

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

A.M., Appellant

and

**U.S. POSTAL SERVICE, DALLAS BULK MAIL
CENTER, Dallas, TX, Employer**

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**Docket No. 08-2153
Issued: May 12, 2009**

Appearances:
Appellant, pro se
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 July 31, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated May 27, 2008 denying her request for reconsideration. Because more than one year has elapsed from the last merit decision dated June 8, 2006 to the filing of this appeal, the Board lacks jurisdiction over the merits of this claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration without a merit review.

FACTUAL HISTORY

On December 9, 2005 appellant, then a 45-year-old mail handler, filed a traumatic injury claim alleging that she slipped and fell on ice while loading mail onto a truck that day. She noted that she injured her wrist, fingers, neck and legs. Appellant did not initially stop work. She submitted treatment notes from Dr. Carl Naehritz, a chiropractor, and Dr. Miguel Banta, a

Board-certified anesthesiologist. On February 1, 2006 the Office accepted appellant's claim for lumbar strain and left calcaneus contusion.

On March 15 and 28, 2006 appellant submitted Form CA-7, claim for compensation, for disability from February 12 to March 17, 2006. On February 17, 2006 Dr. Banta released appellant to light duty. Appellant also submitted a March 20, 2006 report of Dr. Marvin Van Hal, a Board-certified orthopedic surgeon, in which he examined appellant's cervical spine and left shoulder.

In an April 25, 2006 letter, the Office advised appellant to submit additional information to support her claim for compensation beginning February 12, 2006. It requested medical evidence supporting disability during the claimed period within 30 days. The Office noted that it had received a work excuse form from appellant's treating physician taking her off work due to pain. It indicated that pain was not a sufficient reason for compensation.

On April 26 and May 2, 2006 appellant submitted additional CA-7 forms for the period March 18 to May 1, 2006.

In a March 20, 2006 report, Dr. Van Hal interpreted diagnostic test results of appellant's cervical spine. On May 1, 2006 Dr. Naehritz advised that appellant could return to regular duty. He released appellant from care on an as-needed basis. In a report of the same date, Dr. Van Hal recommended surgery for decompression of appellant's cervical spine. Appellant returned to work on May 1, 2006. In a May 2, 2006 letter, appellant requested wage-loss compensation.

In a June 8, 2006 decision, the Office found that appellant was entitled to compensation from February 12 to 19, 2006 but denied her claim for other periods finding that the medical evidence did not support her disability for the entire claimed period.

In a June 27, 2006 letter, appellant stated that she wanted "to appeal in writing why I was denied." She disagreed with the June 8, 2006 decision and the circumstances surrounding her claimed disability and her medical care. Appellant asked that the Office "go over my case and answer me as soon as possible."

In a December 12, 2006 telephone memorandum, the Office noted receiving a telephone call from appellant regarding the status of her "appeal." The Office's claims examiner reported leaving a message for appellant that he "forwarded the recon[sideration], however, I also told her previously that she needed to submit a request that actually states reconsideration." In an undated letter received on May 16, 2007, appellant requested reconsideration. She submitted a March 20, 2006 report of Dr. Van Hal already of record.

In a May 27, 2008 decision, the Office denied appellant's request for reconsideration finding that she submitted insufficient evidence to warrant further merit review.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a), the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a

relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹ Section 10.608(b) of Office regulations provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.²

ANALYSIS

Appellant submitted a June 27, 2006 letter to the Office in which she stated that she wished “to appeal in writing why I was denied” and asked that the Office “go over my case and answer me as soon as possible.” In this letter, she noted her disagreement with the Office’s June 8, 2006 decision and why she was entitled to compensation. The Board finds that appellant’s June 27, 2006 letter constituted a request for reconsideration.³ Although the June 27, 2006 letter did not mention the word reconsideration, the Board has held that there may be a request for reconsideration in situations where a letter does not contain the word reconsideration.⁴ The Board has stated that, while no special form is required, the request must be made in writing, identify the decision and the specific issue, for which reconsideration is being requested and be accompanied by evidence or argument not considered previously.⁵ Appellant’s June 27, 2006 letter referenced the June 8, 2006 decision and she explained why she felt that the Office’s decision denying compensation was incorrect. However, the Office took no action regarding appellant’s June 27, 2006 reconsideration request until May 27, 2008, after appellant had submitted a second request for reconsideration on May 16, 2007.

Under these circumstances, the Board therefore finds that the Office erred in delaying the issuance of its reconsideration decision.

The Office’s procedures state that if a reconsideration decision is delayed beyond 90 days and the delay would jeopardize a claimant’s ability to seek a merit review of his claim before the Board, the Office should conduct a merit review and issue a decision so as to protect appellant’s right to appeal.⁶

Appellant filed her request for reconsideration of the Office’s June 8, 2006 decision on June 27, 2006, which the Office received on July 13, 2006. The Office did not issue a decision regarding appellant’s June 27, 2006 request for reconsideration within 90 days. By issuing a nonmerit decision denying appellant’s reconsideration request on May 27, 2008, it effectively

¹ *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

² *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

³ Although appellant’s letter used the word “appeal,” there is no evidence that appellant sought an appeal before the Board at that time.

⁴ See *Jack D. Johnson*, 57 ECAB 593 (2006) and cases cited therein.

⁵ See *id.*

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (May 1996); see also *Ronald A. Eldridge*, 53 ECAB 218 (2001).

denied appellant an opportunity to seek a merit review by the Board of the Office's June 8, 2006 decision. According to its procedures, the Office was required to issue a merit decision within 90 days in order to protect appellant's appeal rights.

The Board will remand the case to the Office for a merit review of its June 8, 2006 decision. Following this and such other development of the record as it deems necessary, the Office shall issue an appropriate merit decision.

CONCLUSION

The Board finds that the Office improperly denied appellant's request for reconsideration without a merit review.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated May 27, 2008 is set aside and the case is remanded for a merit review of appellant's request for reconsideration.

Issued: May 12, 2009
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