

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

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**Y.S., Appellant**

**and**

**U.S. POSTAL SERVICE, SACRAMENTO  
PROCESSING & DISTRIBUTION CENTER,  
West Sacramento, CA, Employer**

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**Docket No. 24-0024  
Issued: March 15, 2024**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On October 10, 2023 appellant filed a timely appeal from an October 2, 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 March 27, 2023, 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.<sup>2</sup>

**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.*

<sup>2</sup> The Board notes that, following the issuance of the October 2, 2023 decision, OWCP received additional evidence. However, 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 20, 2022 appellant, then a 58-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that he developed pain in his back, bilateral buttock, hips, thighs, groin, and legs due to factors of his federal employment, including moderate-to-heavy lifting, carrying, stooping, bending, pulling, pushing, and reaching, and prolonged periods of standing and walking. He noted that he first became aware of his condition and first realized its relationship to factors of his federal employment on May 19, 2022. OWCP accepted appellant's claim for aggravation of lumbar spondylosis and strain of muscle, fascia and tendon of the lower back.

Appellant continued to receive medical treatment. In a report dated February 1, 2023, Dr. Michael D. Halperin, a Board-certified anesthesiologist, noted appellant's complaints of lumbar spondylosis and lower back muscle strain. He indicated that appellant continued to experience persistent back pain in the lower back with bilateral sciatica down into both legs and toes of the bilateral feet. On examination of appellant's lumbar spine, Dr. Halperin observed tenderness at levels of L2-3, L3-4, L4-5, and L5-S1 and bilateral gluteal with muscle spasms. Straight leg raising at the seated position was positive bilaterally. He opined that appellant's claim should be expanded to include lumbosacral radiculopathy.

In a letter dated February 25, 2023, appellant requested that the acceptance of his claim be expanded to include lumbosacral radiculopathy as a primary diagnosis to replace lumbar sprain.

On March 1, 2023 OWCP referred the medical record, along with a statement of accepted facts (SOAF), to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as the OWCP's district medical adviser (DMA), for a determination as to whether appellant developed lumbar radiculopathy as a result of his accepted employment injury. In a March 4, 2023 report, Dr. Harris noted his review of the medical records and SOAF. He indicated that he disagreed with Dr. Halperin's recommendation to expand the acceptance of appellant's claim to include lumbar radiculopathy. Dr. Harris explained that Dr. Halperin did not document any neurologic deficits consistent with lumbar radiculopathy or provide electrodiagnostic studies consistent with lumbar radiculopathy.

By decision dated March 27, 2023, OWCP denied expansion of the acceptance of appellant's claim to include lumbar radiculopathy. It found that the evidence of record did not demonstrate that the claimed medical condition was causally related to his accepted employment injury.

OWCP continued to receive medical evidence.

In an appeal request form dated September 14, 2023, appellant requested review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated October 2, 2023, OWCP denied appellant's request for a review of the written record, finding that the request was untimely filed. It further exercised its discretion and found that the issue could equally well be addressed by requesting reconsideration before OWCP and submitting additional evidence not previously considered.

## **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>

## **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).

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 review is sought. Because appellant’s request for a review of the written record was dated September 14, 2023, it postdated OWCP’s March 27, 2023 decision 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 finds that, in the October 2, 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 before OWCP, along with the submission of additional evidence not previously considered.

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 establishes that OWCP did

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<sup>3</sup> 5 U.S.C. § 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.M.*, Docket No. 22-0521 (issued March 1, 2023); *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>7</sup> *See H.M.*, Docket No. 22-0053 (issued August 12, 2022); *D.S.*, Docket No. 21-1296 (issued March 23, 2022); *see also P.C.*, Docket No. 19-1003 (issued December 4, 2019).

<sup>8</sup> *J.J.*, Docket No. 23-0647 (issued September 12, 2023); *M.F.*, Docket No. 21-0878 (issued January 6, 2022); *Daniel J. Perea*, Docket No. 42 ECAB 214 (1990).

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

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 a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 2, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 15, 2024  
Washington, DC

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

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

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