

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

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<b>J.E., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 14-1185</b>
	)	<b>Issued: September 10, 2014</b>
<b>DEPARTMENT OF AGRICULTURE, FOOD SAFETY &amp; INSPECTION SERVICE, Pittsburg, CA, Employer</b>	)	
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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 28, 2014 appellant timely appealed the April 14, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) which denied his request for a hearing. The latest merit decision was issued on April 19, 2013, which was more than 180 days prior to the filing of the appeal. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board's jurisdiction extends only to the April 14, 2014 nonmerit decision.

**ISSUE**

The issue is whether the Branch of Hearings and Review properly denied appellant's March 13, 2014 hearing request.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193 (2006).

## **FACTUAL HISTORY**

Appellant, a 61-year-old consumer safety inspector, previously filed a traumatic injury claim (Form CA-1) for an alleged August 21, 2012 employment injury (xxxxxx7677). He claimed to have slipped and fallen on a wet floor, twisting both knees and injuring his lower back. OWCP denied appellant's August 21, 2012 traumatic injury claim by decision dated November 2, 2012.<sup>2</sup> Appellant then filed an occupational disease claim (Form CA-2) for injury to his lower back and both knees. He stated that he sustained multiple injuries during his career, but never filed workers' compensation claims. The November 27, 2012 CA-2 form indicated that his current condition was the result of "cumulative injuries" from 1995 to the present. Appellant identified August 21, 2012 as the date he first realized his claimed lower back and bilateral knee conditions were employment related.

Appellant had a right total knee arthroplasty in April 2012 and was a candidate for left knee replacement. In a November 16, 2012 report, Dr. Gary R. Wisner diagnosed bilateral knee sprains and severe left knee osteoarthritis.<sup>3</sup> He also diagnosed thoracic, lumbar and sacral myofascial pain syndrome, with bilateral sciatica, left greater than right. Dr. Wisner stated that appellant's knee and back conditions were "directly related to repetitive cumulative movements only." He further stated that appellant's "work [was] solely and totally the reason for [his] injuries to [bilateral] knee and spine."

The employing establishment advised that appellant was approved for disability retirement effective December 29, 2012.

In a February 15, 2013 decision, OWCP denied the claim. It found that appellant did not establish that he was injured in the performance of duty.

Appellant timely requested reconsideration.

By decision dated April 19, 2013, OWCP denied appellant's claim, finding that the medical evidence did not establish a causal connection between the accepted work factors and his knee or back conditions.

On May 7, 2013 appellant underwent a left total knee arthroplasty.

On March 13, 2014 appellant requested an oral hearing before a hearing representative.

In a decision dated April 14, 2014, the Branch of Hearings and Review denied appellant's hearing request. The hearing representative noted that appellant had previously requested reconsideration, and in response OWCP issued an April 19, 2013 merit decision. She determined that because appellant previously requested reconsideration, he was not entitled to a

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<sup>2</sup> Appellant had been off work since February 20, 2012, and allegedly slipped and fell the same day he returned from a six-month absence. His supervisor, Dr. Adil Chaudhry, challenged the alleged August 21, 2012 slip and fall. Appellant stopped work on September 4, 2012.

<sup>3</sup> Dr. Wisner, a Board-certified orthopedic surgeon, performed appellant's April 24, 2012 right total knee arthroplasty.

hearing as a matter of right. Further, the hearing representative denied the discretionary hearing noting that the matter could be equally well addressed by filing a request for reconsideration with OWCP and submitting new evidence regarding the relevant issue.

### **LEGAL PRECEDENT**

Any claimant dissatisfied with an OWCP decision shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.<sup>4</sup> If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. OWCP regulations further provide that the “claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.”<sup>5</sup> Although a claimant who has previously sought reconsideration is not, as a matter of right, entitled to a hearing, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing following reconsideration.<sup>6</sup>

### **ANALYSIS**

Appellant requested an oral hearing utilizing the appeal request form that accompanied OWCP’s February 15, 2013 merit decision. The hearing request was dated and postmarked March 13, 2014. Appellant had previously requested reconsideration of the February 15, 2013 decision for which OWCP issued the April 19, 2013 decision. OWCP’s latest merit decision denied appellant’s claim, but for a different reason than the February 15, 2013 initial denial. The March 13, 2014 hearing request was made approximately 11 months after the April 19, 2013 decision. Not only was the hearing request untimely, but appellant had already requested reconsideration. Consequently, he is not entitled to a hearing as a matter of right.<sup>7</sup> Although appellant was not entitled to a hearing, the Branch of Hearings and Review exercised its discretion to deny the hearing following reconsideration.<sup>8</sup> In this instance, the hearing representative denied a discretionary hearing on the basis that appellant could instead submit new evidence and request reconsideration before OWCP.<sup>9</sup> The Board finds that the hearing

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<sup>4</sup> 20 C.F.R. § 10.616(a) (2012).

<sup>5</sup> *Id.*

<sup>6</sup> *Hubert Jones, Jr.*, 57 ECAB 467, 472-73 (2006).

<sup>7</sup> 20 C.F.R. § 10.616(a).

<sup>8</sup> *D.E.*, 59 ECAB 438, 442-43 (2008); *J.C.*, 59 ECAB 206, 210-11 (2007).

<sup>9</sup> At the time, appellant had a few days remaining within which to timely request reconsideration of OWCP’s April 19, 2013 merit decision. *See* 20 C.F.R. § 10.607(a).

representative properly exercised her discretionary authority in denying appellant's request for a hearing.<sup>10</sup>

**CONCLUSION**

The Branch of Hearings and Review properly denied appellant's March 13, 2014 request for a hearing.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 14, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 10, 2014  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>10</sup> 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 known facts. *See André Thyratron*, 54 ECAB 257, 261 (2002).