

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

S.M., Appellant	)	
	)	
and	)	<b>Docket No. 23-0501</b>
	)	<b>Issued: February 23, 2024</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>VETERANS HEALTH ADMINISTRATION,</b>	)	
<b>Wilkes Barre, PA, Employer</b>	)	
	)	

*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 February 27, 2023 appellant filed a timely appeal from a November 28, 2022 merit decision and a January 27, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 a 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 entitlement to continuation of pay (COP).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On November 18, 2022 appellant, then a 31-year-old medical officer, filed a traumatic injury claim (Form CA-1) alleging that on September 16, 2022 she contracted COVID-19 when in direct contact with patients while in the performance of duty. She related that she had direct contact with patients every day during the week prior to the onset of symptoms, became symptomatic on September 18, 2022 and tested positive for COVID-19 on September 19, 2022. The Form CA-1 indicated that appellant's regular work hours were 8:00 a.m. to 4:30 p.m. Monday through Friday, and that she stopped work at 8:00 a.m. on September 19, 2022 and returned to work on October 3, 2022.

Along with her claim, appellant submitted laboratory test results dated September 19, 2022 indicating that a COVID-19 antigen test was performed with a positive result.

By decision dated November 28, 2022, OWCP denied appellant's claim for COP, finding that she had not reported her injury on an OWCP-approved form within 30 days of her alleged September 16, 2022 employment injury. It noted that she could claim compensation for wage-loss resulting from the decision by filing a claim for compensation.

By an appeal request form dated December 5, 2022, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated January 27, 2023, OWCP's Branch of Hearings and Review denied appellant's request for 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 requesting reconsideration by OWCP, along with the submission of new evidence.

## **LEGAL PRECEDENT -- ISSUE 1**

A 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."<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> Although there is no right to a review of the written record or an oral hearing, if

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<sup>2</sup> *Id.* at § 8124(b)(1).

<sup>3</sup> 20 C.F.R. § § 10.616, 10.617

<sup>4</sup> *Id.* at § 10.616(a).

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.<sup>5</sup>

### 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 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.

Under OWCP's regulations and procedures, 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 evidence of date of delivery on the record reflecting that the request is untimely.<sup>6</sup> Otherwise, the date of the letter itself should be used.<sup>7</sup>

Appellant requested a review of the written record *via* an appeal request form dated December 5, 2022. As her request for review of the written record was dated within 30 days of the November 28, 2022 decision it was timely filed.<sup>8</sup> Accordingly, the Board finds that OWCP improperly denied appellant's December 5, 2022 request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).<sup>9</sup>

### CONCLUSION

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

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<sup>5</sup> *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).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (September 2020); *see M.J.*, Docket No. 21-0889 (issued May 18, 2022); *T.B.*, Docket No. 20-0158 (issued March 18, 2022).

<sup>7</sup> *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).

<sup>8</sup> *Supra* note 4; *see also D.M.*, Docket No. 19-0686 (issued November 13, 2019); *J.V.*, Docket No. 16-1877 (issued March 7, 2017).

<sup>9</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 27, 2023 decision of the Office of Workers' Compensation Programs is reversed. The November 28, 2022 decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: February 23, 2024  
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