



appointment expired on December 27, 2002. The Office subsequently developed appellant's claim as a traumatic injury and accepted a lumbosacral strain.

In a January 5, 2003 report, Dr. Rabindra Prasad, a chiropractor, diagnosed lumbosacral sprain/strain and paravertebral myospasm. On January 15, 2003 he noted reviewing x-rays and diagnosed lumbar vertebral subluxation, disc degeneration and paravertebral myospasm. Additionally, appellant submitted progress reports from Dr. Prasad.

On April 20, 2004 appellant claimed compensation from December 27, 2002 to March 31, 2004. He also submitted a form dated January 28, 2003, claiming compensation for leave without pay from December 26, 2002 to January 2, 2003. Appellant provided a January 20, 2003 attending physician's report from Dr. Prasad diagnosing lumbar vertebral subluxation, disc degeneration and paravertebral myospasm. In an April 3, 2004 statement, he explained that he sought compensation as he was "refused duty within my limitations for my accepted back condition." Appellant stated that he was laid off by the employing establishment when he became unable to perform his duties.

In an April 29, 2004 statement of accepted facts, the Office indicated that appellant performed light-duty work after his accepted October 28, 2002 injury and "resigned after an apparent back injury following a car accident in December 2002."

In a June 10, 2004 report, Dr. John Randall Chu, a Board-certified orthopedic surgeon and a second opinion physician, noted reviewing the medical evidence and listed findings on examination. He concluded that appellant's lumbar strain was directly related to his October 28, 2002 injury but that his diagnosed disc bulge was preexisting and likely age related. Dr. Chu opined that appellant had continuing discomfort due to his lumbar strain but was not disabled at any time and that objective findings did not support continuing disability. In a June 9, 2004 work capacity evaluation, he advised that appellant could work with restrictions.

By decision dated December 15, 2004, the Office denied appellant's claim for wage-loss compensation from December 27, 2002 to March 31, 2004.

Appellant requested an oral hearing that was held on July 21, 2005. He testified that his casual employee position came up for renewal every three months but that he had worked three years prior to his termination on December 27, 2002. Appellant also submitted evidence that included an April 13, 2004 report from Dr. Firdos Sheikh, a Board-certified neurologist, who noted appellant's history of injury on October 28, 2002 and diagnosed several conditions. In a July 20, 2005 electromyogram (EMG) report, Dr. Sheikh noted "evidence of denervation in the right L5-S1 lumbosacral levels." She provided a corresponding attending physician's report diagnosing lumbar radiculopathy. On July 31, 2005 appellant claimed compensation from March 31, 2004 to January 30, 2005. He also provided an employing establishment "notification of personnel action" form recording an appointment expiration date of December 27, 2002, and an earlier notification of personnel action recording an appointment expiration date of January 1, 1999. Additionally, appellant resubmitted April 5 and May 5, 2003 progress reports from Dr. Prasad's practice and the March 13, 2004 report from Dr. Sheikh. On August 17, 2005 appellant's representative reiterated that appellant's claim was based on the fact that the employing establishment discontinued his limited-duty job. He also argued that the employing

establishment's notification of personnel action form indicated that appellant was terminated "as a direct result of his October 28, 2002 injury." Appellant's representative concluded that the employing establishment "refused him continued limited duty by improperly terminating his employment, which is why [appellant] ceased working."

By decision dated October 18, 2005, the hearing representative affirmed the denial of appellant's compensation claim.

On March 22, 2006 Dr. Sheikh noted appellant's complaints of persistent neck and lower back pain. She reiterated her previous diagnoses. Although Dr. Sheikh noted that appellant was able to work light duty, she concluded: "Based on [appellant's] persistent complaints since his injury on October 28, 2002, it appears his pain is related to the primary insult." In a May 8, 2006 addendum, she explained that appellant had an abnormal magnetic resonance imaging (MRI) scan, which indicated "with reasonable certainty that his traumatic injury is the [cause of] his medical condition." Dr. Sheikh reiterated that appellant was capable of light-duty work.

Appellant also provided evidence concerning his motor vehicle accidents on August 27, 2000 and September 19, 2003.

On August 18, 2006 appellant requested reconsideration. His representative based the reconsideration request on three arguments. First, he asserted that, although appellant was retained as a "casual/temporary employee," he was not informed that his period of employment would end on December 27, 2002 until after his October 28, 2002 injury. The representative concluded that this supported that appellant was terminated due to his injury. Second, he reiterated that appellant's claim was not based on disability for work, but rather on the fact that the employing establishment denied him limited duty. Finally, appellant's representative indicated that appellant was not involved in a motor vehicle accident in December 2002, but was in fact involved in motor vehicle accidents on August 27, 2000, in which he was not injured and, on September 19, 2003, after his termination from the employing establishment, in which he sustained neck injuries. Appellant provided additional factual evidence concerning his August 27, 2000 motor vehicle accident.

By decision dated March 22, 2007, the Office denied appellant's request for reconsideration without conducting a merit review.

### **LEGAL PRECEDENT**

Under section 8128 of the Federal Employees' Compensation Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing federal regulations provides guidance for the Office in using this discretion.<sup>1</sup> The regulations provide that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

"(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

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<sup>1</sup> 20 C.F.R. § 10.606(b)(2) (1999).

“(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].”<sup>2</sup>

Section 10.608(b) provides that when an application for review of the merits of a claim 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.<sup>3</sup> When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant’s application for reconsideration and any evidence submitted in support thereof.<sup>4</sup>

### ANALYSIS

The Board finds that the Office properly denied appellant’s request for reconsideration without conducting a merit review, as appellant did not meet any of the above three criteria.<sup>5</sup> Appellant did not make any assertions regarding Office error in applying or interpreting a specific point of law and, therefore, the Office was not required to reopen the claim for a merit review on that basis. Rather, he based his reconsideration request on several arguments and the provision of evidence.

Appellant’s August 18, 2006 reconsideration request was based on three main arguments. First, he asserted that the employing establishment terminated his appointment because of his injury and submitted his notification of personnel action form with a termination date of December 27, 2002 in support of his position. The Board finds that this argument was previously considered by the Office. Appellant testified about his termination at his hearing and his representative argued the same point in his August 17, 2005 posthearing statement. Accordingly, the Office was not required to reopen the claim for a merit review based on this argument. Second, appellant reiterated that his claim was based on the employing establishment’s denial of light-duty work, not on his own physical disability. He had previously advanced this argument in his own statement on April 3, 2004 and in his representative’s

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<sup>2</sup> *Id.*

<sup>3</sup> 20 C.F.R. § 10.608(b) (1999).

<sup>4</sup> *Annette Louise*, 54 ECAB 783 (2003).

<sup>5</sup> On appeal, appellant notes that his reconsideration request was dated August 18, 2006 and received by the Office on August 28, 2006. He asserts entitlement to a merit review as the Office’s decision was issued more than 90 days later, March 22, 2007. The Board notes that the last merit decision was dated October 18, 2005 and appellant’s August 18, 2006, reconsideration request was filed about 10 months later. Under Office procedures, “there is no obligation to conduct a merit review on insufficient evidence if the maximum one-year time limit for requesting review by the Board will have expired within the 90-day period following the Office’s receipt of the claimant’s reconsideration request.” Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (January 2004). Thus, the Office was not required to conduct a merit review pursuant to its procedures.

posthearing arguments on August 17, 2005. Therefore, the Board finds that this is not a new and relevant argument and cannot constitute a basis for reopening appellant's claim for a merit review. Finally, appellant asserted that the employing establishment and the Office erroneously stated that he was in a motor vehicle accident in December 2002. He explained that he was in a motor vehicle accident on August 17, 2000, in which his passenger was injured but he was not and in another accident on September 19, 2003 after his employment was terminated, in which he sustained neck injuries. The Board finds that this argument is not germane to the underlying question of whether the medical evidence showed he was disabled due to his accepted employment injury during the claimed period or whether the factual evidence shows that the employing establishment made appropriate light-duty work available during his temporary appointment.

Appellant also submitted new medical evidence in support of his reconsideration request; however, the Board finds that the evidence was not relevant to the underlying issue of whether appellant had continuing total disability for work during the claimed period. In a March 22, 2006 report, Dr. Sheikh noted that appellant had continuing complaints of lumbosacral pain. She diagnosed several medical conditions, including lumbosacral radiculopathy and concluded that based on appellant's "persistent complaints since his injury on October 28, 2002, it appears his pain is related to the primary insult." In her May 8, 2006 addendum, Dr. Sheikh reiterated that appellant's initial traumatic injury was the cause of his current medical condition. However, she also stated that appellant was capable of working in a light-duty assignment. The Board finds that Dr. Sheikh's reports are not relevant as she did not address the underlying issue of whether appellant had continuing total disability for work due to his accepted work injury. Instead, she indicated that appellant was capable of working. As Dr. Sheikh did not address whether appellant was totally disabled due to his employment injury during the claimed period, her reports do not constitute relevant new medical evidence.

Therefore the Board finds that appellant neither asserted that the Office misinterpreted or misapplied a specific point of law, advanced a relevant legal argument not previously considered by the Office, or provided new and relevant medical evidence in support of his request for reconsideration.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration without conducting a merit review.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 22, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 2007  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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