

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

C.O., Appellant)	
)	
and)	Docket No. 23-0807
)	Issued: October 30, 2023
U.S. POSTAL SERVICE, PENSACOLA)	
PROCESSING & DISTRIBUTION CENTER,)	
Pensacola, FL, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 26, 2023 appellant filed a timely appeal from a March 16, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated September 30, 2022, 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 over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 16, 2023 nonmerit decision, OWCP and the Board received additional evidence. 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 review of the written record by an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On July 6, 2018 appellant, then a 59-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on July 4, 2018 she strained her back when she pushed a rack to the feeder while in the performance of duty. She did not stop work. On November 5, 2018 OWCP accepted the claim for sprain of ligaments of the thoracic spine. It thereafter expanded acceptance of the claim to include spondylosis of the thoracic region on the right from T7 to T10.

On August 2, 2022 appellant filed a claim for a schedule award (Form CA-7). In support of her claim, she submitted an April 8, 2020 medical report from Dr. Michael Gilmore, a Board-certified orthopedic surgeon, who provided physical examination findings and diagnosed thoracic kyphosis, scapular dyskinesia, and an unspecific injury of shoulder and upper arm. Dr. Gilmore opined that appellant had reached maximum medical improvement and that she had two percent permanent impairment.

On September 21, 2022 OWCP referred the record and a statement of accepted facts to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a district medical adviser and requested that he evaluate appellant's permanent impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*).³

In a September 28, 2022 report, Dr. Katz found no ratable impairment.

By decision dated September 30, 2022, OWCP denied appellant's schedule award claim.

On February 16, 2023 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated March 16, 2023, OWCP denied appellant's request for a review of the written record, finding that it was untimely filed. It further exercised its discretion and determined that the issue in the case could equally well be addressed by a request for reconsideration before OWCP along with the submission of new evidence supporting her schedule award claim.

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

³ A.M.A., *Guides* (6th ed. 2009).

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 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 review of the written record by an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124.

OWCP’s regulations provide that the request for a hearing or review of the written record must be made within 30 days of the date of the decision for which a review is sought. Because appellant’s request for a review of the written record was submitted on February 16, 2023 it postdated OWCP’s September 30, 2022 decision by more than 30 days and, accordingly, was untimely. Appellant was, therefore, not entitled to a review of the written record as a matter of right.⁸

OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.⁹ The Board finds that, in the March 16, 2023 decision, OWCP properly exercised its discretion by determining that the issue in the case could be equally well addressed through a request for reconsideration, 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.¹⁰ The Board finds that the evidence of record does not establish that OWCP

⁴ *Supra* note 1 at § 8124(b)(1).

⁵ 20 C.F.R. §§ 10.616, 10.617.

⁶ *Id.* at § 10.616(a).

⁷ *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).

⁸ *See K.B.*, Docket No. 21-1038 (issued February 28, 2022); *M.F.*, Docket No. 21-0878 (issued January 6, 2022); *see also P.C.*, Docket No. 19-1003 (issued December 4, 2019).

⁹ *Id.*

¹⁰ *Id.*

abused its discretion in connection with its denial of appellant's request for a review of the written record.

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

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 30, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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