

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

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**F.H., Appellant**

**and**

**DEPARTMENT OF THE ARMY, ENGINEERS  
& HOUSING ADMINISTRATION SERVICES  
BRANCH, Fort Lewis, WA, Employer**

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**Docket No. 13-356  
Issued: April 26, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 3, 2012 appellant filed a timely appeal from a November 8, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying a hearing.<sup>1</sup> As the most recent merit decision of OWCP was issued on April 18, 2012, more than 180 days from the date of appeal and pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has no jurisdiction over the merits of the claim.<sup>3</sup>

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<sup>1</sup> On appeal, appellant submitted new medical evidence. The Board does not have jurisdiction over the merits of the case on the present appeal. Therefore, the Board is addressing only the November 8, 2012 decision denying appellant's request for a hearing, but not the April 18, 2012 decision terminating his medical and wage-loss compensation benefits. Also, the Board may not consider new evidence from the first time on appeal that was not before OWCP at the time it issued the final decision in the case.<sup>1</sup>

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

## ISSUE

The issue is whether OWCP properly denied a request for an oral hearing.

## FACTUAL HISTORY

OWCP accepted that on September 1, 1987 appellant, then a 56-year-old warehouse worker, sustained an acute low back strain when lifting a calculator. He underwent a right L4-5 hemilaminectomy on February 9, 1988, authorized by OWCP, who later expanded the claim to accept a herniated nucleus pulposus at L4-5, degenerative disc disease at L4-5 and a right foot drop.<sup>4</sup> Under File No. xxxxxx120, OWCP previously accepted an April 3, 1984 low back strain, and an October 31, 1986 right trapezius strain under File No. xxxxxx220. Appellant stopped work on January 3, 1988 and did not return. He received compensation on the daily and periodic rolls.<sup>5</sup>

Appellant submitted reports from 1992 onward from Dr. W. Brandt Bede, an attending Board-certified orthopedic surgeon, noting chronic weakness and radiculopathy of both lower extremities attributable to the accepted L4-5 herniated disc, degenerative joint disease and failed back syndrome. OWCP periodically referred him for second opinion examinations to assess the nature and extent of the accepted conditions.

In a December 12, 2001 report, Dr. Bede noted that appellant's right foot drop was so severe that he could no longer walk. He opined that appellant's polyneuropathy of both lower extremities was not related to the accepted occupational injuries. OWCP obtained a second opinion on March 12, 2002 from Dr. Richard E. Marks, a Board-certified neurosurgeon, who opined that appellant's lower extremity polyneuropathy and left foot drop were not occupationally related. Dr. Bede submitted periodic reports from 2002 through 2008 diagnosing L4-5 degenerative joint disease, L5 radiculopathy, peripheral neuropathy in both lower extremities.

OWCP found a conflict of medical opinion between Dr. Marks, for OWCP and Dr. Bede, for appellant, regarding the nature and extent of appellant's work-related condition. To resolve this conflict, it selected Dr. Aleksandar Curcin, a Board-certified orthopedic surgeon, who submitted a February 20, 2012 report attributing appellant's current condition to nonoccupational polyneuropathy and cervical spine conditions.

By notice dated March 1, 2012, OWCP advised appellant that it proposed to terminate his wage-loss and medical compensation benefits on the grounds that the accepted injuries had ceased without residuals, based on Dr. Curcin's opinion as impartial medical examiner. In a March 8, 2012 letter, appellant expressed his general disagreement with Dr. Curcin's opinion.

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<sup>4</sup> By February 5, 2003 decision, OWCP denied appellant's claim for a left foot drop.

<sup>5</sup> OWCP undertook a vocational rehabilitation effort in 1989 and 1990. Appellant participated in a training program but was not reemployed.

By decision dated April 18, 2012, OWCP terminated appellant's medical and wage-loss compensation effective April 19, 2012 on the grounds that the accepted injuries had ceased without residuals.

In a letter postmarked September 4, 2012, appellant requested an oral hearing. He enclosed an August 17, 2012 letter from a home aide, who noted that appellant required assistance with all activities of daily living. Appellant also provided an August 6, 2012 letter from an individual who performed his yard work and housework.

Appellant also submitted new medical evidence. In a May 4, 2012 report, Dr. Bede found that appellant was permanently and totally disabled for work due to chronic distal motor and sensory neuropathy and weakness of both lower extremities. Appellant was unable to dorsiflex his feet. In an April 25, 2012 report, Dr. Kenneth H. Shibata, an attending Board-certified internist, stated that he disagreed with Dr. Curcin's February 20, 2012 report. He opined that the accepted April 3, 1984, October 31, 1986 and September 11, 1987 injuries, coupled with the aftereffects of cervical and lumbar decompression surgeries necessitated by those injuries, resulted in permanent and total disability for work. Appellant had permanent bilateral leg weakness with an unsteady, hazardous gait.

By decision dated November 8, 2012, OWCP denied appellant's request for a hearing on the grounds that it was not timely filed within 30 days of the April 18, 2012 decision. It exercised its discretion by performing a limited review of the evidence and further denied his request as the issue in the case could be addressed equally well pursuant to a valid request for reconsideration.

### **LEGAL PRECEDENT**

Section 8124(b)(1) of FECA provides that a claimant not satisfied with a decision of OWCP has a right, upon timely request, to a hearing before an OWCP representative.<sup>6</sup> Section 10.615 of Title 20 of the Code of Federal Regulations provide that a hearing is a review of an adverse decision by an OWCP hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record.<sup>7</sup>

A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark or other carrier's date marking of the request.<sup>8</sup> OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>9</sup> In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.<sup>10</sup>

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<sup>6</sup> 5 U.S.C. § 8124(b)(1). See *A.B.*, 58 ECAB 546 (2007); *Joe Brewer*, 48 ECAB 411 (1997).

<sup>7</sup> 20 C.F.R. § 10.615.

<sup>8</sup> *Id.* at § 10.616(a).

<sup>9</sup> *G.W.*, Docket No. 10-782 (issued April 23, 2010). See also *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>10</sup> *Id.* See also *Rudolph Bermann*, 26 ECAB 354 (1975).

### ANALYSIS

OWCP accepted that appellant sustained an acute lumbar strain, a herniated L4-5 disc, degenerative disc disease at L4-5 and a right foot drop. The accepted injuries necessitated an L4-5 hemilaminectomy. Appellant received compensation on the daily and periodic rolls beginning in 1988. By notice dated March 1, 2012 and finalized on April 18, 2012, OWCP terminated his medical and wage-loss compensation benefits on the grounds that the accepted injuries had ceased without residuals, based on the opinion of Dr. Curcin, a Board-certified orthopedic surgeon and impartial medical examiner. Appellant requested an oral hearing in a letter postmarked September 4, 2012. OWCP denied his request by decision dated November 8, 2012 on the grounds that the request was filed more than 30 days after OWCP's April 18, 2012 decision.

Appellant's letter requesting an oral hearing was postmarked on September 4, 2012, 2012, more than 30 days after issuance of the April 18, 2012 decision. Thus, OWCP properly found that his request for an oral hearing was not timely filed under section 8124(b)(1) of FECA and that he was not entitled to a hearing as a matter of right.

OWCP then exercised its discretion and denied appellant's request for a hearing on the additional grounds that he could address the refusal of suitable work issue in his case equally well by submitting relevant evidence accompanying a valid request for reconsideration. Because reconsideration exists as an alternative review right to address the issues raised by OWCP's April 18, 2012 decision, the Board finds that OWCP did not abuse its discretion in denying appellant's untimely request for an oral hearing.<sup>11</sup>

Appellant may submit this evidence to OWCP accompanying a valid request for reconsideration.

### CONCLUSION

The Board finds that OWCP properly denied appellant's request for a hearing as untimely.

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<sup>11</sup> See *Gerard F. Workinger*, 56 ECAB 259 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 8, 2012 is affirmed.

Issued: April 26, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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