

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

R.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kansas City, KS, Employer**

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**Docket No. 06-2162
Issued: March 14, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 26, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated June 15, 2006, which denied his request for an oral hearing as untimely. He also appealed an August 24, 2006 decision, which denied his reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than one year has elapsed between the most recent merit decision of May 18, 2005 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUES

The issues on appeal are: (1) whether the Office properly denied appellant's request for an oral hearing as untimely; and (2) whether the Office properly determined that appellant's request for reconsideration dated July 7, 2006 was not timely filed and failed to establish clear evidence of error.

FACTUAL HISTORY

On November 24, 2004 appellant, then a 47-year-old mail handler, filed a traumatic injury claim alleging that he sustained a neck and ankle injury when he was dismounting a forklift while in the performance of duty. The Office accepted his claim for a neck strain, contusion of the right shoulder region, sprain of the right ankle and a head contusion and paid appropriate benefits. Appellant returned to work in a modified light-duty position.¹

On February 16, 2005 the Office referred appellant to Dianne McCarthy, a registered nurse, to provide medical management services and to assist in returning him to gainful employment. In a letter dated March 1, 2005, the field nurse notified appellant that she attempted to contact him by telephone but was unsuccessful.

In a letter dated March 10, 2005, the Office notified appellant that it proposed to reduce his compensation. The Office noted that his refusal without good cause to meet with the field nurse to assist in efforts to return to gainful employment could be interpreted as a refusal to undergo vocational rehabilitation. The Office provided appellant 30 days within which to contact the field nurse or show good cause for not cooperating with this effort or the rehabilitation effort would be terminated and action would be initiated to reduce appellant's compensation.

On March 11, 2005 appellant accepted a modified light-duty job offer effective that date. In a letter to the field nurse dated March 1, 2005, appellant contended that, since June 2004 to 2005, the field nurse failed to coordinate the medical aspects of his case or facilitate the flow of information as she was required to do.

By decision dated May 18, 2005, the Office suspended appellant's compensation pursuant to section 8113(b) of the Federal Employees' Compensation Act as a result of his refusal to participate with the nurse services. The Office noted that appellant impeded the rehabilitation effort without good cause.

By letter dated November 20, 2005, appellant requested an oral hearing before an Office hearing representative. In a statement dated February 8, 2006, he asserted that he never refused to work with the field nurse and submitted additional medical evidence from Dr. Walter Porter, a Board-certified Ph.D.

In a June 15, 2006 decision, the Office denied the request as untimely filed pursuant to 5 U.S.C. § 8124. The Office found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

¹ Appellant filed a claim for a neck injury which occurred on June 4, 2004 and which the Office accepted for a cervical strain, file number 11-2022736.

By letters dated July 7 and 12, 2006, appellant requested reconsideration and submitted additional evidence. In a statement dated February 8 and July 7, 2006, he advised that he would cooperate with nurse services and requested another nurse be assigned to his case. Appellant submitted additional medical evidence from Dr. Porter.

By decision dated August 24, 2006, the Office denied appellant's request for reconsideration on the grounds that it was not timely and that appellant did not present clear evidence of error by the Office.

LEGAL PRECEDENT

Section 8124(b) of the Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary.² As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.³

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request when it is made after the 30-day period established for requesting a hearing⁴ or when the request is for a second hearing on the same issue.⁵ The Office procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.⁶

ANALYSIS

The Office suspended appellant's compensation in a decision dated May 18, 2005 pursuant to section 8113(b) of the Act as a result of his refusal to participate in nursing services and by association vocational rehabilitation. Because appellant made his request for an oral hearing on November 20, 2005, more than 30 days after the Office's May 18, 2005 decision, he is not entitled to a hearing as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district Office and

² See 5 U.S.C. § 8124(b)(1).

³ *Id.* See 20 C.F.R. § 10.616(a) (1999); *Charles J. Prudencio*, 41 ECAB 499, 501 (1990).

⁴ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁵ *Johnny S. Henderson*, 34 ECAB 216 (1982).

⁶ *Sandra F. Powell*, 45 ECAB 877 (1994).

submitting evidence not previously considered. Consequently, the Office properly denied appellant a discretionary hearing.

However, the Office neglected to consider that, by failing to issue a decision on appellant's hearing request in a timely fashion, it effectively denied appellant the opportunity to obtain a merit review of the May 18, 2005 decision before the Board. Appellant's November 20, 2005 hearing request went unanswered for more than six months. By the time the Office issued its June 15, 2006 decision denying the requested hearing, appellant did not have the opportunity to timely request reconsideration before the Office or appeal the merits of the Office's May 18, 2005 decision denying compensation. This delay prevented appellant from obtaining further timely review on the merits of his claim pursuant to section 8128 of the Act before the Office or by the Board. The Board finds that the Office abused its discretion. As such, the Office should grant appellant a merit review of his claim.⁷

CONCLUSION

The Board finds that the case is not in posture of decision.⁸

⁷ *Marilyn F. Wilson*, 51 ECAB 234, 235 (1999); 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Brian R. Leonard*, 43 ECAB 255, 259-60 (1991) (the Board held that the Office's delay in processing appellant's request for a hearing effectively denied appellant the opportunity to obtain merit review of his claim and thus, constituted an abuse of discretion).

⁸ The Board finds that it is unnecessary to address the second issue in this case in view of the Board's disposition of the first issue.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2006 decision of the Office of Workers' Compensation Programs is affirmed. The case is remanded for further action consistent with this decision.

Issued: March 14, 2007
Washington, DC

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

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

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