

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

R.S., Appellant	)	
	)	
and	)	Docket No. 23-1022
	)	Issued: January 29, 2024
DEPARTMENT OF THE NAVY, MARINE	)	
CORPS LOGISTICS BASE, Barstow, CA,	)	
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 July 27, 2023 appellant filed a timely appeal from an April 10, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated October 13, 2022 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

**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).

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

## **FACTUAL HISTORY**

On August 4, 2022 appellant, then a 62-year-old heavy mobile equipment mechanic, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment, including working in the transmission/engine shop in the proximity of running engine dynamometers. He noted that he first became aware of his condition and realized its relation to his federal employment on February 6, 2006. Appellant did not stop work.

OWCP received employing establishment audiograms dated February 6, 2006 through August 24, 2016, which revealed asymmetric high and low frequency hearing loss and tinnitus.

In a development letter dated August 10, 2022, OWCP informed appellant of the deficiencies of his claim. It explained the type of additional evidence required and provided a questionnaire for his completion. OWCP provided appellant 30 days to respond.

By decision dated October 13, 2022, OWCP denied appellant's occupational disease claim, finding that it was untimely filed pursuant to 5 U.S.C. § 8122. It determined that the evidence of record did not support that he filed his claim within three years of the date of injury or date of last exposure, or that his supervisor had actual knowledge of the claimed condition within 30 days of the date of injury.

In an appeal request form postmarked March 13, 2023, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

OWCP received audiograms performed as part of the employing establishment's hearing conservation program dated May 5, 1983 through March 1, 2023, which revealed progressive bilateral hearing loss and tinnitus.

Appellant submitted a copy of the August 10, 2022 OWCP development letter. He did not respond to the provided questionnaire.

In a statement dated March 6, 2023, appellant indicated that he began working for the employing establishment in May 1983 in the transmission and engine shop, which built transmissions, drive trains, and engines. From 1986 through 2008, he worked with engine and transmission dynamometers. Appellant indicated that, in 2001, his base line hearing changed and in 2006 the employing establishment required double hearing protection (earplugs and earmuffs). He noted that, in August 2008, he was transferred out of the transmission and engine shop, but maintained that during his employment at that location he sustained permanent hearing loss and tinnitus. Appellant was prescribed hearing aids in 2019.

By decision dated April 10, 2023, OWCP's hearing representative 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 this case could equally well be addressed by requesting 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.”<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 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

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).

As noted above, a request for a review of the written record must be made within 30 days after the date of the issuance of an OWCP final decision. Appellant, on March 13, 2023, requested a review of the written record. As the request was submitted more than 30 days following issuance of OWCP’s October 13, 2022 decision, the Board finds that it was untimely filed. Appellant was, therefore, not entitled to a review of the written record as a matter of right.<sup>6</sup> Section 8124(b)(1) is unequivocal on the time limitation for requesting a review of the written record.<sup>7</sup>

Although appellant’s request for a review of the written record was untimely filed, OWCP has the discretionary authority to grant the request and it must exercise such discretion.<sup>8</sup> The Board finds that, in the April 10, 2023 decision, OWCP properly exercised 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 the only

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<sup>2</sup> *Id.* at § 8124(b).

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

<sup>4</sup> *Id.* at § 10.616(a).

<sup>5</sup> *M.F.*, Docket No. 21-0878 (issued January 6, 2022); *W.H.*, Docket No. 20-0562 (issued August 6, 2020); *P.C.*, Docket No. 19-1003 (issued December 4, 2019); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

<sup>6</sup> *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).

<sup>7</sup> *Supra* note 5. *See also L.S.*, Docket No. 18-0264 (issued January 28, 2020).

<sup>8</sup> *Supra* note 6.

limitation on OWCP's authority is reasonableness.<sup>9</sup> 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 from established facts.<sup>10</sup> 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 as untimely filed, pursuant to 5 U.S.C. § 8124(b).

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's requests 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 April 10, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 29, 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

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<sup>9</sup> *A.M.*, Docket No. 20-1575 (issued May 24, 2021); *R.M.*, Docket No. 19-1088 (issued November 17, 2020). *See also E.S.*, Docket No. 18-1750 (issued March 11, 2019).

<sup>10</sup> *A.M.*, *id.*