

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

P.G., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS, VA
GREATER LOS ANGELES HEALTH CARE
SYSTEM, Los Angeles, CA, Employer

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**Docket No. 24-0447
Issued: August 12, 2024**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 25, 2024 appellant filed a timely appeal from a November 24, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed from OWCP's last merit decision,² dated December 21, 2020, to the filing of this

¹ The Board notes that following the March 25, 2024 appeal, OWCP issued a June 11, 2024 decision addressing appellant's claimed recurrence of disability commencing March 1, 2024. As this decision post-dates the appeal currently before the Board, the Board will not address the June 11, 2024 merit decision in this appeal. 20 C.F.R. § 501.3; *see D.K.*, Docket No. 22-0111 (issued February 8, 2023); *E.R.*, Docket No. 20-1110 (issued December 23, 2020).

² Appellant submitted a timely request for oral argument before the Board, explaining his disagreement with OWCP's decision. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). The Board, in exercising its discretion, denies appellant's request for oral argument as the Board does not have his case can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether 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).

FACTUAL HISTORY

On July 5, 1977 appellant, then a 27-year-old file clerk, filed a traumatic injury claim (Form CA-1) alleging that on June 28, 1977 he injured his back pulling x-ray films while in the performance of duty. OWCP accepted his claim for lumbosacral strain, temporary aggravation of the L4-5 disc herniation, and anorexia secondary to methadone toxicity.⁵

By decision dated May 22, 1984, OWCP reduced appellant's wage-loss compensation effective that date, to reflect his ability to earn wages in the constructed position of general clerk. It found that he was no longer totally disabled but could earn wages at the rate of \$232.02 a week. OWCP applied the principles set forth in the decision of *Albert C. Shadrick*⁶ to calculate appellant's loss of wage-earning capacity (LWEC).

By decision dated July 29, 1988, OWCP found that appellant had not met his burden of proof to modify the May 22, 1984 LWEC determination with exception of the periods of total disability from April 30 through May 7, 1984 and February 2, through 16, 1987.

By decision dated October 27, 1993, OWCP granted appellant a schedule award for 27 percent permanent impairment of the right lower extremity. The period of that award ran from October 17, 1993 through April 14, 1995.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the November 24, 2023 decision, OWCP received additional evidence. 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.*

⁵ OWCP assigned this claim OWCP File No. xxxxxx443. On August 3, 2010 appellant filed a consequential injury claim alleging that on January 1, 1998 he developed opiate toxicity as a result of treatment for his previously accepted employment injuries. OWCP assigned this claim OWCP File No. xxxxxx226. By decisions dated September 21, 2010 and December 23, 2010, OWCP denied this claim finding that methadone toxicity was accepted as a medical condition under File No. xxxxxx443 and that an appropriate decision would be issued in that claim. On August 13, 2023 appellant filed a traumatic injury claim alleging that on August 1, 2016 he was prescribed medication for chronic pain which resulted in a severe allergic reaction involving his entire body while in the performance of duty. By decision dated October 27, 2023, OWCP denied his claim finding that it was untimely filed as the date of his injury was August 1, 2016, but he did not file the claim until August 13, 2023. Appellant requested reconsideration on November 6, 2023 and submitted additional evidence. By decision dated November 20, 2023, OWCP denied his reconsideration request as he had not raised an argument or submitted evidence sufficient to warrant reopening the case for further merit review under 5 U.S.C. § 8128(a). Appellant's claims have not been administratively combined by OWCP.

⁶ 5 ECAB 376 (1953).

By decision dated November 13, 1997, OWCP determined that appellant's actual earnings as an employee development/personnel clerk working six hours a day effective January 5, 1997 fairly and reasonably represented his wage-earning capacity. It calculated his LWEC by applying the principles of *Albert C. Shadrick*.⁷ Appellant elected to receive benefits from the Office of Personnel Management.

By decision dated May 8, 2003, OWCP denied appellant's claim for an additional schedule award.

On December 6, 2006 OWCP expanded the acceptance of appellant's claim to include left wrist scaphoid fracture.

By decision dated December 11, 2015, OWCP granted appellant a schedule award for an additional three percent permanent impairment of the left upper extremity. The period of the award ran for 9.37 weeks from September 1 through November 5, 2007.

By decision dated December 21, 2020, OWCP granted appellant a schedule award for an additional eight percent permanent impairment of the left upper extremity. The period of the award was for 24.96 weeks from September 24, 2020 through March 17, 2021.

On January 18, 2023 appellant requested reconsideration of the November 13, 1997 LWEC decision.

By decision dated January 24, 2023, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On November 5, 2023 appellant requested reconsideration of an October 27, 2023 decision.⁸ In a November 6, 2023 response, OWCP related that it was unclear which decision or issues he was requesting reconsideration and informed him that no further action would be taken.

In a memorandum of telephone call (Form CA-110) dated November 9, 2023, OWCP related that appellant listed a series of claims for compensation (Form CA-7) covering intermittent periods of disability from October 30, 1996 through August 29, 1997.

In a November 9, 2023 letter, OWCP addressed appellant's November 9, 2023 telephone call requesting wage-loss compensation for the periods January 14 through 17, 1997; January 22 through 24, 1997, and August 25 through 29, 1997. It included the July 28, 1988 decision denying these claimed periods of disability as the May 22, 1984 LWEC determination was in place. OWCP noted that appellant received wage-loss compensation for total disability from April 30 through May 7, 1984 and from February 2 through 15, 1987.

On November 17, 2023 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

⁷ *Id.*

⁸ The record currently before the Board does not include a decision dated October 27, 2023.

By decision dated November 24, 2023, OWCP denied appellant's request for an oral hearing, finding that it was untimely filed. It further exercised its discretion and determined that the issue in the case could equally well be addressed by a request for reconsideration before OWCP, along with the submission of new evidence.

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.”⁹ 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.¹⁰ 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.¹¹ 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.¹²

ANALYSIS

The Board finds that OWCP properly found that appellant's request for an oral hearing before an OWCP hearing representative was untimely filed, pursuant to 5 U.S.C. § 8124.

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 a review is sought. Because appellant's request for an oral hearing was submitted on November 17, 2023 it postdated OWCP's 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.¹³

OWCP, however, has the discretionary authority to grant the request, and it must exercise such discretion.¹⁴ 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.¹⁵ The Board finds that the evidence of record

⁹ *Supra* note 1 at § 8124(b)(1).

¹⁰ 20 C.F.R. §§ 10.616, 10.617.

¹¹ *Id.* at § 10.616(a).

¹² *W.H.*, Docket No. 20-0562 (issued August 6, 2020); *P.C.*, Docket No. 19-1003 (issued December 4, 2019); *M.G.*, Docket No. 17-1831 (issued February 6, 2018); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

¹³ *See K.B.*, Docket No. 21-1038 (issued February 28, 2022); *M.F.*, Docket No. 21-0878 (issued January 6, 2022); *see also P.C.*, Docket No. 19-1003 (issued December 4, 2019).

¹⁴ *Id.*

¹⁵ *Id.*; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

indicates that OWCP did not abuse its discretion in connection with its denial of appellant's request for an oral hearing.

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

CONCLUSION

The Board finds that OWCP properly found that appellant's request for an oral hearing before an OWCP hearing representative was untimely filed, pursuant to 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the November 24, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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