

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

D.R., Appellant)	
)	
and)	Docket No. 22-0361
)	Issued: July 8, 2022
)	
U.S. POSTAL SERVICE, POST OFFICE,)	
San Antonio, TX, Employer)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 12, 2022 appellant filed a timely appeal from an October 27, 2021 merit decision and a December 14, 2021 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 October 27, 2021 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 appellant has met her burden of proof to establish eligibility for continuation of pay (COP); and (2) 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 September 20, 2021 appellant, then a 24-year-old postal collect and delivery employee, filed a traumatic injury claim (Form CA-1) alleging that she sustained a concussion, spinal sprain, and right elbow sprain on August 2, 2021 during a motor vehicle accident while in the performance of duty. She stopped work on the date of injury. On the reverse side of the claim form, appellant's supervisor, A.P., controverted her request for COP because notice of the injury had not been reported within 30 days, noting that the claim was not received until September 20, 2021.

Appellant submitted medical evidence in support of her claim.

OWCP, by development letter dated September 21, 2021, informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment submit a copy of an accident report or a police report and comment on whether it agreed with appellant's statements. It afforded both parties 30 days to respond.

In a response memorandum dated September 27, 2021, appellant explained that her claim was untimely filed because her supervisor would not submit her paperwork. She further explained that her supervisor had just informed her about entitlement to compensation benefits due to an "on-the-clock" work injury.

Appellant submitted a police report regarding the August 2, 2021 employment incident. She also submitted additional medical evidence.

By decision dated October 27, 2021, OWCP accepted appellant's claim for thoracic spine ligament sprain, and right elbow contusion.

In a separate decision also dated October 27, 2021, OWCP denied appellant's claim for COP, finding that she had failed to report the August 2, 2021 employment injury on a form approved by OWCP within 30 days, as required. It advised her that the denial of COP did not affect her entitlement to compensation, and that she could, therefore, file a claim for compensation (Form CA-7) for lost wages due to her accepted employment injury.

OWCP continued to receive medical and factual evidence.

On November 28, 2021 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review regarding the October 27, 2021 decision denying her claim for COP.

OWCP thereafter received additional medical evidence.

By decision dated December 14, 2021, OWCP denied appellant's request for an oral hearing as untimely filed, finding that her request was not made within 30 days of the October 27, 2021 decision as it was not requested until November 28, 2021. It further exercised discretion and determined that the issue in this case could equally well be addressed by a request for reconsideration before OWCP along with the submission of new evidence.

LEGAL PRECEDENT -- ISSUE 1

Section 8118 of FECA³ provides for payment of continuation of pay, not to exceed 45 days, to an employee who has filed a claim for a period of wage loss due to traumatic injury with his or her immediate supervisor on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title. Section 8122(a)(2) provides that written notice of injury must be given as specified in section 8119. The latter section provides in part that notice of injury shall be given in writing within 30 days after the injury.⁴ The context of section 8122 makes clear that this means within 30 days of the injury.⁵

OWCP's regulations provide, in pertinent part, that to be eligible for COP, an employee must: (1) have a traumatic injury which is job related and the cause of the disability and/or the cause of lost time due to the need for medical examination and treatment; (2) file Form CA-1 within 30 days of the date of the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.⁶

The employee must provide a written report on a Form CA-1 to the employing establishment within 30 days of the injury.⁷ OWCP's procedures provide that another OWCP-approved form, such as CA-2, CA-2a, or CA-7 forms, which contain words of claim, can be used to satisfy timely filing requirements.⁸

³ *Id.* at § 8118.

⁴ *Id.* at § 8119(a), (c). *See also Gwen Cohen-Wise*, 54 ECAB 732 (2003).

⁵ *T.N.*, Docket No. 21-0402 (issued January 31, 2022); *E.M.*, Docket No. 20-0837 (issued January 27, 2021); *J.S.*, Docket No. 18-1086 (issued January 17, 2019); *Robert M. Kimzey*, 40 ECAB 762, 763-64 (1989); *Myra Lenburg*, 36 ECAB 487, 489 (1985).

⁶ 20 C.F.R. § 10.205(a)(1-3); *see also J.M.*, Docket No. 09-1563 (issued February 26, 2010); *Dodge Osborne*, 44 ECAB 849, 855 (1993); *William E. Ostertag*, 33 ECAB 1925 (1982).

⁷ *Id.* at § 10.210(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Payments*, Chapter 2.8075 (June 2012).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish eligibility for COP.

Appellant filed written notice of her traumatic injury on September 20, 2021, which was more than 30 days after her August 2, 2021 employment injury. Because she filed her claim on September 20, 2021, the Board finds that it was not filed within 30 days of the injury, as specified in sections 8118(a) and 8122(a)(2) of FECA.⁹ In her September 27, 2021 response to OWCP's September 21, 2021 development letter, appellant reported that her supervisor refused to submit her paperwork and delayed telling her that she was entitled to compensation benefits for a work-related injury. The Board finds that OWCP properly denied COP as appellant did not file her claim within the requisite 30 days from the date of injury.¹⁰

LEGAL PRECEDENT -- ISSUE 2

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.”¹¹ 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.¹² 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.¹³ 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.¹⁴

ANALYSIS -- ISSUE 2

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).

⁹ 5 U.S.C. §§ 8118(a), 8122(a)(2).

¹⁰ 20 C.F.R. § 10.210(a); *T.N.*, *supra* note 5; *J.S.*, Docket No. 18-1086 (issued January 17, 2019).

¹¹ 5 U.S.C. § 8124(b)(1).

¹² 20 C.F.R. §§ 10.616, 10.617.

¹³ *Id.* at § 10.616(a).

¹⁴ *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); *M.G.*, Docket No. 17-1831 (issued February 6, 2018); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

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.¹⁵ Because appellant requested a hearing on November 28, 2021, it postdated OWCP's October 27, 2021 decision by more than 30 days and, therefore, is untimely. Appellant was, therefore, not entitled to an oral hearing as a matter of right.¹⁶

OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.¹⁷ The Board finds that, in the December 14, 2021 decision, 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.¹⁸ In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request 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 appellant has not met her burden of proof to establish eligibility for COP. The Board further finds that OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124(b).

¹⁵ *Supra* note 7; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4a (September 2020).

¹⁶ *See D.S.*, Docket No. 21-1296 (issued March 23, 2022); *P.C.*, Docket No. 19-1003 (issued December 4, 2019).

¹⁷ *Id.*

¹⁸ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the October 27 and December 14, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 8, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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