

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

Y.F., Appellant

and

**U.S. POSTAL SERVICE, PD & C,
Kansas City, KS, Employer**

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**Docket No. 06-1042
Issued: August 1, 2006**

Appearances:
Y. F., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On April 4, 2006 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated November 4, 2005 which denied merit review. Because more than one year has elapsed between the last merit decision of the Office dated September 22, 2004 and the filing of this appeal on April 4, 2006, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board lacks jurisdiction to review the merits of his claim.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 14, 2004 appellant, then a 48-year-old mail processing clerk, filed a Form CA-2, occupational disease claim, alleging that standing on concrete for many years caused her right foot tendinitis. In support of her claim she submitted a disability slip with an illegible signature and a report dated July 14, 2004 in which Dr. Lawrence Mandel, a podiatrist, diagnosed right

foot tendinitis and advised that appellant should be in a cast for three weeks. On July 15, 2004 appellant accepted a sitting, modified-duty position.

By letters dated July 27, 2004, the Office asked the employing establishment to respond to appellant's claim and advised her of the type of evidence she needed to submit. This was to include a comprehensive medical report from her treating physician describing her condition, providing a diagnosis and offering an opinion on the relationship between appellant's federal employment and the diagnosed condition. In an August 25, 2004 statement, appellant described her job duties for the past 19 years and stated that they required that she stand on concrete for 10 to 12 hours per day for 5 to 6 days a week.

In a decision dated September 22, 2004, the Office denied the claim, finding the medical evidence insufficient to establish that the claimed condition was caused by employment duties. In letters dated September 30 and October 7, 2005, appellant requested reconsideration, explaining that she was not sure what medical evidence she needed to provide, that there had been a death in her family, that she had surgery in December 2004 and that she had lost paperwork regarding this claim. By decision dated November 4, 2005, the Office denied appellant's reconsideration request.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act¹ vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.² Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).³ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.⁴ Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁵

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.608(a).

⁴ 20 C.F.R. § 10.608(b)(1) and (2).

⁵ 20 C.F.R. § 10.608(b).

ANALYSIS

The only decision before the Board in this appeal is the decision of the Office dated November 4, 2005 denying appellant's application for review. Because more than one year had elapsed between the date of the Office's most recent merit decision dated September 22, 2004 and the filing of her appeal with the Board on April 4, 2006, the Board lacks jurisdiction to review the merits of her claim.⁶

With her September 30, 2005 reconsideration request, appellant advised that she was not sure what medical evidence she needed to provide, that there had been a death in the family, that she had surgery in December 2004 and had lost paperwork regarding this claim.⁷ The merit issue in this case is whether she met her burden of proof to establish that her right foot condition was caused by employment factors, a medical determination and the Office clearly explained the type of evidence she needed to provide in its July 27, 2004 letter. This argument, therefore, does not rise to the standard to warrant merit review. Likewise, appellant's other arguments do not demonstrate that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Consequently, appellant was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).⁸

With respect to the third above-noted requirement under section 10.606(b)(2), appellant did not submit additional evidence. As she did not submit relevant and pertinent new evidence not previously considered by the Office, the Office properly denied her reconsideration request.⁹

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 501.3(d)(2).

⁷ The Board notes that section 10.607(a) of the Office's regulations provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. 20 C.F.R. § 10.607(a); *see Pasquale C. D'Arco*, 54 ECAB 560 (2003). In this case, appellant did not file her reconsideration request until September 30, 2005, more than one year from the date of the September 22, 2004 Office decision. Section 8128(a) of the Act, however, vests the Office with discretionary authority to determine whether it will review an award for or against compensation and the use of the word "may" in section 8128(a) underscores the intent of Congress that discretion be delegated to the Secretary and hence to the Office, to determine whether reconsideration should be granted. 5 U.S.C. § 8128(a); *see Annette Louise*, 54 ECAB 783 (2003).

⁸ 20 C.F.R. § 10.606(b)(2).

⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 4, 2005 be affirmed.

Issued: August 1, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board