

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

K.H., Appellant

and

**U.S. POSTAL SERVICE, HEADQUARTERS,
FIELD INFORMATION SYSTEMS
PROGRAMS, Washington, DC, Employer**

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**Docket No. 09-385
Issued: September 14, 2009**

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 24, 2008 appellant, through his attorney, filed a timely appeal of the November 5, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying his request for a review of the written record. Because more than one year has elapsed between the last merit decision issued on August 15, 2008 and the filing of the 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).

ISSUE

The issue is whether the Office properly denied appellant's request for a review of the written record under 5 U.S.C. § 8124.

FACTUAL HISTORY

This case has previously been before the Board. In an August 15, 2008 decision,¹ the Board affirmed the Office's October 30, 2007 decision finding that appellant did not sustain a recurrence of disability on June 5, 2003 causally related to his accepted January 3, 1994 employment-related injury.²

By letter dated August 18, 2008, appellant, through his attorney, requested a review of the written record by an Office hearing representative. In a November 5, 2008 decision, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record after finding that it did not have jurisdiction to review decisions of the Board. It further reviewed appellant's request and denied the review of the written record as it found that the issue of whether he sustained a recurrence of disability on June 5, 2003 causally related to his accepted January 3, 1994 employment injury could equally well be addressed by requesting reconsideration and submitting new evidence not previously considered.

LEGAL PRECEDENT

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that a claimant not satisfied with a decision of the Secretary 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.³ Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.⁴ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.⁵ Although a claimant may not be entitled to a hearing as a matter of right, the Office has discretionary authority with respect to granting a hearing and the Office must exercise such discretion.⁶

The Act provides the Office with original jurisdiction in the processing of compensation claims and section 8124(a) provides the Office with the duty and authority to issue an initial decision on an employee's claim for compensation.⁷ Once an initial decision is made in a

¹ Docket No. 08-659 (issued August 15, 2008).

² On January 10, 1994 appellant, then a 42-year-old information systems specialist, filed a traumatic injury claim alleging that he sustained right shoulder, buttocks, and back sprains on January 3, 1994 when he slipped on a wet spot while exiting a building and landed in the revolving doors. The Office accepted his claim for right shoulder strain, lumbar strain/sprain with left radiculopathy, thoracic, lumbosacral neuritis or radiculopathy and a single episode of major depressive disorder.

³ 5 U.S.C. § 8124(b)(1).

⁴ 20 C.F.R. §§ 10.616-17.

⁵ *Claudio Vasquez*, 52 ECAB 496 (2002).

⁶ See *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994); *Herbert C. Holley*, 35 ECAB 140 (1981).

⁷ 5 U.S.C. § 8124(a).

compensation case, the claimant's rights arise by which the claimant may seek further review of his claim: the right to a hearing before the Office, the right to reconsideration before the Office or an appeal to the Board. The Board has clarified that the Office does not have the discretionary authority to grant a request for hearing immediately following a Board decision. The Office's Branch of Hearings and Review may not assume jurisdiction in the claims process absent a final adverse decision by the Director. Following the Board's review of an Office decision, there is no final decision of the Office left unreviewed over which the Branch of Hearings and Review can assume jurisdiction to exercise its discretionary appellate authority.⁸

ANALYSIS

Following the issuance of the Office's October 30, 2007 decision finding that appellant did not sustain a recurrence of disability on June 5, 2003 causally related to his accepted January 3, 1994 employment injury, he exercised his appellate rights by requesting an appeal to the Board. The Board reviewed the case and issued its final decision on this claim on August 15, 2008 in Docket No. 08-659. The Office did not subsequently issue a final decision. On August 18, 2008 appellant requested a review of the written record by the Office's Branch of Hearings and Review. The Board has held that, following its review of an Office decision, a claimant does not have the right under 5 U.S.C. § 8124(b)(1) to request a review of the written record in the absence of a final Office decision.⁹ In the instant case, appellant had no right to request a review of the written record following the issuance of the Board's August 15, 2008 decision because there is no final decision of the Office left unreviewed over which the Office's Branch of Hearings and Review could assume jurisdiction to exercise its discretionary appellate authority.¹⁰ Therefore, the Board finds that the Office properly denied appellant's request for a review of the written record on November 5, 2008.¹¹

On appeal, appellant's attorney contended that the Office erred in denying appellant's request for a review of the written record. He stated that the issue in this case was whether it properly denied appellant's continuing medical treatment on May 27, 2003 which was not addressed by the Board in its August 18, 2008 decision. Counsel contended that the Office failed to establish that appellant no longer had any residuals requiring medical treatment and total disability causally related to his accepted January 3, 1994 employment injury. The Board previously addressed the closing of appellant's claim on May 27, 2003 in its August 18, 2008 decision. It stated that the Office closed appellant's claim after paying for various medical services from 1994 to 1997. The Board further stated that prior to closing the claim it did not issue a decision denying any particular claimed benefit. The Board finds that appellant is rearguing the merits of his recurrence of disability claim. As stated, the Board does not currently

⁸ *Robert N. Thomas*, 51 ECAB 180, 180-81 (1999).

⁹ *Id.*

¹⁰ *Id.* See also *Eileen A. Nelson*, 46 ECAB 377 (1994). The Branch of Hearings and Review stated in its November 5, 2008 decision that it had exercised its discretion in denying the request for a review of the written record. However, as discussed, it is not within the Office's discretion to grant a review of the written record immediately following a Board decision.

¹¹ *Robert N. Thomas*, *supra* note 8.

have jurisdiction over the merits of appellant's claim.¹² The Board, therefore, finds that appellant's argument is without merit.¹³

CONCLUSION

The Board finds that the Office properly denied appellant's request for a review of the written record under 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 14, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹² 20 C.F.R. § 501.3(d)(2).

¹³ See *Jennifer A. Guillary*, 57 ECAB 485 (2006).