

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

A.N., Appellant)	
)	
and)	Docket No. 18-0843
)	Issued: December 11, 2018
DEPARTMENT OF THE NAVY, MILITARY)	
SEALIFT COMMAND, Virginia Beach, VA,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 13, 2018 appellant filed a timely appeal from a February 27, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated March 7, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the February 27, 2018 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.*

ISSUE

The issue is whether OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative as untimely filed under 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On September 2, 2003 appellant, then a 36-year-old engine utility worker, filed an occupational disease claim (Form CA-2) asserting that she developed back and leg pain from a herniated disc she sustained in the performance of her federal employment duties. She first became aware of her condition on March 23, 2003, but did not realize a connection to her federal employment until June 9, 2003. OWCP accepted the claim for lumbosacral sprain and displaced lumbar intervertebral disc. It authorized L5-S1 lumbar laminectomy surgeries, which were performed on August 28, 2003 and September 8, 2006. OWCP paid appellant wage-loss compensation and medical benefits on the supplemental rolls as of February 8, 2004 and on the periodic rolls as of June 13, 2004.

On March 24, 2010 OWCP issued a notice of proposed reduction of compensation based on appellant's ability to earn wages as a user support analyst/computer support specialist *Dictionary of Occupational Titles* (DOT #SOC # 15-1041, at the rate of \$576.92 per week.

By decision dated May 27, 2010, OWCP finalized its proposed reduction of compensation benefits, finding that the position of user support analyst/computer support specialist was medically and vocationally suitable, reasonably available and therefore representative of her wage-earning capacity.

On January 20, 2016 OWCP issued a notice proposing to modify appellant's loss of wage-earning capacity (LWEC) determination based on medical evidence establishing that she was capable of performing all the duties of her date-of-injury position.

By decision dated March 7, 2016, OWCP modified the May 27, 2010 LWEC determination to zero to reflect that appellant was capable of returning to her date-of-injury position. It explained that the weight of the medical evidence demonstrated that her condition had "materially changed and improved."

On February 6, 2018 OWCP received appellant's January 26, 2018 request for a telephonic hearing before an OWCP hearing representative regarding the March 7, 2016 decision. The request was postmarked January 31, 2018.

By decision dated February 27, 2018, OWCP denied appellant's request for a telephonic hearing, finding that her request was untimely as it was not filed within 30 days of the March 7, 2016 decision. It exercised its discretion and performed a limited, nonmerit review of the evidence following the issuance of the March 7, 2016 decision. OWCP further denied the hearing request, however, as the issue in the case could equally be addressed by requesting reconsideration and submitting new and relevant evidence.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP hearing representative, provides: "Before review under section 8128(a) of this title, 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 or her claim before a representative of the Secretary."³

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. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.⁴ A request for either an oral hearing or a review of the written record must be sent, in writing, within 30 days of the date of the decision for which the hearing is sought.⁵ A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision.⁶

OWCP has discretion to grant or deny a request that is made after the 30-day period for requesting an oral hearing or review of the written record and must properly exercise such discretion.⁷

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for an oral hearing was untimely filed. OWCP's regulations provide that the hearing request must be sent within 30 days of the date of the decision for which a hearing is sought.⁸ As her request was postmarked January 31, 2018, more than 30 days after OWCP's March 7, 2016 decision, it was untimely filed and she was not entitled to an oral hearing as a matter of right.⁹

The Board further finds that OWCP's hearing representative properly exercised her discretion in denying appellant's request for an oral hearing by determining that the issue in the case could be addressed equally well through a request for reconsideration and the submission of new evidence relevant to the issue at hand.¹⁰ The Board has held that the only limitation on OWCP's discretionary authority is reasonableness. An abuse of discretion is generally shown

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. § 10.615.

⁵ *Id.* at § 10.616(a); *W.B.*, Docket No. 18-0878 (issued October 12, 2018); *G.W.*, Docket No. 10-0782 (issued April 23, 2010); *James Smith*, 53 ECAB 188 (2001).

⁶ *See S.M.*, Docket No. 17-1876 (issued January 24, 2018); *R.T.*, Docket No. 08-0408 (issued December 16, 2008).

⁷ 20 C.F.R. § 10.616(b); *see also F.M.*, Docket No. 18-0161 (issued May 18, 2018).

⁸ *See supra* note 6.

⁹ *See J.A.*, Docket No. 17-1744 (issued January 9, 2018).

¹⁰ *See D.P.*, Docket No. 14-0308 (issued April 21, 2014); *D.J.*, Docket No. 12-1332 (issued June 21, 2013).

through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to logic and probable deduction from established facts.¹¹ In this case, the evidence of record does not establish that OWCP abused its discretion in denying appellant's request for an oral hearing. Accordingly, the Board finds that OWCP properly denied her oral hearing request.¹²

On appeal appellant raises arguments relevant to the merits of this claim. The only issue before the Board, however, is whether OWCP properly denied her request for an oral hearing as untimely filed. As the Board lacks jurisdiction to review the underlying merits of appellant's claim, it cannot review her arguments regarding modification of the March 7, 2016 LWEC determination.¹³

CONCLUSION

The Board finds that OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).

¹¹ See *R.G.*, Docket No. 16-0994 (issued September 9, 2016); *Teresa M. Valle*, 57 ECAB 542 (2006).

¹² See *J.O.*, Docket No. 17-0789 (issued May 15, 2018).

¹³ See *G.S.*, Docket No. 18-0388 (issued July 19, 2018).

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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