

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

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<b>J.K., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-0487</b>
	)	<b>Issued: November 1, 2021</b>
<b>DEPARTMENT OF THE AIR FORCE,</b>	)	
<b>KANSAS AIR NATIONAL GUARD Topeka, KS,</b>	)	
<b>Employer</b>	)	
_____	)	

*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 10, 2021 appellant filed a timely appeal from an August 19, 2020 merit decision and a January 5, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly denied appellant's request for review of the written record pursuant to 5 U.S.C. § 8124(b) as untimely filed; and (2) whether appellant has met her burden of proof to establish a right foot condition causally related to the accepted February 20, 2020 employment incident.

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

## **FACTUAL HISTORY**

On February 25, 2020 appellant, then a 51-year-old social worker, filed a traumatic injury claim (Form CA-1) alleging that on February 20, 2020 she broke several bones in her right foot when she tripped over a space heater while in the performance of duty. On the reverse side of the claim form S.F., an employing establishment supervisor, confirmed that she was in the performance of duty when the incident occurred and that his knowledge of the facts about the injury were in agreement with her statements. He further noted that appellant was treated at the emergency room on the date of the incident and had an appointment later in the week with an orthopedist. Appellant stopped work on the date of injury.

An x-ray report of the right foot dated February 25, 2020 revealed multiple acute nondisplaced fractures of the right distal second through fifth metatarsals.

On February 27, 2020 appellant was treated by Dr. Jon Morgan, a Board-certified orthopedic foot and ankle surgeon, who noted that she related complaints of right foot pain, which she attributed to a history of tripping over a space heater at work on February 20, 2020. Dr. Morgan's physical examination revealed swelling, tenderness, and ecchymosis of the lateral right foot at the base of the metatarsals, and that appellant was ambulating with the use of a scooter. He obtained updated x-rays of the foot and opined that they revealed nondisplaced fractures of the second, third, and fourth metatarsals with slight transverse plain angulation. Dr. Morgan diagnosed pain and nondisplaced fractures of the second, third, and fourth metatarsals of the right foot. He recommended follow-up x-rays, ice, elevation, medication and no weight bearing with the use of a boot.

In follow-up reports dated March 12 and April 2, 2020, Dr. Morgan continued to diagnose nondisplaced fractures of the second, third, and fourth metatarsals and recommended sedentary work restrictions.

In a July 8, 2020 development letter, OWCP informed appellant of the deficiencies of her claim and requested that she provide a narrative medical report from a treating physician, containing a detailed description of findings and a diagnosis, explaining how the employment incident caused, contributed to, or aggravated her medical condition. OWCP afforded appellant 30 days to respond.

Thereafter, OWCP received emergency room records dated February 20, 2020 indicating that appellant was evaluated by Dr. Michael J. Sullivan, a Board-certified emergency medicine specialist, for complaints of right foot pain, which she attributed to rolling her foot in an eversion-type injury that day. Dr. Sullivan performed an examination, reviewed x-rays, and diagnosed multiple closed fractures of metatarsal bone in the right foot.

By decision dated August 19, 2020, OWCP accepted that the February 20, 2020 employment incident occurred as alleged. However, it denied the claim, finding that the medical evidence of record was insufficient to establish that the diagnosed right lower extremity conditions were causally related to the accepted employment incident.

OWCP continued to receive evidence, including additional hospital records by Dr. Sullivan dated February 20, 2020 who noted appellant's history of right foot pain due to rolling her right foot and ankle in an eversion-type injury. Dr. Sullivan diagnosed multiple acute nondisplaced fractures of the right distal second through fifth metatarsals. He also noted her prior history of a Jones' fracture approximately 10 months ago, which was treated nonoperatively.

OWCP also received work restriction notes by Dr. Morgan dated February 27, March 12, and April 2, 2020 indicating that appellant could return to work with restrictions due to work-related fractures in her right foot. In a subsequent note dated April 23, 2020, Dr. Morgan released her to return to work without restrictions.

In an attending physician's report (Form CA-20) dated September 10, 2020, Dr. Morgan noted a history that appellant had tripped over a space heater at work. He diagnosed nondisplaced fractures of the second, third, and fourth metatarsal bones of the right foot. Dr. Morgan checked a box marked "Yes" that the conditions were caused or aggravated by an employment activity. He explained that appellant "fractured foot at work tripping."

By an appeal request form dated August 24, 2020 and received by OWCP on September 25, 2020 appellant requested review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated January 5, 2021, OWCP denied appellant's request for a review of the written record. It found that the request was untimely filed, as it was "postmarked or submitted *via* ECOMP on 9/25/2020," more than 30 days after its August 19, 2020 merit decision. After exercising its discretion, OWCP further found that the issue in the case could equally well be addressed through the reconsideration process.

### **LEGAL PRECEDENT -- ISSUE 1**

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>2</sup> 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.<sup>3</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>4</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.

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<sup>2</sup> 5 U.S.C. § 8124(b)(1).

<sup>3</sup> 20 C.F.R. §§ 10.616, 10.617.

<sup>4</sup> *Id.* at § 10.616(a).

OWCP's procedures provide that the request is timely if it was mailed (as determined by the postmark or other carrier's date marking) within 30 days of the date of the district office's decision. If the postmark is not legible, the request will be deemed timely unless OWCP has kept evidence of date of delivery in the record reflecting that the request is untimely.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

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

While OWCP found in its January 5, 2021 decision that the appeal form was submitted on September 25, 2020, the envelope or other evidence of the carrier's mark was not retained in the record. As the record lacks evidence of the postmark or other evidence from which the date of the mailing could be established, the request for review of the written record is deemed timely.<sup>6</sup> Upon return of the case record, OWCP shall schedule an appropriate hearing before a representative of OWCP's Branch of Hearings and Review.<sup>7</sup>

### **CONCLUSION**

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

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<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4a (September 2020).

<sup>6</sup> *Id.*; see also *R.C.*, Docket No. 20-1388 (issued May 25, 2021); *R.C.*, Docket No. 19-0949 (issued June 24, 2020).

<sup>7</sup> In light of the Board's disposition of Issue 1, Issue 2 is in an interlocutory posture.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 5, 2021 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 1, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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