

<sup>2</sup> The Board notes that, following the February 10, 2023 decision, OWCP 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.*

## **FACTUAL HISTORY**

On May 5, 2017 appellant, then a 38-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral shoulder pain due to factors of his federal employment, including repetitive motions involved in sorting mail. He noted that he first became aware of his condition on March 15, 2017 and realized its relation to his federal employment on April 20, 2017. Appellant did not stop work. On August 11, 2017 OWCP accepted the claim for other synovitis and tenosynovitis of the right and left shoulders and post-traumatic osteoarthritis of the right shoulder.

In a June 7, 2021 note, Dr. Ajay Aggarwal, a Board-certified anesthesiologist, advised that appellant remain out of work until July 12, 2021. In a duty status report (Form CA-17) of even date, he diagnosed bilateral shoulder injuries and indicated that appellant was totally incapacitated and unable to work.

In a report dated July 13, 2021, Dr. Ugochi K. Azuike, a Board-certified physical medicine and rehabilitation specialist, noted that appellant related complaints of bilateral shoulder pain, which he attributed to his work duties as a mail processing clerk. She performed a physical examination and observed tenderness to palpation, decreased range of motion, and positive provocative tests in the bilateral shoulders. Dr. Azuike diagnosed other synovitis and tenosynovitis of the bilateral shoulders and post-traumatic osteoarthritis of the right shoulder and released appellant to return to part-time work, four hours per day. In a Form CA-17 of even date, she noted additional restrictions pertaining to bending, stooping, pushing, and pulling, and that he should not lift greater than five pounds.

On July 15, 2021 appellant accepted the offer of a modified mail processing clerk position, four hours per day.

Reports of magnetic resonance imaging (MRI) scans of the shoulders dated September 21, 2021 demonstrated supraspinatus and infraspinatus tendinitis, subacromial-subdeltoid bursitis, and glenohumeral joint effusion, bilaterally.

In follow-up reports and Forms CA-17 dated September 13 through November 22, 2021, Dr. Azuike noted appellant's complaints and examination findings and continued to release him to part-time work with restrictions.

On March 17 and 29 and April 28, 2022 appellant filed claims for compensation (Form CA-7) for disability from work for the periods June 8 through July 10, 2021; July 13, 2021 through March 25, 2022; and March 26, 2022 and continuing, respectively, for leave without pay (LWOP) and night differential pay.

In development letters dated March 23 and April 1 and 29, 2022, OWCP informed appellant of the deficiencies in his claims for compensation. It advised him of the type of factual and medical evidence needed and afforded him 30 days to submit additional evidence.

OWCP thereafter received a November 29, 2021 medical report by Dr. Azuike, who administered an epidural steroid injection, and advised that appellant remain out of work until December 2, 2021.

On February 22, 2022 appellant accepted the offer of a part-time modified mail clerk position with no lifting greater than five pounds and no reaching above shoulders, operating machinery, climbing, kneeling, or twisting.

In follow-up reports and Forms CA-17 dated January 3 through March 7, 2022, Dr. Azuike noted appellant's complaints and examination findings, and continued to release him to part-time work with restrictions.

A March 17, 2022 report of electromyography and nerve conduction velocity (EMG/NCV) study of the upper extremities revealed bilateral mononeuropathy multiplex pattern of ulnar and median nerves.

OWCP also received chiropractic treatment records.

By decisions dated April 26 and May 2, 2022, OWCP denied appellant's claims for compensation for the periods June 8 through July 10, 2021 and July 13, 2021 through March 25, 2022, respectively, finding that he had not submitted sufficient medical evidence to establish disability from work during the claimed periods due to the accepted employment conditions.

OWCP continued to receive evidence. In a March 7, 2022 medical report, Dr. Azuike noted appellant's complaints and examination findings, and continued to release him to return to part-time, modified-duty work.

In an April 11, 2022 Form CA-17, Dr. Azuike released appellant to return to part-time work four hours per day with restrictions on bending, pulling, pushing, stooping, and fine manipulation and no lifting greater than five pounds.

OWCP also received additional chiropractic treatment notes for dates of service from January 20 through March 16, 2022 and physical performance evaluations dated March 11 and April 15, 2022.

By decision dated May 31, 2022, OWCP denied appellant's claim for compensation for the period March 26, 2022 and continuing, finding that he had not submitted sufficient medical evidence to establish disability from work during the claimed period due to the accepted employment conditions.

OWCP continued to receive evidence including follow-up medical reports, a Form CA-17, and medical records review and narrative reports by Dr. Azuike dated from January 3 through September 2, 2022, as well as chiropractic treatment notes for dates of service from May 4 through September 7, 2022.

On August 8, 2022 OWCP expanded its acceptance of appellant's claim to include cervical disc displacement at C5-6 and C6-7, primary osteoarthritis of the right shoulder acromioclavicular (AC) joint, spinal instabilities of the cervical region, bilateral median neuropathies, and bilateral ulnar nerve lesions.

On October 24, 2022 appellant requested reconsideration of OWCP's April 26 and May 2 and 31, 2022 decisions.

OWCP thereafter received a December 7, 2021 report of Dr. Azuike for bilateral shoulder injections, and additional chiropractic treatment records for dates of service from September 15 through December 1, 2022.

In a January 5, 2023 letter, OWCP advised appellant that it had determined that his October 24, 2022 requests for reconsideration did not clearly identify the decisions for which he sought reconsideration and, therefore, it would not take any further action on his requests.

On January 24, 2023 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

OWCP thereafter received additional evidence, including November 7 and December 12, 2022 medical reports and a January 13, 2023 Form CA-17 by Dr. Azuike and further chiropractic treatment notes.

By decision dated February 10, 2023, OWCP's Branch of Hearings and Review 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 his claims for disability.

### **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>3</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>4</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>5</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>6</sup>

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<sup>3</sup> *Supra* note 1 at § 8124(b)(1).

<sup>4</sup> 20 C.F.R. §§ 10.616, 10.617.

<sup>5</sup> *Id.* at § 10.616(a).

<sup>6</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).

### **ANALYSIS**

The Board finds that OWCP properly found that appellant's request for a review of the written record before an OWCP hearing representative was 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 January 24, 2023 it postdated OWCP's April 26 and May 2 and 31, 2022 decisions by more than 30 days and, accordingly, was untimely. He was, therefore, not entitled to a review of the written record as a matter of right.<sup>7</sup>

OWCP, however, has the discretionary authority to grant the request, and it must exercise such discretion.<sup>8</sup> 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.<sup>9</sup> The Board finds that the evidence of record indicates that OWCP did not abuse 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 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 request for review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

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<sup>7</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>8</sup> *Id.*

<sup>9</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 10, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 19, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board