

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

M.Y., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bloomfield, NJ, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 08-2140
Issued: June 2, 2009**

Appearances:

*James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 30, 2008 appellant filed a timely appeal of the November 14, 2007 and February 27, 2008 nonmerit decisions of the Office of Workers' Compensation Programs, which denied reconsideration.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board does not have jurisdiction over the merits of appellant's claim.²

ISSUE

The issue is whether the Office properly denied appellant's September 18 and December 14, 2007 requests for reconsideration under 5 U.S.C. § 8128(a).

¹ Appellant's counsel also sought to appeal a July 9, 2008 decision of the Office. However, the Office did not issue a final decision on that date. A July 9, 2008 letter from the Office advised appellant that the November 14, 2007 nonmerit decision was not subject to further review by the Office, but instead must be appealed to the Board. See 20 C.F.R. § 10.608(b) (2008). Accordingly, the July 9, 2008 correspondence is not a final Office decision subject to review by the Board. See 20 C.F.R. § 10.501.2.

² The Office issued its most recent merit decision on February 15, 2007, which is more than a year prior to the filing of the instant appeal. As such, the Board does not have jurisdiction over the February 15, 2007 merit decision.

FACTUAL HISTORY

On March 19, 2001 appellant, then a 42-year-old mail carrier, was involved in an employment-related motor vehicle accident. The Office accepted the claim for lumbar strain and cervical radiculitis. Appellant received wage-loss compensation.³ By decision dated February 15, 2007, the Office terminated appellant's wage-loss compensation and medical benefits effective February 20, 2007. It based its decision on the March 12, 2006 report of Dr. David I. Rubinfeld, a Board-certified orthopedic surgeon and Office referral physician.⁴

On September 18, 2007 appellant's counsel requested reconsideration, contending that the Office's reliance on Dr. Rubinfeld's opinion as a basis for terminating benefits was erroneous. The request for reconsideration was accompanied by a January 2, 2007 work capacity evaluation (Form OWCP-5c) from Dr. Raymond Russomanno.⁵

In a decision dated November 14, 2007, the Office denied appellant's request for reconsideration.

On December 14, 2007 appellant's counsel again requested reconsideration. He indicated that he had enclosed a "new report of Dr. Cornelius Nicoll dated November 8, 2007." Counsel noted that Dr. Nicoll was the treating physician and his report should carry great weight. The Board notes, however, that the December 14, 2007 request was not accompanied by a November 8, 2007 report from Dr. Nicoll.⁶

By decision dated February 27, 2008, the Office denied appellant's December 14, 2007 request for reconsideration. It found that the newly submitted November 8, 2007 report, which consisted of two lines, was not relevant to the issue at hand. Therefore, further merit review was unwarranted.

³ The Office placed her on the periodic compensation rolls effective December 2, 2001.

⁴ Dr. Rubinfeld saw appellant on March 9, 2006 and found her orthopedic examination to be normal. He noted that her subjective complaints were not supported by objective findings on examination. Dr. Rubinfeld concluded that appellant's accepted conditions of cervical radiculitis and lumbar strain had resolved and there were no active, current orthopedic conditions. He also indicated that appellant was able to return to her full-time mail carrier duties without restriction. There was no need for additional orthopedic treatment. Dr. Rubinfeld previously examined appellant at the Office's behest on April 25, 2002. His latest findings were entirely consistent with his previous report dated May 1, 2002.

⁵ This report was originally received January 17, 2007, and was referenced by the Office in its February 15, 2007 decision terminating benefits.

⁶ Dr. Nicoll had previously served as appellant's treating physician through March 2004, at which time he discharged her from his care. Appellant subsequently obtained approval from the Office to select a new treating physician. However, there is no indication from the record that she made arrangements for alternate medical care. After an approximate three-year hiatus, appellant returned to Dr. Nicoll for treatment. Following the February 2007 termination of benefits, the Office received treatment notes from Dr. Nicoll covering the period April 12 through November 8, 2007. The notation for November 8, 2007 reads: "[Appellant] returns to the office today with continued complaints of pain still. Letter in chart will describe the condition." The Office received this latest update on November 26, 2007.

On April 15, 2008 counsel faxed a copy of Dr. Nicoll's November 8, 2007 two-page narrative report along with a request for reconsideration of the "decision dated November 14, 2007."⁷

By letter dated July 9, 2008, the Office advised appellant that the November 14, 2007 nonmerit decision was not subject to further reconsideration. Appellant's only recourse was to file an appeal with the Board. The Office informed appellant that it would take no further action with respect to the April 15, 2008 request filed by counsel.

LEGAL PRECEDENT

The Office has the discretion to reopen a case for review on the merits.⁸ 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.⁹ 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.¹⁰

ANALYSIS

Appellant's September 18 and December 14, 2007 requests for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Appellant's representative presented factual arguments regarding previously considered medical reports. Therefore, 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).¹¹

Appellant also failed to satisfy the third requirement under section 10.606(b)(2). She did not submit any relevant and pertinent new evidence with either her September 18 or December 14, 2007 request for reconsideration. The record already included a copy of Dr. Russomanno's January 2, 2007 work capacity evaluation. The Office specifically addressed this report in the February 15, 2007 decision terminating benefits. Submitting additional

⁷ While the Board acknowledges receipt of Dr. Nicoll's November 8, 2007 narrative report, we do so only to establish the procedural posture of the claim. The substance of the doctor's two-page report is not subject to review by the Board because the Office did not receive this report until after it issued the February 27, 2008 decision. *See* 20 C.F.R. § 10.501.2(c).

⁸ 5 U.S.C. § 8128(a) (2006).

⁹ 20 C.F.R. § 10.606(b)(2).

¹⁰ *Id.* at § 10.608(b).

¹¹ *Id.* at § 10.606(b)(2)(i) and (ii).

evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim.¹²

Regarding Dr. Nicoll's recent treatment notes, albeit new, this evidence is essentially duplicative of his earlier treatment notes, Dr. Nicoll's April 12 through November 8, 2007 notes addressed appellant's subjective complaints of cervical and lumbar pain. These latest treatment notes do not mention either of the two previously accepted conditions or specifically relate any ongoing symptoms to the March 19, 2001 employment-related motor vehicle accident. Dr. Nicoll's April 12 through November 8, 2007 treatment notes are not relevant to the issue on reconsideration, which is whether appellant has any ongoing employment-related residuals. Consequently, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).¹³

CONCLUSION

The Board finds that the Office properly denied appellant's September 18 and December 14, 2007 requests for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2008 and November 14, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 2, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹² *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

¹³ 20 C.F.R. § 10.606(b)(2)(iii).