United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 07-2240**
	)	**Issued: August 13, 2008**
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, Employer	)	

Appearances:
Martin Kaplan, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On August 27, 2007 appellant, through counsel, filed a timely appeal of a nonmerit decision of the Office of Workers' Compensation Programs dated July 25, 2007.[1] Because more than one year has elapsed between the last merit decision of the Office dated August 24, 2006 and the filing of this appeal on August 27, 2007, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board lacks jurisdiction to review the merits of appellant's case.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[1] The Board notes that, while the date on appellant's letter is July 30, 2007, the postmark on the envelope indicates the appeal was not mailed until August 27, 2007. It was received by the Board on September 4, 2007.

FACTUAL HISTORY

On April 30, 2001 appellant, then a 40-year-old mailman, filed an occupational disease claim alleging that on April 5, 2001 he first realized his cervical degenerative disc disease and bony spondylosis had been aggravated by his employment. The Office accepted the claim for aggravation of herniated C5-6 intervertebral disc, which was expanded to include aggravation of cervical spondylosis on August 5, 2006 and aggravation of lumbosacral spondylosis without myelopathy on May 21, 2007.[2] It accepted appellant's July 30, 2002 recurrence claim and authorized wage-loss compensation for the period December 18, 2004 to March 11, 2005 and August 5, 2005 to March 6, 2006. Appellant stopped work with the employing establishment on August 5, 2005. He accepted the employing establishment's offer of limited duty and returned to work on May 15, 2006. Appellant stopped work on May 23, 2006 and returned on May 8, 2006.[3]

On March 16, 2006 Robert A. Sciortino, a second opinion Board-certified orthopedic surgeon, diagnosed cervical spondylosis and status post cervical fusion and discectomy. He opined that appellant's preexisting condition had been permanently aggravated by his employment duties. Dr. Sciortino concluded that appellant was disabled from performing his usual employment duties, but was capable of working a modified job. In an attached work capacity evaluation form, he opined that appellant was capable of working eight hours per day with restrictions. The restrictions included up to four hours of reaching above the shoulder; up to two hours of twisting, six hours of pushing and pulling a maximum of 20 pounds; and up to six hours of lifting a maximum of 10 pounds.

On April 27, 2006 appellant informed the Office that he had accepted a job offer as a new car salesperson on March 10, 2006, but resigned on April 14, 2006.

In a June 1, 2006 report, Dr. Gurpreet S. Padda, a treating Board-certified anesthesiologist, noted that he had been treating appellant for cervical radiculopathy and cervicalgia. He opined that appellant was "capable of answering the [tele]phone at his place of employment" and was unable to deliver or case mail.

Appellant returned to light-duty work answering the telephone at the employing establishment on June 8, 2006.

On June 7, 2006 appellant accepted a light-duty job offer of answering the telephone and taking messages for eight hours a day.

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[2] Appellant filed a claim for disability retirement with the Office of Personnel Management on August 3, 2006, which was approved effective May 29, 2007.

[3] Appellant filed a claim for a schedule award on June 7, 2006. As the Office has not issued a final decision addressing appellant's entitlement to a schedule award for any employment-related permanent impairment, the Board lacks jurisdiction to address this issue on appeal. 20 C.F.R. § 501.2(c); *see Linda Beale*, 57 ECAB 429 (2006) (the Board's jurisdiction extends only to a review of final decisions by the Office issued within one year of the date of the filing of an appeal).

On a June 12, 2006 duty status report, Dr. Padda indicated that appellant was capable of lifting/carrying between 10 pounds continuously and 35 pounds intermittently for five to six hours per day, standing up to eight hours per day, walking five to six hours per day, intermittent climbing for five to six hours per day; intermittent twisting for five to six hours per day, pushing/pulling for eight hours per day; driving a vehicle for two to three hours per day; and intermittent reaching above shoulder for two to three hours per day.

On June 30, 2006 appellant accepted a new limited-duty job offer. The job duties included two to three hours of case letter and flat-sized mail; one to two hours of delivering portions of mail; three to five hours of writing up various types of mail; three to five hours of policing interior and outside of building, picking up the trash and emptying trash cans and ashtrays. The physical requirements were lifting/carrying and reaching above the shoulder up to five pounds for one to two hours; standing and walking three to five hours; two to three hours of driving and sitting; and eight hours of fine manipulation, fine grasping and twisting intermittently.

In a letter dated July 14, 2006, the Office informed appellant that the evidence of record was currently insufficient to support his claim for a recurrence of disability beginning on or about July 1, 2006. Appellant was advised as to the type of medical and factual evidence required to support his claim and given 30 days to submit the requested evidence.

In a letter dated August 2, 2006, the Office informed appellant that the evidence of record was currently insufficient to support his claim for a recurrence of disability beginning on or about July 21, 2006. Appellant was advised as to the type of medical and factual evidence required to support his claim and given 30 days to submit the requested evidence.

On August 2, 2006 Dr. Padda stated that he had been treating appellant for lumbar and cervical radiculopathy. He opined that appellant was capable of working light-duty work and referenced his June 1, 2006 letter.

On August 24, 2006 the Office denied appellant's claim for a recurrence of disability beginning on or about July 1, 2006.

The case lay dormant until April 6, 2007 when the Office referred appellant to Dr. Guy H. Frumson, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Drs. Padda and Sciortino regarding work restrictions. On April 25, 2007 Dr. Frumson, in an attached work restriction form, opined that appellant was capable of working a sedentary job position two to four hours per day.

In a letter dated June 25, 2007, the Office informed appellant that additional evidence was required and that, once the evidence was received, Dr. Frumson would be requested to provide a supplemental medical report.

By letter dated July 3, 2007, appellant's counsel requested reconsideration, referencing Dr. Frumson's report as supporting appellant's recurrence claim.

In a July 18, 2007 letter, the employing establishment noted that appellant stopped working on July 21, 2006 when he "went into an AWOL [absent without leave] status after accepting a modified job offer."

By decision dated July 25, 2007, 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. It noted that appellant did not submit any new evidence, but further noted that appellant's counsel contended that the report by Dr. Frumson was sufficient to support modification of the August 24, 2006 decision.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[4] provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[5] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[6]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[7]

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[8] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[9]

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[4] 5 U.S.C. § 8101 *et seq.*

[5] 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

[6] 20 C.F.R. § 10.605.

[7] 20 C.F.R. § 10.606. *See Susan A. Filkins*, 57 ECAB 630 (2006).

[8] 20 C.F.R. § 10.607(a). *See Joseph R. Santos*, 57 ECAB 554 (2006).

[9] 20 C.F.R. § 10.608(b). *See Candace A. Karkoff*, 56 ECAB 622 (2005).

ANALYSIS

On August 24, 2006 the Office denied appellant's claim for a recurrence of disability beginning on or about July 1, 2006. However, following issuance of the August 24, 2006 decision and prior to appellant's July 3, 2007 reconsideration request, the Office referred appellant to Dr. Frumson, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Drs. Padda and Sciortino regarding work restrictions. In soliciting this information, the Office proceeded to exercise its discretionary authority under 5 U.S.C. § 8128, to reopen the case on its own motion.[10] The Office's April 6, 2007 letter to Dr. Frumson was in further development of appellant's claim as the Office found there was a conflict in the medical opinion evidence regarding appellant's work restrictions. On April 25, 2007 Dr. Frumson concluded that appellant was capable of working a sedentary position two to four hours per day and provided physical restrictions. As the record currently stands, the Office has not issued a merit decision evaluating the evidence it solicited and obtained from Dr. Frumson. In addition, since the Office undertook further development of the record when it referred appellant to Dr. Frumson to resolve the conflict in the medical opinion evidence, the Office has responsibility to develop the evidence in a fair and impartial manner.[11] This case is somewhat analogous to *David F. Garner*,[12] in which the Board found that, after reopening the merits of the employee's claim for further development, receiving additional factual and medical evidence regarding the issue of causal relationship, the Office abused its discretion in denying reconsideration under the clear evidence of error standard. Rather, the Board noted that the Office should have conducted a merit review of the claim.

Exercising its discretionary authority, the Office solicited and received relevant pertinent evidence not previously considered. Therefore, the Office must conduct an appropriate merit review of the evidence under section 8128(a) on the issue of whether appellant established a recurrence of disability on or about July 1, 2006.[13] Following such a review and any development which the Office deems necessary, the Office shall issue an appropriate merit decision.

CONCLUSION

The Board finds that the Office improperly denied further merit review of the claim under 5 U.S.C. § 8128(a).

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[10] *See, e.g., Joyce A. Fasanello*, 49 ECAB 490 (1998).

[11] *See Robert Kirby*, 51 ECAB 474 (2000); *Mae Z. Hackett* , 34 ECAB 1421 (1983). *See also R.H.*, 59 ECAB ___ (Docket No. 07-2124, issued March 7, 2008); *F.R.*, 58 ECAB ___ (Docket No. 05-15, issued July 10, 2007) (section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination).

[12] 43 ECAB 459 (1992) (Gerson, D., dissenting); *see also Joyce A. Fasanello*, *supra* note 10.

[13] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the July 25, 2007 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for a review of the merits of appellant's claim and any other proceedings deemed necessary by the Office to be followed by an appropriate decision.

Issued: August 13, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board