

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

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**J.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cleveland, OH, Employer**

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**Docket No. 10-1222  
Issued: December 21, 2010**

*Appearances:*  
*Martin Kaplan, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On March 30, 2010 appellant, through her representative, filed a timely appeal from the March 15, 2010 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration. As the last merit decision was issued on September 25, 2009, more than 180 days prior to March 30, 2010, the date of this appeal, the Board does not have jurisdiction to review the merits of the claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the nonmerit decision.

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On March 18, 2004 appellant, then a 47-year-old processing clerk, sustained an injury in the performance of duty when she fell in a parking lot. The Office accepted her claim for right leg contusion, right ankle fracture, left ankle fracture and left ankle arthritis. Appellant received compensation for temporary total disability on the periodic rolls.

On September 3, 2009 the Office issued a notice of proposed suspension because appellant failed to report for a functional capacity evaluation on August 27, 2009 and a medical second opinion examination on September 1, 2009 as directed.

On September 10, 2009 appellant's representative stated that appellant attended the August 27, 2009 functional capacity evaluation. He stated that she would attend and fully cooperate with a rescheduled second opinion examination. Counsel added that the Office minimized appellant's request to have the second opinion examination rescheduled to an earlier time:

"It was not merely for the convenience of picking a child up from school. Dr. Moss's office is 58 miles and more than 1 hour from [appellant's] home. [She] cannot leave her son alone for the time required to travel to and attend the second opinion examination at the time it was scheduled. The Office has previously accommodated [her] child care needs when scheduling second opinion examinations."

On September 11, 2009 the Office reissued the notice of proposed suspension, dropping any reference to the functional capacity evaluation and citing appellant's failure to report for the September 1, 2009 second opinion examination as directed. It received the September 10, 2009 reply of appellant's representative on September 14, 2009.

In a September 25, 2009 decision, the Office suspended appellant's compensation for failing to report for the second opinion examination scheduled for September 1, 2009. It noted as follows:

"You did not attend your scheduled examination. By letter dated September 11, 2009, our Office gave you 14 days to provide written evidence justifying your failure to attend or cooperate with this examination.

"You have not provided an explanation of your failure to attend or cooperate."

On February 15, 2010 appellant's representative requested reconsideration of the September 25, 2009 suspension. Arguing that decision was incorrect because appellant provided a good cause explanation for not attending the second opinion examination, he repeated what he wrote on September 10, 2009. Appellant's representative added that appellant agreed to attend the second opinion examination before the Office suspended her benefits. Moreover, he argued that she attended the rescheduled examination, so the Office should reinstate her compensation retroactive to the date on which she agreed to attend.

In a decision dated March 15, 2010, the Office denied appellant's request for reconsideration. It found that appellant's representative presented the same argument he made on September 10, 2009, which the Office considered in its September 25, 2009 decision. The Office denied a merit review of appellant's case because she failed to submit a new and relevant argument to counter the September 25, 2009 decision.

On appeal, appellant's representative repeats his September 10, 2009 argument and adds: "These arguments were not considered in the original decision dated September 25, 2009 and therefore a merit review is warranted."

## **LEGAL PRECEDENT**

The Office may review an award for or against payment of compensation at any time on its own motion or upon application.<sup>1</sup> The employee shall exercise this right through a request to the district Office.<sup>2</sup>

An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by the Office in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup>

A request for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>4</sup> A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the request for reconsideration without reopening the case for a review on the merits.<sup>5</sup>

## **ANALYSIS**

Following the Office's September 25, 2009 decision suspending compensation, appellant's representative sent a timely request for reconsideration. The issue, therefore, is whether that request met at least one of the standards for obtaining a merit review of appellant's case.

The request for reconsideration asserted that the Office's September 25, 2009 decision was incorrect because appellant provided a good cause explanation for not attending the second opinion examination. Putting aside the particulars of that explanation and whether they constituted good cause, the Board notes that the Office suspended appellant's compensation on September 25, 2009 without addressing the reasons appellant's representative provided in his September 10, 2009 reply, which the Office received on September 14, 2009. Indeed, the Office's September 25, 2009 decision stated: "You have not provided an explanation of your failure to attend or cooperate." The record shows that statement to be incorrect.

The Board finds that appellant's request for reconsideration advanced a relevant legal argument not previously considered by the Office, namely, that the Office may not suspend

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> 20 C.F.R. § 10.605.

<sup>3</sup> *Id.* at § 10.606.

<sup>4</sup> *Id.* at § 10.607(a).

<sup>5</sup> *Id.* at § 10.608.

compensation under 5 U.S.C. § 8123(d) without duly considering whether the explanation provided establishes good cause and without addressing the reasons for its determination in its final decision.<sup>6</sup> Because appellant's request for reconsideration meets at least one of the three standards for obtaining a merit review of her case, the Board will reverse the Office's March 15, 2010 decision and remand the case for a merit review and final decision on the suspension of appellant's compensation for failing to report to the September 1, 2009 second opinion examination as directed.

### **CONCLUSION**

The Board finds that the Office improperly denied appellant's request for reconsideration. Appellant is entitled to a merit review of her case.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 15, 2010 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further action consistent with this opinion.

Issued: December 21, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>6</sup> *Id.* at § 10.126 (an Office decision shall contain findings of fact and a statement of reasons); *see Raymond C. Dickinson*, 48 ECAB 646 (1997) (holding that, although the Office did not review the employee's stated reasons in its decision to suspend compensation, an Office hearing representative duly considered the evidence on review).