

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

M.P., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Carol Stream, IL,
Employer**

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**Docket No. 09-1916
Issued: March 12, 2010**

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 July 21, 2009 appellant filed a timely appeal from a June 19, 2009 decision of the Office of Workers' Compensation Programs denying her request for reconsideration. Because more than 180 days has elapsed from the Office's last merit decision dated May 8, 2006 to 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.

ISSUE

The issue is whether the Office abused its discretion in denying appellant's request for reconsideration.

FACTUAL HISTORY

On January 29, 2005 appellant, then a 48-year-old mail processor, filed a traumatic injury claim alleging that on January 27, 2005 she went to the restroom at work and a defective toilet paper holder fell and struck her head and right shoulder. Jimella Wright, her supervisor, stated

that the toilet paper holder was intact after the alleged incident and indicated that it was attached at a level that was below appellant's head and shoulder.

On February 4, 2005 Mary Hughes, an employing establishment injury compensation specialist, controverted the claim. She stated that appellant was off work from January 19 to 26, 2005. Upon appellant's return to work on January 27, 2005, at the end of her tour, she alleged that a toilet paper holder fell and struck her head and right shoulder. Ms. Hughes stated that the toilet paper holder was not fastened high enough to have fallen and struck someone in the head and shoulder. An employing establishment physician examined appellant on January 27, 2005 after the incident and found no laceration or swelling of her scalp. Appellant returned to work on January 28, 2005, alleging that her head was hurting on the left side.

By letter dated March 15, 2005, the Office asked appellant to provide additional factual and medical evidence.

By decision dated April 21, 2005, the Office denied appellant's claim on the grounds that the evidence failed to establish that she sustained an injury on January 27, 2005 as alleged.

On April 24, 2005 appellant requested an oral argument that was held on March 30, 2006. By decision dated May 8, 2006, an Office hearing representative affirmed the April 21, 2005 decision on the grounds that appellant failed to establish that she sustained an injury on January 27, 2005 in the performance of duty, as alleged.

On June 20, 2006 appellant requested reconsideration. She contended that there were misstatements of fact in an April 6, 2005 notice of removal she received from the employing establishment. In a May 24, 2006 letter, Dr. Jacob Salomon, a Board-certified general surgeon, stated that appellant was disabled from January 29 to February 15, 2005 because she was being monitored for possible neurological damage. The trauma to her head on January 27, 2005 was to an area where she had a biopsy regarding her lupus condition and he wanted a magnetic resonance imaging (MRI) scan performed to rule out brain injury. Appellant was released to return to work when the MRI scan revealed no permanent neurological injury.

On June 30, 2006 the Office received an April 6, 2005 notice of removal in which the employing establishment advised appellant that she was removed from her position for engaging in activities inconsistent with her claim of total disability on January 27, 2005. The next document in the case record is a June 11, 2009 telephone memorandum noting appellant's request for the status of her 2006 request for reconsideration.

By decision dated June 19, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence was not sufficient to warrant further merit review. There is no indication of the reason for the three-year delay in issuing a decision following her June 20, 2006 request for reconsideration.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹ 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.² To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.³ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁴

ANALYSIS

The Board finds that the Office abused its discretion in denying appellant's request for reconsideration.

When the Office delays a reconsideration decision beyond 90 days, and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, the Office should conduct a merit review.⁵ In this case, on June 20, 2006 appellant requested reconsideration of the Office May 8, 2006 decision. However, the Office did not issue a decision on her request for three years, precluding a merit review by the Board of the May 8, 2006 decision. The Board will remand the case to the Office for a merit decision in order to protect the claimant's appeal rights.⁶

CONCLUSION

The Board finds that the Office abused its discretion in denying appellant's request for reconsideration. After such further development as it deems necessary, it should issue a merit decision on her request for reconsideration.

¹ Under section 8128(a) of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his or her] own motion or on application." 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.606(b)(2).

³ *Id.* at § 10.607(a).

⁴ *Id.* at § 10.608(b).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (June 1997).

⁶ *Joseph L. Cabral*, 44 ECAB 152 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 19, 2009 is set aside and the case is remanded for further action consistent with this decision.

Issued: March 12, 2010
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