

ISSUE

The issue is whether OWCP properly denied appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On February 28, 2020 appellant, then a 53-year-old social worker, filed a traumatic injury claim (Form CA-1) alleging that on February 20, 2020 a tooth/molar on the upper-left side of his face was broken off due to a skiing accident while in the performance of duty. He explained that he was skiing with veterans on a structured therapeutic outing, when another skier collided with him. That skier's helmet struck appellant in the upper-left side of his face, causing his tooth to break off. On the reverse side of the claim form, appellant's supervisor acknowledged that appellant was injured in the performance of duty. Appellant did not stop work. On March 19, 2020 OWCP accepted the claim for complete loss of tooth number 12 due to trauma. On March 25, 2020 it expanded the acceptance of the claim to include tooth number 20 due to trauma.

In an October 27, 2020 report, Dr. K. Cheyn Gunnerson, a dentist, advised that appellant was seen following an accident causing the loss of two teeth, numbers 12 and 20, and also was seen for regular preventative care. He noted that appellant returned with tooth 13 fractured at the gum line. Dr. Gunnerson opined, "[t]here is no other reason from a clinical standpoint for the loss of the tooth other than from trauma due to his accident." He also explained that further examination revealed that tooth number 14 needed to be extracted due to a lesion that was likely caused by the accident. Dr. Gunnerson explained that tooth number 14 was likely to fail due to the lesion and should be extracted and replaced with an implant. He requested that the acceptance of appellant's claim be expanded to include two additional teeth, numbers 13 and 14, as being affected by the accident.

In a development letter dated November 6, 2020, OWCP informed appellant that additional evidence was necessary to establish further expansion of his expansion claim. It advised him of the type of medical evidence necessary and afforded him 30 days to respond.

OWCP received a copy of Dr. Gunnerson's October 27, 2020 report and x-ray films of teeth numbers 13 and 20.

By decision dated December 14, 2020, OWCP denied expansion of appellant's claim to include additional fracture of tooth 13 and lucent lesion of tooth 14.

In a February 16, 2021 statement, appellant further described his employment injury and related that he continued to have pain and problems associated with teeth on the left side of his mouth. He noted that two additional teeth were affected by the accepted employment injury.

In a March 3, 2021 report, Dr. Gunnerson opined that appellant's claim should be expanded to include injury to teeth numbers 13 and 14 as being related to the original injury, "as well as any additional teeth that may require attention due to the accident." He explained that damage from trauma to the teeth and jaw bones does not always immediately reveal itself. The length of time it takes for the tooth to die after injury depends on the extent of the injury and the body's individual

unique response to trauma, and can take months or even years to manifest. Dr. Gunnerson noted that appellant's injury was significant enough to cause trauma requiring treatment to teeth numbers 12 and 20 immediately. He related that on October 20, 2020 eight months after the injury, and without sustaining another injury to the left side of his face, Dr. Johnson reported that tooth number 13 was loose, and that tooth number 14 was indicating a lucent lesion/abscess. Dr. Gunnerson noted that appellant's teeth did not exhibit any signs of injury prior to the accident and appellant had always demonstrated proper oral hygiene with regular six-month appointments that maintained his dental health needs.

On June 7, 2021 appellant contacted OWCP by telephone to inquire as to the status of his appeal. OWCP informed him that the appeal was still pending and advised him to submit the appeal request form. Appellant indicated that he had provided the form to his physician to forward the form to OWCP with the accompanying medical report. OWCP informed him that the appeal request form was not received. Appellant advised that he would "get that sent."

On June 8, 2021 OWCP received an appeal request form dated December 28, 2020, wherein appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. Appellant noted on this form, "this was originally sent on Dec[ember] 28, 2020 via mail."

By decision dated June 29, 2021, OWCP's Branch of Hearings and Review denied appellant's request for review of the written record. It found that the request was untimely filed. After exercising its discretion, OWCP further found that the issue in the case could equally well be addressed through the reconsideration process and submission of additional evidence.

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."³ 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.⁴ 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.⁵ 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.

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. §§ 10.616, 10.617.

⁵ *Id.* at § 10.616(a).

ANALYSIS

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

By decision dated December 14, 2020, OWCP denied expansion of appellant's claim to include additional fracture of tooth 13 and lucent lesion of tooth 14. Its regulations provide that a 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. 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.⁶ The case record establishes that appellant's request was not filed within 30 days of the December 14, 2020 merit decision. On June 7, 2021 appellant contacted OWCP by telephone to inquire as to the status of his appeal. OWCP informed him that the appeal was still pending and advised him to submit the appeal request form. Appellant indicated that he had provided the form to his physician to forward the form to OWCP with the accompanying medical report. OWCP informed him that the appeal request form was not received. Appellant advised that he would "get that sent." On June 8, 2020 he submitted an appeal request form which noted that "this was originally sent on Dec[ember] 28, 2020 via mail." However, the case record does not contain a postmarked envelope for appellant's original request for a review of the written record. As his request for review of the written record was not filed within 30 days of OWCP's December 14, 2020 merit decision, the Board finds that the request was untimely filed, and appellant was not entitled to a review of the written record as a matter of right.⁷

Although appellant was not entitled to a review of the written record as a matter of right, OWCP's Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing following reconsideration.⁸ In this instance, the hearing representative denied a discretionary review of the written record because appellant could instead submit new evidence and request reconsideration before OWCP. The Board finds that the hearing representative properly exercised discretionary authority in denying appellant's request for a review of the written record.⁹

The Board has held that the only limitation on OWCP's authority is reasonableness.¹⁰ 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

⁶ *Id.*

⁷ The 30-day period for determining the timeliness of an employee's request for an oral hearing or review commences the day after the issuance of OWCP's decision. See *Donna A. Christley*, 41 ECAB 90 (1989).

⁸ *D.E.*, 59 ECAB 438, 442-43 (2008); *J.C.*, 59 ECAB 206, 210-11 (2007).

⁹ 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 known facts. *André Thyratron*, 54 ECAB 257, 261 (2002).

¹⁰ *R.M.*, Docket No. 19-1088 (issued November 17, 2020). See also *E.S.*, Docket No. 18-1750 (issued March 11, 2019).

from established facts.¹¹ 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 a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 17, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹¹ *P.C.*, Docket No. 19-1003 (issued December 4, 2019).