

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

B.T., Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Memphis, TN, Employer**

)
)
)
)
)
)
)
)
)
)

**Docket No. 10-2349
Issued: June 15, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 23, 2010 appellant filed a timely appeal of the April 21, 2010 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for a hearing. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.²

ISSUE

The issue is whether the Branch of Hearings and Review properly denied appellant's February 5, 2010 request for a hearing.

¹ 5 U.S.C. §§ 8101-8193.

² The last merit decision was issued February 26, 2010, which is more than 180 days prior to the filing of the instant appeal.

FACTUAL HISTORY

Appellant, a 51-year-old clerk, has an accepted traumatic injury claim for dislocated right patella and right medial meniscus tear, which arose on August 3, 1981.³ During the three decades since her 1981 right knee injury, she held several limited-duty assignments as a consequence of her employment-related injury.

On February 20, 2007 appellant filed a claim for recurrence of disability beginning January 29, 2007. OWCP denied the recurrence claim by decision dated May 16, 2007. Appellant timely requested an oral hearing, however, her hearing was delayed more than two and a half years.⁴ In a decision dated February 26, 2010, the Branch of Hearings and Review affirmed the May 16, 2007 decision.

While her January 29, 2007 recurrence claim was still pending before the Branch of Hearings and Review, appellant filed another notice of recurrence (Form CA-2a) on August 31, 2009. This subsequent claim was for a recurrence of disability beginning August 20, 2009. Appellant submitted an August 25, 2009 certificate from the Campbell Clinic indicating that she was unable to work as of that date. The certificate further noted that she would be able to return to work on August 31, 2009, which she did.⁵ By letter dated December 7, 2009, OWCP requested additional information regarding appellant's August 20, 2009 recurrence of disability. Appellant did not provide the requested information within the allotted time frame. As a result, OWCP denied her August 20, 2009 recurrence claim by decision dated January 8, 2010. On February 5, 2010 appellant requested an oral hearing with respect to OWCP's January 8, 2010 decision. Appellant also submitted additional medical evidence.

On February 25, 2010 the Branch of Hearings and Review acknowledged receipt of appellant's recent hearing request. The next day, the hearing representative issued the above-referenced decision affirming the denial of appellant's previous January 29, 2007 recurrence claim.

By decision dated April 21, 2010, the Branch of Hearings and Review denied appellant's February 5, 2010 request for an oral hearing. The hearing representative noted that a hearing had already been held and a decision was issued on February 26, 2010 affirming OWCP's decision. The hearing representative further explained that, because appellant had already received an oral hearing on the issue of recurrence of disability, she was not entitled to another hearing on the same issue as a matter of right. Additionally, the hearing representative considered whether to grant a discretionary hearing and declined to do so, noting that appellant could request reconsideration before OWCP.

³ OWCP subsequently expanded her claim to include chondromalacia of the right patella and right knee arthritis as accepted conditions.

⁴ The hearing occurred on December 9, 2009.

⁵ On her Form CA-2a, appellant identified Dr. Gregory D. Dabov, a Board-certified orthopedic surgeon, as her treating physician. While Dr. Dabov is associated with the Campbell Clinic, the caregiver's signature on the August 25, 2009 return to work certificate is not legible.

LEGAL PRECEDENT

Any claimant dissatisfied with an OWCP decision 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.⁶ If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. OWCP regulations further provide that the “claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.”⁷ Although a claimant who has previously sought reconsideration is not, as a matter of right, entitled to a hearing, the Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing following reconsideration.⁸ Similarly, the Branch of Hearings and Review may exercise its discretion to conduct a hearing where a claimant requests a second hearing on the same issue.⁹

ANALYSIS

The Board finds that the Branch of Hearings and Review improperly denied appellant’s February 5, 2010 request for an oral hearing regarding OWCP’s January 8, 2010 decision. The hearing representative denied the request on the mistaken premise that appellant had already received a hearing on the “same issue.” While it is true that appellant participated in a December 9, 2009 hearing regarding her claim for recurrence of disability beginning January 29, 2007, this was not the same issue addressed by OWCP in its January 8, 2010 decision. The prior hearing addressed appellant’s claim for recurrence of disability beginning January 29, 2007, and the February 26, 2010 decision upheld OWCP’s May 16, 2007 decision. Appellant’s February 5, 2010 request for an oral hearing pertained to OWCP’s January 8, 2010 decision. The issue addressed in that particular decision was whether appellant sustained a recurrence of disability beginning August 20, 2009, not January 29, 2007. Appellant’s recurrence claims are similar in nature, but the factual issues presented with respect to the two claims are not the same. Consequently, the denial of appellant’s February 5, 2010 hearing request on the premise that she already received a hearing on the “same issue” was improper.

The Board finds that the February 5, 2010 hearing request was timely filed.¹⁰ Furthermore, appellant had not previously requested reconsideration of the January 8, 2010 decision. Accordingly, she is entitled to a hearing as a matter of right.¹¹ The case will be

⁶ 20 C.F.R. § 10.616(a) (2010).

⁷ *Id.*

⁸ 5 U.S.C. §§ 8124(b)(1) and 8128(a); 20 C.F.R. § 10.616(a); *Hubert Jones Jr.*, 57 ECAB 467, 472-73 (2006).

⁹ *Hubert Jones Jr.*, *supra* note 8.

¹⁰ The February 5, 2010 request was date-stamped as received on February 23, 2010, which is more than 30 days after the January 8, 2010 decision. However, the Branch of Hearings and Review neglected to retain the envelope that contained appellant’s request. In the absence of a postmark or other carrier’s date marking, the February 5, 2010 date of the request will be used for purposes of determining timeliness. *See* 20 C.F.R. § 10.616(a).

¹¹ 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

remanded to the Branch of Hearings and Review for further consideration of OWCP's January 8, 2010 decision denying appellant's claim for recurrence of disability beginning August 20, 2009.

CONCLUSION

The Branch of Hearings and Review improperly denied appellant's February 5, 2010 request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: June 15, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board