

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

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**J.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Chicago, IL, Employer**

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**Docket No. 09-623  
Issued: September 16, 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  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 2, 2009 appellant filed a timely appeal of the October 16, 2008 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for an oral hearing. The most recent merit decision in this case was issued on November 28, 2007. Because more than one year has elapsed between the most recent merit decision of November 28, 2007 and the filing of this appeal, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3 the Board only has jurisdiction to review the October 16, 2008 nonmerit decision.

**ISSUE**

The issue is whether the Office properly denied appellant's request for an oral hearing as untimely filed.

**FACTUAL HISTORY**

On June 13, 1996 appellant, then a 41-year-old clerk, filed a traumatic injury claim alleging that on June 6, 1996 she injured her right side, shoulder and back after tripping and falling on a floor mat while dispatching mail. She did not stop work.

Initial medical reports noted that appellant slipped and fell at work and offered diagnoses that included strain of the right knee, foot and shoulder and lumbosacral sprain. On July 22, 1996 the Office accepted her claim for right shoulder strain, right foot strain, right knee strain and lumbosacral strain. Appellant subsequently submitted a July 26, 1996 report from Dr. Carlton West, a Board-certified orthopedic surgeon, who diagnosed resolving strain of the L-S spine with mild sciatica. Dr. West also found that appellant's right knee had advanced degenerative changes that involved medial and patellofemoral compartments and indicated that osteoarthritis disease predating her injury.

On August 14, 2007 appellant filed a claim for a recurrence of disability alleging that she sustained pain on her right side on July 25, 2006 as a result of lifting trays, pulling, bending and walking at work. She stopped work on July 26, 2006 and returned on July 31, 2006. On October 18, 2007 the Office requested that appellant submit additional factual and medical evidence to support her recurrence claim and allowed her 30 days to submit such evidence. Appellant did not respond.

In a November 28, 2007 decision, the Office denied appellant's claim, finding that the evidence was insufficient to establish a recurrence of disability beginning July 26, 2006 due to the accepted work injury.

Appellant subsequently submitted reports dated July 9, 2007 and June 10, 2008 from Dr. Shri Agrawal, a Board-certified internist, who diagnosed degenerative arthritis in both knees, more symptomatic on the right.

On June 28, 2008 appellant requested an oral hearing. In a statement of the same date, she noted that her delayed response was due to the fact that she stopped work on November 30, 2007 and underwent stomach surgery on December 24, 2007. Appellant further noted that she sustained a job-related injury in 1981 and at that time was informed of her right knee arthritis and the need for a knee replacement, which she refused. She indicated that the 1996 work injury worsened her knee condition. Appellant also indicated that the air conditioning at her workplace worsened her arthritis.

In a decision dated October 16, 2008, the Office denied appellant's oral hearing request finding that it was not filed within 30 days. It exercised its discretion and determined that her case could be equally well addressed by requesting reconsideration and submitting 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 Office is entitled to a hearing before an Office hearing representative when the request is made within 30 days after issuance of the Office's decision.<sup>1</sup> Under the implementing regulations, a claimant who has received a final adverse decision by the Office is entitled to a hearing by writing to the address specified in the decision within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which

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<sup>1</sup> 5 U.S.C. § 8124(b)(1).

a hearing is sought.<sup>2</sup> If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.<sup>3</sup>

The Board has held that 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 that the Office must exercise this discretionary authority in deciding whether to grant a hearing. 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 Board precedent.<sup>4</sup>

### ANALYSIS

The Office denied appellant's claim on November 28, 2007. Appellant's request for an oral hearing was dated June 28, 2008. Because the hearing request was made more than 30 days after the November 28, 2007 decision, the Board finds that the Office properly denied her request for a hearing as untimely filed. Appellant is not entitled to a hearing as a matter of right. The Board has held that section 8124(b)(1) is unequivocal in setting forth the time limitation in requests for hearing.<sup>5</sup>

The Office exercised its discretionary authority under section 8124 in considering whether to grant a hearing. It found that appellant's request could be equally well addressed through a request for reconsideration under section 8128 and the submission of new evidence. The Board has held that it is an appropriate exercise of discretion for the Office to apprise appellant of the right to further proceedings under the reconsideration provisions of section 8128.<sup>6</sup> The Board finds that the Office properly exercised its discretion in denying appellant's request for an oral hearing as untimely.

On appeal, appellant asserts that she has submitted 10 years worth of medical evidence supporting that she has arthritis. She also contends that working on machines, standing up, walking and lifting at work caused pain in her knee, arm and right side. However, as noted, the Board only has jurisdiction over the nonmerit decision of the Office denying her request for an oral hearing. As appellant's assertions do not address whether appellant's oral hearing request was timely filed, they are not relevant to the issue before the Board in this appeal.<sup>7</sup>

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<sup>2</sup> 20 C.F.R. § 10.616(a); 5 U.S.C. § 8124(b)(1).

<sup>3</sup> *Teresa Valle*, 57 ECAB 542 (2006).

<sup>4</sup> *D.E.*, 59 ECAB \_\_\_\_ (Docket No. 07-2334, issued April 11, 2008).

<sup>5</sup> *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

<sup>6</sup> *See André Thyratron*, 54 ECAB 257 (2002).

<sup>7</sup> Regarding evidence that appellant submitted to the Office after issuance of the Office's November 28, 2007 merit decision, the Board notes that this evidence was not considered by the Office in reaching its final decision. Consequently, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

**CONCLUSION**

The Board finds that the Office properly exercised its discretion in denying appellant's request for an oral hearing as untimely.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated October 16, 2008 is affirmed.

Issued: September 16, 2009  
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