

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

D.M., Appellant

and

**U.S. POSTAL SERVICE, SEVEN OAKS
STATION, Detroit, MI, Employer**

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**Docket No. 10-2237
Issued: June 28, 2011**

Appearances:

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On September 2, 2010 appellant filed an application for review of a decision of the Office of Workers' Compensation Programs (OWCP) dated August 17, 2010 that denied her claim. The appeal was docketed as No. 10-2237.

The record indicates that on March 4, 2008 appellant filed a traumatic injury claim, alleging that she sustained a right shoulder and elbow injury when she slipped and fell on ice on February 25, 2008. By decision dated May 14, 2008, OWCP denied the claim, and on June 4, 2008 appellant requested a hearing. In correspondence dated June 11, 2009 appellant's attorney noted that he had not received a response to her hearing request. The attorney attached a copy of a September 17, 2008 correspondence to the Branch of Hearings and Review of OWCP requesting that a telephone hearing be scheduled.¹ By letter dated July 10, 2009, OWCP advised the attorney that the appeal would be reviewed and he would be notified of the outcome. On July 16, 2009 appellant, through his attorney, requested reconsideration with OWCP. On August 14, 2009 the attorney asked that OWCP respond to his June 11, 2009 correspondence regarding appellant's appeal. On March 10, 2010, appellant's attorney asked that OWCP

¹ A copy of the September 17, 2008 letter is not previously found in the record.

respond to the July 19, 2009 reconsideration request.² In a merit decision dated August 17, 2010, OWCP denied modification of the May 14, 2008 decision.

The Board has duly considered the matter and finds that the case is not in posture for decision. Section 8124(b) of the Federal Employees' Compensation Act (FECA) states unequivocally that a claimant not satisfied with a decision of OWCP has a right, upon timely request, to a hearing before a representative of OWCP.³ Any claimant dissatisfied with a decision of OWCP shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. 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.⁴

Appellant's hearing request was postmarked June 4, 2008 and received by OWCP on June 10, 2008, well within 30 days of the May 14, 2008 OWCP decision denying appellant's claim. Appellant's hearing request was therefore timely. While appellant also requested reconsideration on July 16, 2009, the Board has long held that if there are simultaneous requests for a hearing and for reconsideration, OWCP is to proceed with adjudicating the hearing request before reconsideration.⁵ In this case, it was not proper for the claims examiner to exercise discretion that is within the purview of the Branch of Hearings and Review. Inasmuch as appellant's hearing request was timely filed, the Board will set aside the August 17, 2010 decision and remand the case for OWCP to schedule an oral hearing.⁶

² In a decision dated June 2, 2008, OWCP denied appellant's recurrence claim since his primary claim had been denied. On May 12, 2009 it refused to process CA-7 forms claiming compensation on the grounds that the initial claim had been denied.

³ 5 U.S.C. § 8124(b); 20 C.F.R. § 10.616.

⁴ *Claudio Vazquez*, 52 ECAB 496 (2001).

⁵ See *Eddie Franklin*, 51 ECAB 223 (1999); *Mary E. Schipske*, 43 ECAB 318 (1991); *Mary G. Allen*, 40 ECAB 190 (1988); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings & Review of the Written Record*, Chapter 2.1601.3 (October 1992).

⁶ In view of the Board's decision regarding the timeliness of appellant's request for a hearing, the Board will not address the merit issue of whether OWCP properly denied appellant's claim.

IT IS HEREBY ORDERED THAT the August 17, 2010 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for OWCP to schedule a hearing.

Issued: June 28, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board