

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

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**T.L., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Houston, TX, Employer**

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**Docket No. 19-0028  
Issued: April 26, 2019**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On October 3, 2018 appellant filed a timely appeal from an August 3, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days has elapsed from OWCP's last merit decision, dated September 16, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.<sup>3</sup>

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<sup>1</sup> The Board notes appellant's request of a September 16, 2016 OWCP decision. However, no such decision appears within the file as presented. The only decision within the Board's jurisdiction is the August 3, 2018 nonmerit decision.

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

<sup>3</sup> The Board notes that, following the August 3, 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 a review of the written record before an OWCP hearing representative as untimely filed under 5 U.S.C. § 8124(b).

## FACTUAL HISTORY

On August 6, 2016 appellant, then a 29-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she strained her right lower back while attempting to lift a parcel from a parcel hamper while in the performance of duty. The employing establishment indicated that she stopped work on the day of the injury.

Appellant submitted an August 6, 2016 signed statement explaining that when she attempted to lift a big box marked "fragile" she felt a sharp pain in her back on the right side. She indicated that, when she subsequently bent down to pick up smaller packages, she felt a lot of pain.

Discharge notes dated August 6, 2016 from East Houston Regional Medical Center reflect that appellant was treated by Dustin Miles, a physician assistant, who diagnosed muscle strain and back pain and injury. Mr. Miles prescribed pain medication and a muscle relaxant, and issued instructions for home care of the injury. A duty status report (Form CA-17) signed by him noted a diagnosis of strain and advised that appellant could return to work without restrictions on August 8, 2016.

An August 8, 2016 duty status report (Form CA-17) signed by Dr. Carmen P. Wong, a Board-certified family practitioner, indicated that appellant was cleared to return to work on August 11, 2016 without restrictions. The report contains her clinical finding of right parathoracic chest wall pain and her diagnosis of chest pain.

Appellant returned to full-duty work on August 11, 2016.

In an August 16, 2016 development letter, OWCP advised appellant of the deficiencies of her claim and requested that she submit additional factual information and medical evidence in support of her claim along with responses to an attached questionnaire. It afforded her 30 days to submit the requested information.

By decision dated September 16, 2016, OWCP denied appellant's claim. It found that, although she had established that the August 6, 2016 employment incident occurred as alleged, the medical evidence of record was insufficient to establish a diagnosed condition causally related to the accepted incident.

On October 24, 2016 OWCP received August 6, 2016 emergency department records from Bayshore Medical Center, reflecting treatment for "[right] side back pain onset this AM when lifted heavy object at work." Dr. Marymichael Smith Werick, Board-certified in emergency medicine, examined appellant and diagnosed thoracic myofascial strain.

On June 11, 2018 OWCP received a May 31, 2018 duty status report (Form CA-17) signed by Dr. Wong, which diagnosed lower back pain with right-sided radiculopathy and L5-S1 disc herniation.

By appeal request form dated July 14, 2018 and postmarked July 19, 2018, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated August 3, 2018, OWCP's hearing representative determined that appellant was not entitled to a review of the written record as a matter of right because her request was untimely filed. She also denied a discretionary hearing, finding that the issue could equally well be addressed by appellant requesting reconsideration and providing new evidence or argument to establish that appellant sustained an injury in the performance of duty.

### **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 [or her] claim before a representative of the Secretary."<sup>4</sup>

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."<sup>5</sup> 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 the hearing is sought.<sup>6</sup> However, OWCP has discretion to grant or deny a request that is made after this 30-day period.<sup>7</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>8</sup>

### **ANALYSIS**

The Board finds that OWCP properly denied appellant's July 19, 2018 request for a review of the written record before an OWCP hearing representative as untimely filed under 5 U.S.C. § 8124(b).

Appellant had 30 days from OWCP's September 16, 2016 merit decision to request a review of the written record before OWCP's Branch of Hearings and Review. She requested a review of the written record by request form dated July 14, 2018 and postmarked July 19, 2018. As the postmark date was more than 30 days after OWCP's September 16, 2016 decision, appellant

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<sup>4</sup> 5 U.S.C. § 8124(b)(1).

<sup>5</sup> 20 C.F.R. § 10.615.

<sup>6</sup> *Id.* at § 10.616(a).

<sup>7</sup> *G.W.*, Docket No. 10-0782 (issued April 23, 2010); *James Smith*, 53 ECAB 188, 191-92 (2001).

<sup>8</sup> *James Smith*, *id.*

was not entitled to a review of the written record as a matter of right.<sup>9</sup> Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.<sup>10</sup>

The Board finds that OWCP properly exercised its discretion in denying appellant's request for a review of the written record by determining that the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence relevant to the issue of fact of injury.<sup>11</sup> The Board has held that the only limitation on OWCP's authority is reasonableness, and 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 deduction from established facts.<sup>12</sup> The Board finds that the evidence of record does not indicate that OWCP abused its discretion in its denial of appellant's untimely request for a review of the written record. Accordingly, the Board finds that OWCP properly denied her July 19, 2018 request for a review of the written record as untimely filed under 5 U.S.C. § 8124(b).<sup>13</sup>

### CONCLUSION

The Board finds that OWCP did not abuse its discretion when it denied appellant's July 19, 2018 request for a review of the written record before an OWCP hearing representative as untimely filed under 5 U.S.C. § 8124(b).

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<sup>9</sup> Under OWCP's regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4a (October 2011).

<sup>10</sup> 5 U.S.C. § 8124(b)(1); *see R.H.*, Docket No. 18-1602 (issued February 22, 2019); *William F. Osborne*, 46 ECAB 198 (1994).

<sup>11</sup> *R.H.*, *id.*; *M.H.*, Docket No. 15-0774 (issued June 19, 2015).

<sup>12</sup> *R.H.*, *id.*; (citing *Daniel J. Perea*, 42 ECAB 214, 221 (1990)).

<sup>13</sup> *Id.*; *R.P.*, Docket No. 16-0554 (issued May 17, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 3, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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