

ISSUE

The issue is whether OWCP properly denied appellant's request for a review of the written record as untimely.

FACTUAL HISTORY

On July 17, 2008 appellant, then a 55-year-old parcel post distribution machine operator, filed a traumatic injury claim (Form CA-1) alleging that on July 3, 2008 he sustained a left knee injury as a result of pushing/pulling a mail container while in the performance of duty. He did not stop work at the time of the alleged injury. On August 20, 2008 appellant went back to work in a limited-duty capacity.

Appellant submitted a December 9, 2008 radiological report by Dr. Kevin C. Jones, a Board-certified radiologist, who diagnosed medial meniscus tear, moderate joint effusion and Baker's cyst and mild patellofemoral osteoarthritis. In a December 1, 2008 medical report, Dr. H. Lynn Norman, a Board-certified orthopedic surgeon, diagnosed left knee pain with effusion and chondromalacia. In a December 17, 2008 progress report, he diagnosed a tear of the medial meniscus, left knee and chondromalacia.

By decision dated January 6, 2009, OWCP accepted appellant's claims for tear of medial meniscus of left knee and chondromalacia patellae, left.

On January 15, 2009 appellant underwent left knee arthroscopic surgery.

In a May 27, 2009 medical report, Dr. Norman advised appellant to return to regular work with restrictions on deep knee bending.

On May 28, 2009 appellant returned to work in his date-of-injury position.

On June 23, 2009 appellant filed a claim for a schedule award.

By letters dated June 24, 2009, OWCP requested a medical assessment of permanent impairment from Dr. Norman.

In a May 27, 2009 medical report, Dr. Norman opined that appellant still had some soreness in his knee but was functioning well overall and able to do his regular job. He restricted appellant from doing any deep knee bends and noted that he did not anticipate any long-term permanent work restrictions.

On July 29, 2009 a district medical adviser reviewed the medical evidence on file and concluded that it did not establish that appellant had reached maximum medical improvement and therefore a permanent, measurable scheduled impairment could not be calculated.

By letters dated August 3, 2009, OWCP advised appellant of the deficiencies in the evidence needed to support his claim for a schedule award and allotted 30 days to submit additional information, including maximum medical improvement date and percentage of impairment. Appellant did not submit any additional evidence.

By decision dated October 1, 2009, OWCP denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish entitlement to a schedule award.

In a January 7, 2010 medical report and assessment of permanent impairment, Dr. Norman indicated that the date of maximum improvement was September 9, 2009 as it was his last examination of appellant and he had improved as far as expected regarding his condition.

By appeal form postmarked March 16, 2010, appellant requested a review of the written record by OWCP's hearing representative in connection with his claim.

By decision dated March 26, 2010, OWCP denied appellant's request for a review of the written record. It found that his request was untimely because it was not made within 30 days of its October 1, 2009 decision. OWCP further indicated that it had exercised its discretion and further denied appellant's request for the reason that the relevant issue of the case could be addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.³

LEGAL PRECEDENT

Section 8124(b)(1) of FECA provides: "Before review under section 8128(a) of this title [relating to reconsideration], a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on [his] claim before a representative of the Secretary."⁴

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."⁵ 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.⁶ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.⁷ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.⁸

³ The Board notes that, following the issuance of the March 26, 2010 OWCP decision and on appeal, appellant submitted new evidence. However, the Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence, together with a written request for reconsideration to OWCP, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b).

⁴ 5 U.S.C. § 8124(b)(1).

⁵ 20 C.F.R. § 10.615.

⁶ *Id.* at § 10.616(a).

⁷ *G.W.*, Docket No. 10-782 (issued April 23, 2010). *See also Herbert C. Holley*, 33 ECAB 140 (1981).

⁸ *Id.* *See also Rudolph Bermann*, 26 ECAB 354 (1975).

ANALYSIS

Appellant had 30 calendar days from OWCP's October 1, 2009 decision, or until November 2, 2009, to request a review of the written record. Because his request was postmarked March 16, 2010, his request was untimely. Appellant was not entitled to a review of the written record as a matter of right under section 8124(b)(1) of FECA. Exercising its discretion to grant a review of the written record, OWCP denied his request on the grounds that he could equally well address any issues in his case by requesting reconsideration. Because reconsideration exists as an alternative appeal right to address the issues raised by OWCP's October 1, 2009 decision, the Board finds that it did not abuse its discretion in denying appellant's untimely request for a review of the written record.⁹

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a review of the written record.

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 16, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁹ *Gerard F. Workinger*, 56 ECAB 259 (2005).