

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

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A.M., Appellant)	
)	
and)	Docket No. 21-0256
)	Issued: July 22, 2021
DEPARTMENT OF HOMELAND SECURITY,)	
U.S. CUSTOMS & BORDER PROTECTION,)	
El Cajon, CA, 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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On December 9, 2020 appellant filed a timely appeal from a December 1, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from OWCP's last merit decision, dated May 11, 2020, to the filing of this appeal, pursuant to FECA¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

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(b).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 11, 2020 appellant, then a 55-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on February 26, 2020 he felt a sharp pain in his lower back as he attempted to restrain a subject during his defensive tactic training while in the performance of duty. He did not stop work.

In a March 30, 2020 development letter, OWCP informed appellant that the evidence of record was insufficient to support his claim. It advised him of the type of factual and medical evidence needed and provided a factual questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In an April 16, 2020 work capacity evaluation (Form OWCP-5c), Dr. Michael L. Pomerantz, a Board-certified orthopedic surgeon, advised that appellant was capable of performing his usual work duties without restrictions. In a work status note of even date, he released him to work that day.

By decision dated May 11, 2020, OWCP accepted that the February 26, 2020 employment incident occurred as alleged, but denied appellant's traumatic injury claim, finding that the medical evidence of record did not contain a diagnosed medical condition in connection with the accepted employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA. The May 11, 2020 decision was mailed to appellant's last known address of record.

Appellant continued to submit additional medical evidence.

On September 25, 2020, appellant called OWCP to inquire why medical bills weren't being paid in relation to his claim. OWCP advised him that the claim had been denied and "that he needs to appeal in order to have the possibility of acceptance upon additional review." It resent appellant a copy of the May 11, 2020 decision since it appeared appellant had misplaced his.

By appeal request form dated October 4, 2020, postmarked October 6, 2020, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated December 1, 2020, OWCP's hearing representative denied appellant's request for an oral hearing, finding that the request was not made within 30 days and, therefore, was untimely filed. The hearing representative informed appellant that his case had been considered in relation to the issue involved and that the issue could be equally addressed by requesting reconsideration and submitting evidence not previously considered.

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

² *Supra* note 1 at § 8124(b)(1).

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.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.⁵

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(b).

OWCP's regulations provide that a request for an oral hearing must be made within 30 days of the date of the decision for which a review is sought.⁶ Because appellant's hearing request was postmarked October 6, 2020, because appellant's hearing request was postmarked October 6, 2020, which was more than 30 days after OWCP's May 11, 2020 decision, it was untimely. Appellant was, therefore, not entitled to an oral hearing as a matter of right.⁷

Although appellant's October 6, 2020 request for a hearing was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion.⁸ The Board finds that, in the December 1, 2020 decision, OWCP's Branch of Hearings and Review properly exercised its 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.⁹ An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction

³ 20 C.F.R. §§ 10.616, 10.617.

⁴ *Id.* at § 10.616(a).

⁵ *W.H.*, Docket No. 20-0562 (issued August 6, 2020); *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); *Delmont L. Thompson*, 51 ECAB 155 (1999).

⁶ *Supra* note 4. Under OWCP's regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011). *See also G.S.*, Docket No. 18-0388 (issued July 19, 2018).

⁷ *See P.C.*, Docket No. 19-1003 (issued December 4, 2019); *M.K.*, Docket No. 19-0428 (issued July 15, 2019); *R.H.*, Docket No. 18-1602 (issued February 22, 2019); *William F. Osborne*, 46 ECAB 198 (1994).

⁸ *M.L.*, Docket No. 20-0294 (issued October 21, 2020); *P.C.*, *id.*

⁹ *D.M.*, Docket No. 20-1465 (issued March 1, 2021); *O.R.*, Docket No. 20-0743 (issued January 28, 2021).

from established facts.¹⁰ In this case, OWCP did not abuse its discretion by denying appellant's request for an oral hearing. Accordingly, the Board finds that OWCP properly denied his request for an oral hearing.

On appeal appellant argues the merits of his claim. The only issue before the Board, however, is whether OWCP abused its discretion when it denied his October 6, 2020 request for an oral hearing as untimely filed. As the Board lacks jurisdiction to review the underlying merits of appellant's claim, it cannot review his arguments regarding his traumatic injury claim.¹¹

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(b).

ORDER

IT IS HEREBY ORDERED THAT the December 1, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 22, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁰ See *A.M.*, Docket No. 19-0861 (issued September 21, 2020); *T.G.*, Docket No. 19-0904 (issued November 25, 2019); *Daniel J. Perea*, 42 ECAB 214 (1990).

¹¹ *R.H.*, Docket No. 19-1488 (issued February 20, 2020); *B.S.*, Docket No. 18-1075 (issued February 21, 2019).