

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

K.P., Appellant)	
)	
and)	Docket No. 23-1177
)	Issued: June 17, 2024
DEPARTMENT OF THE ARMY, MEDICAL)	
DEPARTMENT ACTIVITY, EVANS ARMY)	
COMMUNITY HOSPITAL, Fort Carson, CO,)	
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 18, 2023 appellant filed a timely appeal from a July 19, 2023 merit decision and a September 12, 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.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b); and (2) whether appellant has met her burden of proof to establish a recurrence of the need for medical treatment, commencing May 17, 2023, causally related to her accepted June 1, 2018 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 5, 2018 appellant, then a 44-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on June 1, 2018 she sustained a right foot sprain when she fell down a stair while in the performance of duty. She stopped work on June 1, 2018 and returned to work on June 4, 2018. OWCP accepted the claim for right foot sprain.

On April 8, 2019 Dr. John Shank, a Board-certified orthopedic surgeon, performed a right Lapidus procedure, gastrocnemius recession, second hammertoe repair with proximal interphalangeal fusion, second metatarsophalangeal (MTP) synovectomy, proximal incision, second digit MTP capsulotomy, plantaris tenotomy, and intraoperative fluoroscopic imaging of the right foot. Appellant stopped work at the time of this surgery and OWCP paid her wage-loss compensation on the supplemental rolls, effective April 8, 2019.² On December 24, 2019 Dr. Shank performed deep hardware removal of the right foot and intraoperative fluoroscopic imaging of the right foot. He diagnosed retained symptomatic hardware, right Lapidus procedure, and forefoot reconstruction. Both the April 8 and December 24, 2019 procedures were authorized by OWCP.

By decision dated August 27, 2020, OWCP expanded the acceptance of appellant's claim to include right gastrocnemius equinus, right second digit hammertoe, right second digit synovitis, and right foot metatarsalgia.

On August 12, 2021 Dr. Shank treated appellant for pain of the right first and second MTP joints laterally and plantar fibromatosis. He diagnosed right first MTP injury-related pain secondary to metatarsalgia and administered an intra-articular injection. Dr. Shank opined that treatment of appellant's right foot condition should be covered by workers' compensation.

On May 17, 2023 appellant filed a notice of recurrence (Form CA-2a) alleging a recurrence, on the same date, of the need for medical treatment causally related to the accepted June 1, 2018 employment injury. She noted that she continued to experience symptoms related to her accepted right foot conditions since the original injury and sought treatment from Dr. Shank. Appellant indicated that, after returning to work following the original injury, her hours were limited until August 2019.

On May 18, 2023 OWCP expanded the acceptance of appellant's claim to include right foot/ankle continuity of bone disorders.

In a development letter dated May 18, 2023, OWCP informed appellant of the deficiencies of her recurrence claim. It advised her of the type of additional factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

² OWCP paid appellant wage-loss compensation through March 20, 2020, and then, by a November 4, 2020 decision, paid her schedule award compensation for two percent permanent impairment of the right lower extremity from March 27 through May 6, 2020.

In a June 21, 2013 response to OWCP's development letter, appellant denied any additional injuries and indicated that she had consistent chronic right foot pain daily since the June 1, 2018 employment injury. She reported difficulty wearing closed toe shoes and experiencing pain with any activity including walking, exercising, hiking, and running. Appellant noted that she had no change in her work activities. She advised that she had undergone intra-articular injections, but they did not provide significant long-term relief.

On June 30, 2023 OWCP received a June 22, 2023 report from Miyoko Green, a physician assistant, who treated appellant for chronic right foot pain. Ms. Green noted physical examination findings of a long second digit compared to the remaining digits and tenderness to palpation about the second MTP joint and distal tip of the second digit and first MTP joint at the sesamoid bone. She diagnosed right foot metatarsalgia and possible Freiberg's infarction secondary to an employment injury.

On June 30, 2023 OWCP also received a copy of the previously submitted August 12, 2021 report of Dr. Shank.

By decision dated July 19, 2023, OWCP denied appellant's recurrence claim, finding that she had not established that she required additional medical treatment due to a worsening of the accepted work-related conditions, without intervening cause.

OWCP received additional evidence, including a July 10, 2023 magnetic resonance imaging (MRI) scan of the right foot, July 14, 2023 report of Dr. Shank, and an August 4, 2023 report of Dr. Lisa L. Baron, a Board-certified family practitioner.

By an appeal request form dated August 17, 2023, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.³

By decision dated September 12, 2023, OWCP denied appellant's request for a review of the written record, finding that it was untimely filed. It further exercised its discretion and determined that the issue in this case could equally well be addressed by requesting reconsideration before OWCP, along with the submission of new evidence.

LEGAL PRECEDENT -- ISSUE 1

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."⁴

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

³ There was no envelope containing a postmark found in the case record.

⁴ 5 U.S.C. § 8124(b)(1).

between two formats, an oral hearing or a review of the written record.”⁵ 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 a hearing is sought.⁶ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.⁷ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly denied appellant’s request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124.

OWCP’s regulations provide that a request for review of the written record must be made within 30 days of the date of the decision for which a review is sought.⁹

Under OWCP’s regulations and procedures, the timeliness of a request for a review of the written record is determined on the basis of the postmark of the envelope containing the request. If the postmark is not legible, the request will be deemed timely unless OWCP has kept evidence of date of delivery on the record reflecting that the request is untimely.¹⁰ Otherwise, the date of the letter itself should be used.¹¹

OWCP found that appellant’s request for a review of the written record was untimely filed as it was filed more than 30 days after the issuance of OWCP’s July 19, 2023 merit decision. The Board finds, however, that OWCP did not retain any postmark or other marking evidencing the date of delivery. Appellant’s submission containing the request for a review of the written record was dated August 17, 2023. As this was within 30 days of the July 19, 2023 decision, the request was, therefore, timely filed. Accordingly, the Board finds that OWCP improperly denied appellant’s request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).¹²

⁵ 20 C.F.R. § 10.615.

⁶ *Id.* at § 10.616.

⁷ *G.W.*, Docket No. 10-0782 (issued April 23, 2010).

⁸ *Id.*

⁹ 20 C.F.R. § 10.615.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4a (September 2020). *See T.B.*, Docket No. 20-0158 (issued March 18, 2022).

¹¹ *See M.J.*, Docket No. 21-0889 (issued May 18, 2022); *K.B.*, Docket No. 21-1038 (issued February 28, 2022); *see J.H.*, Docket No. 06-1565 (issued February 20, 2007); *James B. Moses*, 52 ECAB 465 (2001) *citing William J. Kapfhammer*, 42 ECAB 271 (1990); *see also Douglas McLean*, 42 ECAB 759 (1991).

¹² In light of the Board’s disposition of Issue 1, Issue 2 is rendered moot.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

ORDER

IT IS HEREBY ORDERED THAT the September 12, 2023 decision of the Office of Workers' Compensation Programs is reversed. The July 19, 2023 decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: June 17, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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