

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

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| P.K., Appellant |) | |
| |) | |
| and |) | Docket No. 24-0216 |
| |) | Issued: April 16, 2024 |
| U.S. POSTAL SERVICE, GARY PROCESSING |) | |
| & DISTRIBUTION CENTER, Gary, IN, |) | |
| 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 December 29, 2023 appellant filed a timely appeal from a September 18, 2023 merit decision and a November 24, 2023 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.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b); and (2) whether appellant has met her burden of proof to establish an injury in the performance of duty on June 21, 2023, as alleged.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 23, 2023 appellant, then a 56-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that on June 20, 2023 she experienced low back and left leg pain while working on the dock. She noted that she first became aware of her condition and realized its relation to her federal employment on June 21, 2023. Appellant stopped work on June 21, 2023 and returned to full duty on June 22, 2023.

In a development letter dated June 30, 2023, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of additional factual and medical evidence needed and afforded her 60 days to submit the necessary evidence.

OWCP subsequently received an after-visit summary dated June 21, 2023 from Lena Modieh, a nurse practitioner, which noted that appellant had been seen that day for acute bilateral low back pain with left-sided sciatica.

In a report dated July 18, 2023, Dr. J. Michael Morgenstern, an orthopedic surgeon, related appellant's statements that she developed left lower back pain on June 21, 2023 while working on the dock. He diagnosed lumbosacral disc syndrome and possible herniated disc. Dr. Morganstern opined that while working on the dock on June 21, 2023 appellant experienced left lower back pain radiating into her left calf.

By a follow-up development letter dated July 31, 2023, OWCP advised appellant that the evidence of record was insufficient to establish her claim. It reminded her that she had 60 days from the June 30, 2023 development letter to submit the necessary evidence.

Dr. Morgenstern, in an August 17, 2023 report, related that appellant developed lumbosacral radicular symptoms from a work-related injury. He diagnosed lumbosacral disc syndrome with left-sided radicular symptoms and possible herniated disc. Dr. Morgenstern concluded that appellant developed left lower back, buttock, and thigh pain due to working on the dock on June 21, 2022. In a duty status report (Form CA-17) of even date, he placed appellant off work.

In a letter dated August 31, 2023, the employing establishment controverted the claim.

By decision dated September 18, 2023, OWCP converted appellant's occupational disease claim to a traumatic injury claim, which it denied, finding that the evidence was insufficient to establish that an employment incident occurred on June 21, 2023, as alleged.

OWCP subsequently received an October 12, 2023 report, wherein Dr. Morgenstern diagnosed lumbosacral intervertebral disc disorder and thoracolumbar strain, which he attributed to appellant's employment. He detailed her employment duties, noting that on the date-of-injury she was working on the dock, pushing and pulling cages containing heavy packages. Dr. Morgenstern indicated that appellant's physical examination findings were unchanged. He concluded that appellant sustained an occupational injury from repetitive work duties requiring intense lower back strain, daily, for 10 years.

On October 17, 2023 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.²

By decision dated November 24, 2023, OWCP's Branch of Hearings and Review denied appellant's request for review of the written record, finding that it was untimely filed. The Branch of Hearings and Review further exercised its discretion and determined that the issue in this case could be equally well addressed by requesting reconsideration by OWCP and submitting new evidence.

LEGAL PRECEDENT -- ISSUE 1

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

Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats, an oral hearing or a review of the written record."⁴ The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.⁵ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.⁶ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly denied appellant's request for a review of the written record as untimely filed.

OWCP's regulations require that a request for a hearing or a review of the written record be made within 30 days of the date of the decision for which a review is sought. The timeliness of a request for a hearing is determined based on the postmark of the envelope containing the request. If the postmark is not legible, the request will be deemed timely unless OWCP has kept

² An envelope containing a postmark is not found in the case record. The form requesting a review of the written record is dated October 17, 2023.

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. § 10.615.

⁵ *Id.* at § 10.616.

⁶ *M.R.*, Docket No. 22-0321 (issued July 7, 2022).

⁷ *Id.*

evidence of date of delivery on the record reflecting that the request is untimely.⁸ Otherwise, the date of the letter itself should be used.⁹

Appellant requested a review of the written record on October 17, 2023. As her request for review of the written record was dated within 30 days of the September 18, 2023 decision, it was timely filed.¹⁰ Accordingly, the Board finds that OWCP improperly denied appellant's October 17, 2023 request for a review of the written record as untimely filed.¹¹

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for a review of the written record as untimely filed.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (September 2020); *see also M.J.*, Docket No. 21-0889 (issued May 18, 2022); *T.B.*, Docket No. 20-0158 (issued March 18, 2022).

⁹ *See S.M.*, Docket No. 23-0501 (issued February 23, 2024); *K.B.*, Docket No. 21-1038 (issued February 28, 2022); *see J.H.*, Docket No. 06-1565 (issued February 20, 2007); *James B. Moses*, 52 ECAB 465 (2001); *citing William J. Kapfhammer*, 42 ECAB 271 (1990); *see also Douglas McLean*, 42 ECAB 759 (1991).

¹⁰ *Supra* note 5; *see also S.M., id.; D.M.*, Docket No. 19-0686 (issued November 13, 2019); *J.V.*, Docket No. 16-1877 (issued March 7, 2017).

¹¹ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the November 24, 2023 decision of the Office of Workers' Compensation Programs is reversed. The September 18, 2023 decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: April 16, 2024
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