



## ISSUE

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

## FACTUAL HISTORY

On February 12, 2009 appellant, then a 44-year-old mail processor clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 15, 2009 she strained her right elbow when she was lifting a tray of mail, it began to fall, and she tried to catch it. On March 12, 2009 OWCP accepted the claim for right elbow and forearm sprain. It subsequently expanded acceptance of the claim to include right medial epicondylitis, and lesion of the right ulnar nerve. OWCP paid appellant intermittent wage-loss benefits on the supplemental rolls, effective March 16, 2009, and on the periodic rolls, effective November 20, 2011.

OWCP referred appellant for vocational rehabilitation on August 25, 2016.

On May 17, 2018 appellant underwent a functional capacity evaluation (FCE). The evaluator determined that appellant provided inconsistent performance and an unacceptable effort. The evaluator explained that appellant failed the majority of total objective effort criteria and a physical demand level could not be determined. In a May 31, 2018 rehabilitation action report, the vocational rehabilitation counselor noted that this was the second time appellant failed the FCE, and questioned the probability of success with vocational rehabilitation.

By letter dated May 24, 2018, OWCP notified appellant of the penalties under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failing to cooperate with vocational rehabilitation without good cause. It noted that, if appellant did not comply with the instructions contained in the letter within 30 days, the rehabilitation effort would be terminated and action would be taken to reduce her compensation under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519. OWCP's letter was sent to appellant's address of record. No response was received.

By decision dated June 29, 2018, OWCP reduced appellant's compensation to zero, effective that date, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, due to failure to cooperate with vocational rehabilitation without good cause.

On August 8, 2018 OWCP received appellant's request for an oral hearing. The request was postmarked August 2, 2018.

By decision dated September 18, 2018, OWCP's hearing representative denied appellant's request for an oral hearing, finding that the request was untimely filed. The hearing representative informed appellant that the issues had been considered by OWCP in its June 29, 2018 decision and could be further addressed by requesting reconsideration and submitting evidence not previously considered.

## LEGAL PRECEDENT

Section 8124 FECA provides that a claimant is entitled to a hearing before an OWCP representative when a request is made within 30 days after issuance of an OWCP final decision.<sup>3</sup>

A hearing is a review by an OWCP hearing representative of a final adverse decision issued by an OWCP district office.<sup>4</sup> 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.<sup>5</sup> 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. 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.<sup>6</sup>

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.<sup>7</sup>

## ANALYSIS

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).

Appellant had 30 days, following OWCP's June 29, 2018 merit decision, to request an oral hearing before a representative of OWCP's Branch of Hearings and Review. As her request for an oral hearing was postmarked August 2, 2018, more than 30 days after OWCP's June 29, 2018 decision, it was untimely filed. Appellant is, therefore, not entitled to an oral hearing as a matter of right.<sup>8</sup> Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.<sup>9</sup>

OWCP also has the discretionary power to grant an oral hearing or review of the written record even if the claimant is not entitled to a review as a matter of right. The Board finds that OWCP, in its September 18, 2018 decision, properly exercised its discretion. It noted that it had

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<sup>3</sup> 5 U.S.C. § 8124(b)(1).

<sup>4</sup> 20 C.F.R. § 10.616.

<sup>5</sup> *Id.* at § 10.615.

<sup>6</sup> *See C.F.*, Docket No. 20-0297 (issued October 19, 2020); *K.L.*, Docket No. 19-0480 (issued August 23, 2019).

<sup>7</sup> *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).

<sup>8</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 2.1601.4(a) (October 2011); *see also G.S.*, Docket No. 18-0388 (issued July 19, 2018).

<sup>9</sup> 5 U.S.C. § 8124(b)(1); *see M.K.*, Docket No. 19-0428 (issued July 15, 2019); *R.H.*, Docket No. 18-1602 (issued February 22, 2019); *William F. Osborne*, 46 ECAB 198 (1994).

considered the matter and the issue could be equally well addressed through a reconsideration request and the submission of evidence to establish that appellant had good cause not to participate in the vocational rehabilitation effort. The Board has held that, as the only limitation on OWCP's authority is reasonableness, 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>10</sup> The Board finds that the evidence of record does not indicate that OWCP abused 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.

### **CONCLUSION**

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

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 18, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 22, 2021  
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

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<sup>10</sup> See *T.G.*, Docket No. 19-0904 (issued November 25, 2019); *Daniel J. Perea*, 42 ECAB 214 (1990).