

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

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**K.H., Appellant**

**and**

**U.S. POSTAL SERVICE, BULK MAIL  
CENTER, St. Louis, MO, Employer**

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**Docket No. 07-906  
Issued: July 26, 2007**

*Appearances:*  
*Appellant, 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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 20, 2007 appellant filed a timely appeal from the November 21, 2006 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this denial. The Board also has jurisdiction to review the Branch of Hearings and Review's June 15, 2006 decision denying an oral hearing. The Board has no jurisdiction to review the Office's April 9, 1999 decision terminating compensation, as appellant filed this appeal more than one year after the date of that decision.

**ISSUES**

The issues are: (1) whether the Office properly denied appellant's April 18, 2006 request for an oral hearing before an Office hearing representative; and (2) whether the Office properly denied her November 8, 2006 request for reconsideration on the grounds that it was untimely filed and did not demonstrate clear evidence of error.

## **FACTUAL HISTORY**

On September 30, 1998 appellant, then a 42-year-old mail handler, filed a claim alleging that her lower back pain was a result of her federal employment: “Assignments I was given on a regular basis (centering the gross units) consisted of twisting left to right. This assignment always seem to start the pain, having to do any bending and lifting afterwards always aggravated the area of lower back even more.” The Office accepted her claim for lumbar strain.

In a decision dated April 9, 1999, the Office terminated compensation benefits for the accepted lumbar strain. The Office found that the weight of the medical evidence rested with appellant’s orthopedic surgeon, Dr. David R. Lange, who reported no objective findings of the lumbar strain. In an attached statement of review rights, the Office notified appellant that she had 30 days to request an oral hearing before an Office hearing representative and one year to request that the Office reconsider its decision.

In a letter postmarked April 18, 2006, appellant requested an oral hearing before an Office hearing representative. In a decision dated June 15, 2006, the Office’s Branch of Hearings and Review found that she was not entitled to an oral hearing as a matter of right because her request was untimely. The Branch nonetheless considered the request and determined that appellant could equally well address the issue in her case by requesting reconsideration and submitting evidence not previously considered establishing that she continues to suffer residuals of her 1998 employment injury.

On November 8, 2006 appellant requested reconsideration:

“This letter’s intent is to request reconsideration.

“Though I’ve requested appealed this case to the hearing and review board as well as The ECAB Board, the case has been returned to the district office for further adjudication being new evidence has been included in this file and my appeal rights for reconsideration had not been exhausted. The only records you may not have pertaining to this case are medical bill, which my health insurance carriers will be forwarding to you. Please feel free to contact me if you should need further assistance.

“For your information the original claim for this reoccurring injury is A1199832 -- date of traumatic injury January 20,1990.”<sup>1</sup>

In a decision dated November 21, 2006, the Office denied appellant’s request for reconsideration. The Office found that the request was untimely and failed to present clear evidence of error in its April 9, 1999 decision terminating compensation for the 1998 lumbar strain.

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<sup>1</sup> At the top of her request, appellant wrote “File No. 110167606,” the Office file number for her 1998 lumbar strain injury.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8124(b)(1) of the Federal Employees' Compensation Act provides:

“Before review under section 8128(a) of this title, 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 claim before a representative of the Secretary.”<sup>2</sup>

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.<sup>3</sup> The Office has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>4</sup> In such a case the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

Because appellant made her April 18, 2006 request for an oral hearing more than 30 days after the Office's April 9, 1999 decision terminating compensation for the accepted lumbar strain, she is not entitled to a hearing as a matter of right. The Office's Branch of Hearings and Review nonetheless considered the matter and denied a discretionary hearing on the grounds that she could address the issue in her case through the reconsideration process. As appellant may pursue the issue in her case through this alternative review process, the Board finds that the Office did not abuse its discretion in denying her untimely request for an oral hearing.<sup>6</sup> The Board will affirm the Office's June 15, 2006 decision.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of the Act does not grant a claimant the right to a merit review of her case.<sup>7</sup> Rather, this section vests the Office with discretionary authority to review prior decisions:

“The Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application. The Secretary, in accordance with the facts found on review may--

(1) end, decrease, or increase the compensation awarded; or

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<sup>2</sup> 5 U.S.C. § 8124(b)(1).

<sup>3</sup> 20 C.F.R. § 10.616(a) (1999).

<sup>4</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>5</sup> *Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>6</sup> The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g.*, *Jeff Micono*, 39 ECAB 617 (1988).

<sup>7</sup> *Gregory Griffin*, 41 ECAB 186 (1989); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

(2) award compensation previously refused or discontinued.”<sup>8</sup>

The Office, through regulations, has imposed limitations on the exercise of this discretionary authority. Section 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. This section further provides that the Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>9</sup>

### **ANALYSIS -- ISSUE 2**

Appellant’s November 8, 2006 request for reconsideration comes more than one year after the Office’s April 9, 1999 decision terminating compensation for the 1998 lumbar strain. It is, therefore, untimely. To obtain a merit review of her case, appellant must show clear evidence of error in the Office’s April 9, 1999 decision.

The Board finds that appellant’s request for reconsideration does not show clear evidence of error. She made no convincing argument and submitted no evidence clearly demonstrating on its face that the Office erroneously terminated her benefits for the 1998 lumbar strain. The Board will affirm the Office’s November 21, 2006 decision denying her request. She is not entitled to a reopening of her case.

### **CONCLUSION**

The Board finds that the Office properly denied appellant’s untimely request for an oral hearing before an Office hearing representative. The Board also finds that the Office properly denied her untimely request for reconsideration.

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<sup>8</sup> 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. § 10.607 (1999).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 21 and June 15, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 26, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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