

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

M.S., Appellant)	
)	
and)	Docket No. 22-0530
)	Issued: August 16, 2022
U.S. POSTAL SERVICE, UNIVERSITY CITY)	
POST OFFICE, St. Louis, MO, Employer)	
)	

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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 27, 2022 appellant filed a timely appeal from September 2 and December 23, 2021 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed from the last merit decision dated June 30, 2021 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.

¹ The Board finds that, during the pendency of this appeal, OWCP issued a March 14, 2022 merit decision denying modification of the same underlying issue addressed in OWCP's September 2, 2021 nonmerit decision. It also issued a May 6, 2022 decision denying reconsideration of the March 14, 2022 merit decision. The Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s). 20 C.F.R. § 501.2(c)(3), 10.626; *see D.P.*, Docket No. 20-1330 (issued February 19, 2021); *J.C.*, Docket No. 19-1849, n.2 (issued November 17, 2020); *Arlonia B. Taylor*, 44 ECAB 591 (1993) (Groom, Alternate Member, concurring in part and dissenting in part); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990). Consequently, OWCP's March 14 and May 6, 2022 decisions are set aside as null and void.

² 5 U.S.C. § 8101 *et seq.*

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).

FACTUAL HISTORY

On October 15, 2002 appellant, then a 41-year-old carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained a low back muscle sprain due to factors of her employment including lifting. She indicated that she first became aware of her conditions and first realized that they were caused or aggravated by her federal employment on October 22, 2002. Appellant stopped work on October 23, 2002 and returned to work on January 6, 2003. OWCP accepted the claim for low back strain and L4-5 lumbar disc displacement without myelopathy.³ It paid appellant wage-loss compensation on the supplemental rolls commencing November 30, 2002.

On February 25, 2005 appellant returned to work four hours per day as a modified general clerk on March 5, 2005.

By decision dated November 16, 2006, OWCP issued a loss of wage-earning capacity (LWEC) determination based on appellant's actual earnings as general clerk. It found that she had worked in the position for over 30 days commencing March 5, 2005 and that the employment fairly and reasonably represented her wage-earning capacity.

OWCP received a March 1, 2021 note from Dr. Peggy Boyd Taylor, an osteopath specializing in family medicine, listing appellant's diagnoses of lumbar intervertebral disc displacement without myelopathy and lumbar sprain, which persisted.

In a letter dated March 17, 2021, OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Michael H. Ralph, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of her employment-related conditions, the extent of disability, and appropriate medical treatment recommendation.

In a report dated April 12, 2021, Dr. Ralph noted his examination of appellant. He opined that appellant's work-related conditions had resolved.

In an April 21, 2021 notice of proposed termination, OWCP proposed terminating appellant's wage-loss compensation and medical benefits because the medical evidence of record established that she no longer had residuals or disability due to her accepted work-related conditions. It determined that the weight of the medical evidence rested with Dr. Ralph's April 12, 2021 second opinion report. OWCP afforded appellant 30 days to submit additional evidence or argument. No additional evidence or argument was received.

³ Appellant retired from the employing establishment, effective May 31, 2020.

By decision dated June 30, 2021, OWCP terminated appellant's wage-loss compensation and medical benefits, effective July 18, 2021. It found that the medical evidence of record established that she no longer had residuals or disability causally related to her accepted work-related conditions.

On a form dated July 16, 2021 and postmarked August 11, 2021, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated September 2, 2021, OWCP's Branch of Hearings and Review denied appellant's hearing request. It found that the request was untimely filed as it was postmarked on August 11, 2021, more than 30 days after OWCP's June 30, 2021 decision. After exercising its discretion, OWCP further found that the issue in the case could equally well be addressed through the reconsideration process.

On September 27, 2021 appellant requested reconsideration of the September 2, 2021 decision. She asserted that she did not receive the June 30, 2021 decision until July 14, 2021. Appellant noted that her request for an oral hearing had been mailed by certified mail on August 11, 2021.

OWCP received a copy of the July 16, 2021 hearing request, postmarked August 11, 2021.

OWCP, in a letter dated October 18, 2021, noted that a decision had been issued on September 2, 2021 denying her request for a hearing. It advised appellant to follow the appeal rights attached to the September 2, 2021 decision.

On December 14, 2021 appellant again requested reconsideration. In support thereof, she submitted another copy of the July 16, 2021 hearing request, postmarked August 11, 2021.

By decision dated December 23, 2021, OWCP's Branch of Hearings and Review again denied appellant's hearing request as untimely filed. The Branch of Hearings and Review noted that she had previously requested a hearing and "The Branch issued the same decision on 09/02/2021..." After exercising its discretion, OWCP further found that the issue in the case 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

⁴ 5 U.S.C. § 8124(b).

⁵ 20 C.F.R. §§ 10.616, 10.617.

postmark or other carrier's date marking and before the claimant has requested 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 the request for an oral hearing must be made within 30 days of the date of the decision for which review is sought.⁸ Because appellant's hearing request was postmarked on August 11, 2021, it post-dated OWCP's June 30, 2021 decision by more than 30 days and, therefore, was untimely. Appellant was, therefore, not entitled to an oral hearing as a matter of right.⁹

OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.¹⁰ The Board finds that OWCP 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. 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 deductions from established facts.¹¹ In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's requests for an oral hearing. Accordingly, the Board finds that OWCP properly denied her request for an oral hearing pursuant to 5 U.S.C. § 8124(b) as untimely filed.

CONCLUSION

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

⁶ *Id.* at § 10.616(a).

⁷ *M.F.*, Docket No. 21-0878 (issued January 6, 2022); *W.H.*, Docket No. 20-0562 (issued August 6, 2020); *P.C.*, Docket No. 19-1003 (issued December 4, 2019); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

⁸ *Supra* note 4; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (September 2020).

⁹ *See D.S.*, Docket No. 21-1296 (issued March 23, 2022); *P.C.*, Docket No. 19-1003 (issued December 4, 2019).

¹⁰ *Id.*

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the September 2 and December 23, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 16, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

A handwritten signature in black ink, reading "J. D. McGinley". The signature is written in a cursive style with a large, looped initial "J" and a long, sweeping underline.

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board