

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

| | | |
|---------------------------------|---|-----------------------------|
| C.B., Appellant |) | |
| |) | |
| and |) | |
| |) | |
| DEPARTMENT OF VETERANS AFFAIRS, |) | Docket No. 23-1035 |
| LIEUTENANT COLONEL CHARLES S. |) | Issued: June 5, 2024 |
| KETTLES VA MEDICAL CENTER, |) | |
| Ann Arbor, MI, Employer |) | |
| |) | |

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 24, 2023 appellant filed a timely appeal from a March 6, 2023 merit decision and a May 18, 2023 nonmerit decision of the Office of Workers’ Compensation Programs (OWCP). Pursuant to the Federal Employees’ Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the May 18, 2023 decision, appellant submitted additional evidence to OWCP. 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.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish entitlement to continuation of pay (COP); and (2) whether OWCP properly denied appellant's request for a review of the written record by an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On March 2, 2023 appellant, then a 57-year-old medical clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 30, 2023 she contracted COVID-19 with double pneumonia through exposure from two coworkers while in the performance of duty. On the reverse side of the claim form, her supervisor acknowledged that she was injured in the performance of duty. Appellant stopped work on January 30, 2023 and returned to work on March 1, 2023.

By decision dated March 6, 2023, OWCP denied appellant's claim for COP, finding that she had not reported her injury on an OWCP-approved form within 30 days of the alleged January 30, 2023 injury.

In support of her claim, appellant submitted a polymerase chain reaction (PCR) test result, collected on January 31, 2023, which indicated that she tested positive for COVID-19.

By decision dated April 20, 2023, OWCP accepted appellant's claim for COVID-19.

On May 12, 2023 appellant requested a review of the written record of the March 6, 2023 COP denial by a representative of OWCP's Branch of Hearings and Review.

By decision dated May 18, 2023, OWCP denied appellant's request for a review of the written record, finding that her request was not made within 30 days of the March 6, 2023 OWCP decision as it was submitted on May 12, 2023. It further exercised discretion and determined that the issue in this case could be equally-well addressed by a request for reconsideration before OWCP along with the submission of new evidence.

LEGAL PRECEDENT -- ISSUE 1

Section 8118(a) of FECA authorizes COP, not to exceed 45 days, to an employee who has filed a claim for a period of wage loss due to a traumatic injury with his or her immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of

this title.³ This latter section provides that written notice of injury shall be given within 30 days.⁴ The context of section 8122 makes clear that this means within 30 days of the injury.⁵

OWCP's regulations provide, in pertinent part, that to be eligible for COP, an employee must: (1) have a traumatic injury which is job related and the cause of the disability and/or the cause of lost time due to the need for medical examination and treatment; (2) file Form CA-1 within 30 days of the date of the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish entitlement to COP.

The record reflects that appellant filed written notice of her traumatic injury on a Form CA-1 on March 2, 2023, alleging that on January 30, 2023 she contracted COVID-19 while in the performance of duty. She stopped work on January 30, 2023. As previously noted, OWCP's regulations provide that a Form CA-1 must be filed within 30 days of the date of the injury.⁷ As appellant filed her Form CA-1 on March 2, 2023, more than 30 days after the January 30, 2023 date of injury, the Board finds that she has not met her burden of proof.⁸ Accordingly, appellant has not met her burden of proof to establish entitlement to COP.

LEGAL PRECEDENT -- ISSUE 2

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

³ *Id.* at § 8118(a).

⁴ *Id.* at § 8122(a)(2).

⁵ *E.M.*, Docket No. 20-0837 (issued January 27, 2021); *J.S.*, Docket No. 18-1086 (issued January 17, 2019); *Robert M. Kimzey*, 40 ECAB 762-64 (1989); *Myra Lenburg*, 36 ECAB 487, 489 (1985).

⁶ 20 C.F.R. § 10.205(a)(1-3); *see also T.S.*, Docket No. 19-1228 (issued December 9, 2019); *J.M.*, Docket No. 09-1563 (issued February 26, 2010); *Dodge Osborne*, 44 ECAB 849 (1993); *William E. Ostertag*, 33 ECAB 1925 (1982).

⁷ *Id.*

⁸ *See D.M.*, Docket No. 23-0108 (issued July 11, 2023).

⁹ 5 U.S.C. § 8124(b)(1).

¹⁰ 20 C.F.R. §§ 10.616, 10.617.

determined by postmark or other carrier's date of 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 -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for a review of the written record before an OWCP hearing representative as 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 requested a review of the written record on May 12, 2023, more than 30 days after OWCP's March 6, 2023 decision, the Board finds that it was untimely. Appellant was, therefore, not entitled to a review of the written record as a matter of right.¹³

The Board further finds that OWCP, in its May 18, 2023 decision, properly exercised its discretionary authority, explaining that it had considered the matter and denied appellant's request for a review of the written record as her claim could be equally well addressed through a reconsideration request.

OWCP 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 indicates that OWCP did not abuse its discretion in connection with its denial of appellant's request for a review of the written record.¹⁶ Accordingly, the Board finds that OWCP properly denied appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

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); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

¹³ *See H.M.*, Docket No. 22-0053 (issued August 12, 2022); *see also P.C.*, Docket No. 19-1003 (issued December 4, 2019).

¹⁴ *See M.F.*, Docket No. 21-0878 (issued January 6, 2022).

¹⁵ *See K.B.*, Docket No. 21-1038 (issued February 28, 2022); *B.W.*, Docket No. 16-1860 (issued May 4, 2017); *Samuel R. Johnson*, 51 ECAB 612 (2000).

¹⁶ *See E.H.*, Docket No. 23-0503 (issued July 20, 2023).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish entitlement to COP. The Board also finds that OWCP properly denied appellant's request for a review of the written record before an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the March 6 and May 18, 2023 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 5, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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