

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

SANDRA L. MORTON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Grand Haven, MI, Employer**

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**Docket No. 04-1249
Issued: September 17, 2004**

Appearances:
Gary T. Neal, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On April 12, 2004 appellant filed a timely appeal of the January 9, 2004 decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration. Because more than one year has elapsed between the last merit decision dated January 16, 2003 and 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(d)(2). Accordingly, the only decision properly before the Board is the Office's January 9, 2004 decision denying appellant's request for reconsideration.

ISSUE

The issue is whether the Office properly denied appellant's request for a review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 4, 2002 appellant, then a 38-year-old letter carrier, filed a traumatic injury claim for a low back injury she allegedly sustained in the performance of duty on March 1, 2002.

Appellant stated that she was on her morning break when she bent over to get change from the vending machine and felt something pop in her lower back. She described her injury as a possible slipped disc or ruptured disc. The case was assigned claim number A09-2019067.¹

In an attached statement, appellant explained that she fell and injured her back at work on January 23, 2001. She resumed full-time work on February 4, 2002 and on February 22, 2002 while climbing stairs on her delivery route she felt a sharp pain in her lower back. The pain intensified over the next few days and on February 25, 2002 she saw her doctor who recommended additional physical therapy and work restrictions. Appellant stated that she returned to work on February 26, 2002 and continued to work until the morning of March 1, 2002, when she sustained her current injury. She also stated that she was unsure whether the injury she sustained on February 25, 2002 was a continuation of her January 23, 2001 injury. She was reportedly advised to file it as a new claim and let the compensation specialists decide the appropriate status.

The Office received progress notes, disability slips and a March 28, 2002 report from Dr. Scott A. Addison, a family practitioner, who reported that appellant had injured her back on January 23, 2001 and had recently been treated in the emergency room on March 1, 2002. A recent magnetic resonance imaging scan revealed small central disc bulges at L4-5 and L5-S1, which were unchanged from last year's examination. He further stated that appellant had borderline central canal stenosis at L4-5, but no evidence of disc herniation. Dr. Addison indicated that appellant had made significant progress since her original back injury of January 23, 2001 and had returned to full-time work, but she had a recurrence of her back pain on March 1, 2002. He diagnosed low back pain with radiculopathy and advised that appellant was disabled since March 1, 2002. Dr. Addison also stated that appellant's current pain was consistent with the pain she developed after her fall at work in January 2001 and in his opinion her current pain was a recurrence of her original injury.

The Office denied the claim by decision dated April 23, 2002. The Office accepted as factual that appellant bent over on March 1, 2002 to retrieve change while at work. It found that the medical evidence failed to establish that appellant's current back condition was related to the March 1, 2002 employment incident.

Appellant requested an oral hearing, which was held on November 8, 2002. In an April 29, 2002 report, Dr. Addison reiterated his belief that appellant's current back pain was not a new problem, but was a recurrence of the injury she sustained after her fall in January 2001. Dr. Mark J.R. Moulton, a Board-certified orthopedic surgeon, reported on May 10, 2002 that appellant injured her back on January 23, 2001 and returned to work approximately three weeks later. He noted that appellant had significant degenerative disc disease, which he suspected was somewhat of a preexisting condition. Dr. Moulton also noted that appellant developed annular tears at L3-4, L4-5 and L5-S1 and he surmised that they may have occurred with her original

¹ Appellant sustained three prior low back injuries on January 21, 1999 (A09-0449811), January 23, 2001 (A09-2006001) and February 22, 2002 (A09-2019059). Additionally, the Office authorized surgery under the January 21, 1999 claim. The case records of the respective low back claims were combined under claim number A09-2006001.

fall. In a November 18, 2002 report, Dr. Moulton related appellant's back pain to her employment injuries in January 1999 and January 23, 2001.

In a decision dated January 16, 2003, the Office hearing representative affirmed the April 23, 2002 decision.

On October 28, 2003 appellant requested reconsideration. The request was accompanied by an October 21, 2003 deposition from Dr. David M. Krencik, a Board-certified anesthesiologist, who related appellant's current low back and left leg pain to her January 23, 2001 injury. Appellant also submitted a September 5, 2003 deposition from Dr. Moulton who related her current back condition to her fall at work.

By decision dated January 9, 2004, the Office denied appellant's request for reconsideration. The Office found the deposition testimony of Drs. Krencik and Moulton irrelevant to the instant claim as both physicians attributed appellant's current condition to her prior injury and not the March 1, 2002 employment incident.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act, the Office has the discretion to reopen a case for review on the merits.² Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (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.³ Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁴

ANALYSIS

Appellant's October 28, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Counsel argued that there was sufficient evidence to establish that appellant's ongoing low back condition was causally related to her January 23, 2001 work injury. The instant claim, however, is for an injury allegedly sustained on March 1, 2002. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).⁵

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(2) (1999).

⁴ 20 C.F.R. § 10.608(b) (1999).

⁵ 20 C.F.R. §§ 10.608(b)(2)(i) and (ii) (1999).

With respect to the third requirement that the information submitted constituted relevant and pertinent new evidence not previously considered by the Office, appellant submitted deposition testimony from Drs. Krenick and Moulton, both of whom related her current condition to a prior fall at work on January 23, 2001. This evidence does not demonstrate a causal relationship between appellant's current condition and her March 1, 2002 employment incident, which is the issue on reconsideration. Appellant did not submit any relevant and pertinent new evidence, therefore, she is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).⁶ As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied the October 28, 2003 request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's October 28, 2003 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 17, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁶ 20 C.F.R. § 10.608(b)(2)(iii) (1999).