

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

R.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Jacksonville, FL, Employer**

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**Docket No. 08-1181
Issued: November 19, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 13, 2008 appellant filed a timely appeal from a December 5, 2007 decision of the Office of Workers' Compensation Programs which denied his reconsideration request without conducting a merit review. Because more than one year has elapsed between the most recent merit decision of the Office dated January 18, 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) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

This is the second appeal in the present case. In an October 11, 2007 decision, the Board affirmed a January 18, 2007 Office decision which denied appellant's claim for a traumatic injury. The Board found that appellant failed to meet his burden of proof to establish that he sustained a bilateral arm and shoulder injury causally related to the November 28, 2006

employment incident.¹ The facts and the circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.²

In a letter dated May 18, 2007, appellant requested reconsideration. He submitted a copy of the traumatic injury claim filed on November 29, 2006 and a copy of his March 28, 2007 appeal form submitted to the Board. A November 28, 2006 attending physician's report from Dr. William D. Moore, a Board-certified internist, treated appellant for cervical pain which began on November 28, 2006 when he was pushing a mail container at work. Dr. Moore diagnosed C6-7 disc herniation and noted with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity. An April 16, 2007 attending physician's report from Dr. Andrew Canestra, a Board-certified neurologist, noted that appellant reported pushing a mail cart at work on November 28, 2006 when it stopped suddenly causing an injury to his cervical spine. Dr. Canestra diagnosed cervical disc herniation, left paracentral disc herniation at C6-7 and noted with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity. He noted appellant was totally disabled commencing November 29, 2006. On June 21, 2007 Dr. Canestra noted that appellant had surgery on May 7, 2007 and could return to full-time work on June 25, 2007 with no lifting over 25 pounds.

By decision dated December 5, 2007, the Office denied appellant's reconsideration request on the grounds that the evidence was repetitious and immaterial and insufficient to warrant further merit review.

LEGAL PRECEDENT

Under section 8128(a) of the Act,³ the Office has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,⁴ which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

"(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]."

¹ On November 29, 2006 appellant, then a 51-year-old tractor trailer operator, filed a claim alleging that, on November 28, 2006, he experienced bilateral arm and shoulder pain while pushing a general purpose container on a trailer.

² Docket No. 07-1241 (issued October 11, 2007).

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁵

ANALYSIS

The Office denied appellant's reconsideration request without conducting a merit review, on the grounds that the evidence submitted neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

However, appellant submitted relevant and pertinent evidence not previously considered by the Office. The Office's January 18, 2007 decision denied appellant's claim because he had not submitted sufficient medical evidence to establish his claim. Appellant submitted an attending physician's report from Dr. Cannestra dated April 17, 2007. He addressed the causation of appellant's injuries. Dr. Cannestra noted a history of appellant's injury on November 28, 2006 and diagnosed cervical disc herniation, left paracentral disc herniation at C6-7. He noted with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity. Dr. Cannestra opined that appellant was totally disabled from November 29, 2006 to June 18, 2007.

This medical evidence was not previously of record and is relevant to the issue of whether appellant's current condition is related to the incident of November 28, 2006. This evidence was not previously considered by the Office in rendering a decision. The Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁶ The Board finds that the report from Dr. Cannestra is relevant new evidence that is sufficient to require reopening appellant's case for further review on its merits.

Therefore, the Office improperly refused to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128. Consequently, the case will be remanded to the Office for a merit review. Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision on appellant's claim.

CONCLUSION

The Board finds that the Office, in its decision dated December 5, 2007, improperly denied appellant's request for reconsideration of his case on its merits.⁷

⁵ 20 C.F.R. § 10.608(b).

⁶ See *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁷ Following the Office's December 5, 2007 decision and on appeal, appellant submitted additional evidence to the Office. However, the Board may not consider new evidence on appeal; see 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further development in accordance with this decision.

Issued: November 19, 2008
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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