that occurred when he lifted something and his shoulder popped. She diagnosed left shoulder primary osteoarthritis, left shoulder impingement syndrome, an incomplete rotator cuff tear with a rupture of the left shoulder, not specified as traumatic, and acromioclavicular joint arthritis.

In a November 19, 2018 letter, the employing establishment controverted appellant's claim.

By decision dated December 6, 2018, OWCP denied appellant's traumatic injury claim, finding that the evidence of record failed to establish a diagnosis in connection with the accepted June 7, 2018 employment incident.

In a November 26, 2018 report, Josie Dean, a certified physician assistant, indicated that appellant presented with stabbing and throbbing shoulder pain and was following up on a June 7, 2018 workplace injury that had occurred while lifting and felt his shoulder pop. She noted that appellant performed a lot of repetitive activities at work and had experienced issues for a while, but not to the degree of his current problem. Ms. Dean recommended arthroscopic surgery and indicated that appellant should continue with the work restrictions provided on October 29, 2018.

On June 14, 2019 OWCP received appellant's May 22, 2019 request for review of the written record with respect to the December 6, 2018 merit decision.

OWCP received a May 22, 2019 report from Dr. James Bond, a Board-certified orthopedic surgeon, wherein he indicated that appellant presented with throbbing and stabbing left shoulder pain from his June 7, 2018 work injury which occurred when he lifted something and felt his shoulder pop.

On July 2, 2019 the Branch of Hearings and Review denied appellant's request for a review of the written record, finding that it was untimely as it was not postmarked within 30 days of the issuance of the December 6, 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."<sup>3</sup> Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide

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<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's request for review of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

OWCP's regulations provide that the request for review of the written record must be made within 30 days of the date of the decision for which a review is sought. Because appellant's May 22, 2019 hearing request postdated OWCP's December 6, 2018 decision by more than 30 days, it was untimely and he was not entitled to a review of the written record as a matter of right.<sup>7</sup>

Although appellant's May 22, 2019 request for a review of the written record was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion.<sup>8</sup> The Board finds that in the July 2, 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 submitting additional medical 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.<sup>9</sup> In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for a review of the written record. Accordingly, the Board finds that OWCP properly denied appellant's request for a review of the written record.

### CONCLUSION

The Board finds that OWCP properly denied appellant's request for review of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

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<sup>4</sup> 20 C.F.R. §§ 10.616, 10.617.

<sup>5</sup> *Id.* at § 10.616(a).

<sup>6</sup> *M.G.*, Docket No. 17-1831 (issued February 6, 2018); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

<sup>7</sup> *See P.C.*, Docket No. 19-1003 (issued December 4, 2019).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 2, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 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