

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILBERT H. MILLS and U.S. POSTAL SERVICE,
VILLAGE POST OFFICE, New York, NY

*Docket No. 02-170; Submitted on the Record;
Issued July 22, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for merit review.

This case is before the Board for the third time. In the first appeal, the Board granted a motion by the Office's Director to remand the case because the Office had erred in denying appellant's request for reconsideration as untimely.¹ On remand the Office denied modification of its previous decision that appellant had failed to establish a recurrence of disability as of February 12, 1990. In the second appeal, the Board affirmed the denial of compensation on the grounds that the report of Dr. Howard E. Finklestein, a Board-certified orthopedic surgeon, represented the weight of the medical evidence.² The factual findings and legal conclusions in those decisions are incorporated by reference.

On July 8, 1999 appellant requested reconsideration on the grounds that his modified window clerk assignment was changed in early 1987 and that his duties were much more strenuous, resulting in a recurrence of disability on February 12, 1990. Appellant submitted copies of a special achievement award dated December 15, 1989, statements from four coworkers and a July 8, 1999 report from Dr. Knolly E. Millett, a Board-certified family practitioner.

¹ Docket No. 96-956 (issued November 27, 1996).

² Docket No. 97-1704 (issued July 9, 1998).

On July 16, 2001 the Office denied reconsideration on the grounds that the evidence submitted was repetitious or irrelevant and therefore insufficient to warrant merit review.³

The Board finds that the Office abused its discretion in refusing to reopen appellant's claim for merit review.

The only Office decision before the Board on appeal is dated July 16, 2001, denying appellant's request for reconsideration. Because more than one year has elapsed between the last merit decision dated July 8, 1998 and the filing of this appeal on October 17, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.⁴

Section 8128(a) of the Federal Employees' Compensation Act⁵ vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).⁷ The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.⁸ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.⁹

With his request for reconsideration, appellant submitted new evidence consisting of statements from four coworkers and himself regarding his assigned job duties and a medical report from his treating physician, Dr. Millett. The Office found the coworkers' statements to be "of no probative value whatsoever."

However, these statements address the issue raised by appellant in his request for reconsideration, namely, that his duties changed in 1987 when he was reassigned from window

³ The record indicates that appellant's request and supporting material were misplaced, thus causing the delay in processing.

⁴ 20 C.F.R. §§ 501.2(c), 501.3(d)(2). *See John Reese*, 49 ECAB 397, 399 (1998).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 5 U.S.C. § 8128(a) ("The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.").

⁷ 20 C.F.R. § 10.608(a) (1999).

⁸ 20 C.F.R. § 10.606(b)(1)-(2) (1999).

⁹ 20 C.F.R. § 10.608(b) (1999).

clerk to Intelpost operator. In its July 8, 1998 merit decision, the Board found that there was no evidence of any change in the nature and extent of appellant's limited-duty position. Because the statements submitted by appellant in support of his request for reconsideration constitute evidence of such a change, the Board finds that it is new and pertinent to the issue of whether appellant sustained a recurrence of disability in 1990.¹⁰

Additionally, the July 8, 1999 medical report from Dr. Millett discussed treatment of appellant since 1974 and appellant's disability as of February 12, 1990. He noted that appellant had to lift and move heavy boxes of supplies in his new position and was required to do a lot of bending. The Board finds that this evidence must be considered by the Office as relevant to appellant's claim for total disability.¹¹

Inasmuch as appellant has submitted evidence that meets the standard of subsection (iii) of section 10.606(b)(2), the Board finds that this case must be remanded for the Office to conduct a merit review of appellant's claim.

The July 16, 2001 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC
July 22, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁰ See *Terry R. Hedman*, 38 ECAB 222, 227 (1986) (finding that part of an employee's burden in establishing a recurrence of disability is to show either a change in the nature and extent of his work-related condition that disabled him or a change in the nature and extent of his limited-duty job requirements).

¹¹ See *Paul Kovash*, 49 ECAB 350, 354 (1998) (finding that medical evidence submitted in support of reconsideration need only be relevant and pertinent and not previously considered to require the Office to conduct a merit review of the claim).