

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

B.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
West Bloomfield, MI, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 07-1786
Issued: January 11, 2008**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 25, 2007 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated June 6, 2007 which denied merit review. Because more than one year has elapsed between the most recent merit decision of the Office dated July 27, 2005 and the filing of this appeal on December 11, 2006, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

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

FACTUAL HISTORY

This case has been before the Board on two prior occasions. In a June 8, 2005 decision, the Board found that the Office met its burden of proof to terminate appellant's compensation benefits effective March 3, 2004, that the Office did not abuse its discretion in denying her request for a hearing and that appellant failed to meet her burden of proof to establish that she

had any disability after March 3, 2004 causally related to her accepted conditions.¹ By decision dated May 9, 2007, the Board found that the Office properly denied appellant's request for a hearing. However, the record contained a timely reconsideration request dated June 21, 2006 of a July 27, 2005 decision. The Office was instructed to issue an appropriate decision in that regard.² The law and the facts of the previous Board decisions are incorporated herein by reference.

By decision dated June 6, 2007, the Office denied appellant's reconsideration request on the grounds that the medical evidence submitted in support of her schedule award was irrelevant because all medical and compensation benefits were terminated on March 3, 2004. This appeal follows.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ 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.⁴ 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).⁵ 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.⁶ 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.⁷

¹ Docket No. 05-110 (issued June 8, 2005).

² Docket No. 06-2164 (issued May 9, 2007). On July 14, 2005 appellant filed a schedule award claim, and by decision dated July 27, 2005, the Office found that she was not entitled to a schedule award. The Office explained that as her compensation benefits had been terminated because she no longer had residuals of her employment injury, she was not entitled to a schedule award. The Office provided appeal rights and attached the appropriate form. On June 21, 2006 appellant, through counsel, noted that a schedule award claim had been filed and submitted a medical report from Dr. Dee Ann Bialecki-Haase, Board-certified in family medicine.

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.608(a).

⁶ 20 C.F.R. § 10.608(b)(1) and (2).

⁷ 20 C.F.R. § 10.608(b).

ANALYSIS

The only decision before the Board in this appeal is the decision of the Office dated June 6, 2006 denying appellant's application for review of its July 27, 2005 decision. Because more than one year had elapsed between the date of the Office's most recent merit decision on the issue in this case, dated July 27, 2005, and the filing of her appeal with the Board on June 25, 2007, the Board lacks jurisdiction to review the merits of appellant's claim.⁸

With his June 21, 2006 letter, counsel for appellant contended that she was entitled to a schedule award and submitted a June 9, 2006 medical report in which Dr. Bialecki-Haase, Board-certified in family medicine, provided an impairment rating of appellant's right upper extremity. When a claimant's compensation is not terminated based on his or her refusal of suitable work under 5 U.S.C. § 8106(c), he or she is not barred from receiving schedule award compensation for any period after the termination decision has been reached.⁹ In this case, appellant's compensation was terminated on March 3, 2004 because the medical evidence of record established that she no longer had residuals or disability causally related to her employment-related back and right carpal tunnel conditions. Compensation was not terminated due to a refusal of an offer of suitable work. Appellant is not precluded from receiving schedule award compensation for any permanent impairment found related to the accepted injury.¹⁰

The Board finds that the Office erroneously adjudicated appellant's claim as a reconsideration of the termination of her benefits. Appellant's claim for a schedule award should go forward.¹¹ The case will be remanded to the Office for a decision on the merits of her schedule award claim. On remand, the Office should consider Dr. Bialecki-Haase's rating and any additional medical evidence of record to determine if appellant has established that she has permanent impairment due to her accepted conditions.

CONCLUSION

The Board finds that the Office improperly denied appellant's request for a merit review pursuant to section 8128(a) of the Act.

⁸ 20 C.F.R. § 501.3(d)(2).

⁹ *M.M.*, Docket No. 06-1728 (issued April 5, 2007).

¹⁰ *Id.*

¹¹ See *Paul R. Reedy*, 45 ECAB 488 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 6, 2007 be set aside and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: January 11, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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