

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

Y.A., Appellant)	
)	
and)	Docket No. 23-0160
)	Issued: June 20, 2023
DEPARTMENT OF VETERANS AFFAIRS,)	
MICHAEL E. DEBAKEY VA MEDICAL)	
CENTER, Houston, TX, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On November 10, 2022 appellant filed a timely appeal from a September 19, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated September 17, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the September 19, 2022 decision, appellant submitted additional evidence to the Board on appeal. 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.*

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 July 30, 2018 appellant, then a 45-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on July 28, 2018 she injured her right arm when a coworker grabbed it and assaulted her while in the performance of duty. On the reverse side of the claim form, appellant's supervisor, J.B., challenged appellant's claim and indicated that a police investigation found that the incident was unfounded. Appellant did not stop work.

In an August 6, 2018 development letter, OWCP informed appellant of the deficiencies of her claim. It explained the type of evidence required and provided a questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information. It afforded both parties 30 days to respond.

Appellant subsequently submitted a July 29, 2018 police report regarding the alleged July 28, 2018 employment incident, which included statements from appellant and the alleged assailant, N.A. Her witness statement indicated that at 7:30 p.m. on the date of injury appellant requested the roundsboard from N.A., and he stated that he was not done with it. At approximately 7:45 p.m., appellant again requested the board and, when N.A. was done, she reached out to pick it up. H.A. grabbed her right arm and squeezed it very firmly in front of two witnesses. Appellant shouted, "do not touch me, and grab me like that," and he aggressively moved very close to her from where he was sitting down. N.A. continued to verbally abuse her, saying "[appellant] do n[o]t know how to act," and calling her names. A witness told him not to touch appellant again. Appellant walked away, called the police, and left a message for her unit manager. The police report determined that the claim of assault was unfounded.

The employing establishment executed an authorization for examination and/or treatment (Form CA-16) on July 30, 2018.

Appellant submitted medical evidence in support of her claim.

Appellant responded to OWCP's development questionnaire on August 18, 2018 noting that N.A. had been angry with her and created a hostile work environment since she reported him for patient abuse. She also stated that the incident had been investigated by the police and an employing establishment fact-finding investigation was pending.

In a September 6, 2018 letter, J.M., appellant's supervisor provided an account of the events preceding the alleged assault. She provided an August 20, 2018 witness statement from appellant's coworker, S.M., and an August 22, 2018 witness statement from her coworker, P.A. J.M. also provided an employing establishment fact-finding memorandum dated August 24, 2018. The memorandum indicated that there was no camera footage of the incident as the camera server was not working on the date of injury. It concluded that staff members working at the time did not report any form of assaultive or aggressive behavior by N.A. towards appellant, but that they did witness an elevated level of aggressive behavior by appellant towards N.A.

In a September 7, 2018 statement, W.T., an employing establishment workers' compensation program manager, challenged appellant's claim based on the July 28, 2018 police report, August 24, 2018 fact-finding memorandum, and September 6, 2018 letter from J.M.

In a September 17, 2018 memorandum of telephone call (Form CA-110), OWCP noted that appellant inquired regarding the status of her case and was advised that her claim had been denied and she could call back with questions after she received the decision letter.

By decision dated September 17, 2018, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the July 28, 2018 employment incident occurred as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive medical and factual evidence.

In an August 11, 2020 Form CA-110, OWCP noted that appellant had called and indicated that she had just received a copy of her denial decision.

In an August 15, 2022 Form CA-110, OWCP noted that appellant had called and indicated that she never received the denial decision.

By letter received on September 1, 2022, postmarked on August 27, 2022, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. She provided evidence in support of her claim.

By decision dated September 19, 2022, OWCP denied appellant's request for an oral hearing, finding that the request was not made within 30 days of the September 17, 2018 decision and, therefore, was untimely filed. 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

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

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. §§ 10.616, 10.617.

⁵ *Id.* at § 10.616(a).

within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.⁶

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).

Appellant had 30 days following OWCP's September 17, 2018 merit decision to request an oral hearing before a representative of OWCP's Branch of Hearings and Review. The Board notes that, in an August 11, 2020 Form CA-110, OWCP noted that she had called and indicated that she had just received a copy of her denial decision. In an August 15, 2022 Form CA-110, OWCP noted that appellant had called and indicated that she never received the denial decision. The Board has held, however, that absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is called the mailbox rule.⁷ The evidence of record establishes that the September 17, 2018 decision was properly mailed to appellant at her last known address of record. As appellant's request for an oral hearing was postmarked August 27, 2022, more than 30 days after OWCP's September 17, 2018 decision, it was untimely filed and she was, therefore, not entitled to an oral hearing as a matter of right.⁸

The Board finds that OWCP, in its September 19, 2022 decision, 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 as the only limitation on OWCP's authority is reasonableness, and 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 from established facts.⁹ 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 her request for an oral hearing, as untimely filed, pursuant to 5 U.S.C. § 8124(b)(1).¹⁰

⁶ See *A.M.*, Docket No. 21-0256 (issued July 22, 2021); *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).

⁷ See *J.W.*, Docket No. 21-0869 (issued January 14, 2022); *V.C.*, Docket No. 20-0798 (issued November 16, 2020).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4a (September 2020); see *W.N.*, Docket No. 20-1315 (issued July 6, 2021); see also *G.S.*, Docket No. 18-0388 (issued July 19, 2018).

⁹ See *T.G.*, Docket No. 19-0904 (issued November 25, 2019); *Daniel J. Perea*, 42 ECAB 214 (1990).

¹⁰ The Board notes that the employing establishment executed a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. See 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

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 September 19, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 2023
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board