

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

I.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 09-1402
Issued: January 6, 2010**

Appearances:
Thomas Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 6, 2009 appellant filed a timely appeal from Office of Workers' Compensation Programs' February 23, 2009 nonmerit decision. Because more than one year has elapsed between the last merit decision dated December 27, 2007 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)(2) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for reconsideration under 5 U.S.C. § 8128.

FACTUAL HISTORY

On June 2, 2006 appellant, a 43-year-old mail handler, filed a claim for benefits, alleging that he injured his lower back on May 1, 2006 while reaching down to pick up a sack of mail.¹

On July 20, 2006 the Office advised appellant that it required additional factual and medical evidence to determine whether he was eligible for compensation benefits. It asked him to submit a comprehensive medical report from his treating physician describing his symptoms and the medical reasons for his condition, and an opinion as to whether his claimed condition was causally related to his federal employment. The Office requested that appellant submit the additional evidence within 30 days.

By decision dated August 23, 2006, the Office denied appellant's claim, finding that he failed to submit sufficient medical evidence in support of his claim that he sustained a lower back leg injury in the performance of duty on May 1, 2006.

In a report dated February 23, 2007, Dr. Joyce Goldenberg, Board-certified in physical medicine and rehabilitation, stated that appellant was experiencing neck and low back pain, which he attributed to the May 1, 2006 work incident. She noted complaints of constant, dull neck pain along with weakness, decreased mobility and stiffness; the pain radiated through the right arm into his fingers. Dr. Goldenberg stated that appellant also had constant pain in his lower, middle and upper back pain with weakness, decreased mobility and stiffness, radiating to the right buttock. She advised him to abstain from heavy lifting, carrying, pushing, pulling and prolonged walking, standing, sitting, bending and twisting, as these activities exacerbated his pain. Dr. Goldenberg opined that appellant was not able to work due to his injuries.

In a February 28, 2007 report, Dr. Richard Morgan, an osteopath, reviewed appellant's history of injury and noted complaints of severe neck and low back pain. He stated that appellant's neck pain is constant, throbbing in nature and advised that the low back pain radiated into the right buttock; the pain was shooting and burning in nature and was worsened by pulling, lifting, and carrying heavy objects, prolonged sitting and standing. Dr. Morgan stated that appellant's pain and symptoms had not diminished since the May 2006 work incident. He diagnosed cervical disc displacement, lumbosacral disc displacement, cervical nerve root injury and lumbar nerve root injury and prescribed a course of physical therapy. Dr. Morgan also recommended that appellant undergo a magnetic resonance imaging (MRI) scan and x-rays of the entire spine. He stated that appellant was currently totally disabled and recommended that he continue to abstain from work for four to six weeks until he could be reevaluated.

By letter dated March 23, 2007, appellant requested reconsideration.

By decision dated May 3, 2007, the Office denied modification of the August 23, 2006 decision.

¹ The Board notes that appellant filed a Form CA-2a claim for a recurrence of disability. The Office, by letter dated June 20, 2006, advised him that his description of the May 1, 2006 work incident had not presented the required elements for a recurrence of disability claim. It therefore informed appellant that it would adjudicate his claim as one based on a new injury.

In an August 27, 2007 report, received by the Office on September 24, 2007, Dr. Goldenberg stated that appellant had been injured prior to his May 2006 work incident, when he experienced a recurrence of his neck and low back pain that he attributed to handling heavy mailbags at work. She noted that his job required him to rapidly twist and turn at the waist, which exacerbated his neck and low back symptoms. Dr. Goldenberg related that appellant experienced a painful pop in his back, which caused him to stop working. She stated that when she examined him on June 23, 2006 she found severe trigger point spasms in his cervical and lumbar spine; she asserted that these were objective findings, which cannot be fabricated. Dr. Goldenberg also noted decreased range of motion and decreased strength in the cervical and lumbar spine, symptoms consistent with his previous MRI scan results. She asserted that the pain appellant experienced in May 2006 was directly related to his previous October 2004 work injury. Dr. Goldenberg stated that returning to work at that time caused an exacerbation of his symptoms and advised that he was still not fully recovered.

On September 3, 2007 appellant requested reconsideration.

In a July 11, 2007 report, received by the Office on October 24, 2007, Dr. Morgan essentially reiterated his previous findings and conclusions. He noted that appellant received appropriate treatment for his diagnosed conditions, including physical therapy, chiropractic care, trigger point injections and nerve block to the affected areas in the cervical and lumbar spine. Dr. Morgan opined that the injuries appellant sustained were causally related to the May 1, 2006 work incident.

By decision dated December 27, 2007, the Office denied modification of the August 23, 2006 decision.

By letter dated December 15, 2008, appellant's attorney requested reconsideration. Counsel alleged that appellant has established that he sustained an injury while reaching down to pick up a bag of mail on May 1, 2006. He also alleged that appellant had established with probative medical evidence causal relationship between the incident and appellant's diagnosed conditions. Appellant resubmitted Dr. Goldenberg's February 23, 2007 report and the February 28 and July 11, 2007 reports from Dr. Morgan. He did not submit any additional medical evidence.

By decision dated February 23, 2009, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by constituting relevant and pertinent evidence not previously considered by the Office.² Evidence that repeats

² 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.³

ANALYSIS

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. Appellant's representative argued that appellant had established that he sustained injury as a result of the May 1, 2006 incident. As the claim was denied because appellant had not submitted rationalized medical evidence to establish that he sustained an injury as a result of picking up a bag of mail on May 1, 2006, appellant's representative would have to provide new and relevant evidence in this regard to obtain a merit review. The evidence appellant submitted is not pertinent to the issue on appeal. The February 23, 2007 report from Dr. Goldenberg and the February 28 and July 11, 2007 reports from Dr. Morgan were previously considered by the Office. The Board has held that the submission of evidence, which does not address the particular issue involved in the case, does not constitute a basis for reopening the claim.⁴ Appellant has not submitted any new medical evidence, which addresses the relevant issue of whether appellant's claimed lower back sprain was causally related to factors of his federal employment. Appellant's attorney did not advance a point of law or fact not previously considered by the Office in his request letter. The Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

CONCLUSION

The Office properly refused to reopen appellant's case for reconsideration on the merits of his claim under 5 U.S.C. § 8128(a).

³ *Howard A. Williams*, 45 ECAB 853 (1994).

⁴ *See David J. McDonald*, 50 ECAB 185 (1998).

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: January 6, 2010
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