



## **FACTUAL HISTORY**

On December 28, 2004 appellant, then a 54-year-old retired postal inspector, filed a notice of occupational disease (Form CA-2) claiming that he sustained degenerative lumbar disc disease with lower extremity paresthesias in the performance of duty. He attributed his lumbar condition to several work factors: his general work environment from 1978 through his retirement on January 3, 2002; a physical fitness program; heavy lifting and carrying from November 1983 to February 1996 while on an undercover team; a March 23, 1991 occupational motor vehicle accident claimed under File No. xxxxxx731;<sup>1</sup> weapons training from May 1992 to June 2001; a February 26, 1993 explosion; surveillance from February 1996 to January 2002; sorting packages in an unheated airplane hangar from December 23, 1999 to January 6, 2000; bending, lifting, stooping, carrying and stair climbing on September 20 and November 13, 2001. Appellant stated that he was first aware of the conditions on March 23, 1991 and first related them to his federal employment on June 1, 2001.

In January 12 and August 18, 2005 letters, the employing establishment contended that appellant's claim was not timely filed within the three-year time limitation of section 8122 of the Federal Employees' Compensation Act.<sup>2</sup>

Appellant submitted medical evidence from several attending physicians. On March 28, 1991 Dr. Peter Lesniewski, an attending Board-certified surgeon, opined that the March 23, 1991 car accident caused acute cervical and lumbosacral sprains. On January 7, 1992 he recommended physical therapy. In an April 19, 2001 report, Dr. John Keleman, an attending Board-certified neurologist, noted appellant's complaints of back and foot pain after sorting packages at work in December 1999. He ordered a June 1, 2001 lumbar magnetic resonance imaging (MRI) scan which showed degenerative disc disease. Dr. Keleman diagnosed bilateral L5-S1 radiculopathy.<sup>3</sup> In a July 12, 2004 report, Dr. Frederic A. Mendelsohn, an attending Board-certified neurologist, noted appellant's account of foot and back pain after unloading parcels in 1999.<sup>4</sup> On August 9, 2005 he diagnosed sciatica secondary to a herniated L5-S1 disc, substantially worsened by diabetic polyneuropathy.

Appellant also submitted reports of periodic physical examinations performed by contract physicians for the employer. A November 15, 1995 report noted his account of "job related" foot paresthesias and back pain. A May 12, 1999 report explained that appellant attributed paresthesias of both hands and his left foot to a March 1991 motor vehicle accident. May 14 and August 22, 2001 reports again noted his account of back pain and bilateral foot paresthesias since

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<sup>1</sup> The nature and duration of any accepted injuries sustained in the March 23, 1991 accident is not of record on the present appeal.

<sup>2</sup> 5 U.S.C. § 8122.

<sup>3</sup> A May 31, 2001 MRI scans showed degenerative disc disease at L5-S1 with left L5 nerve root impingement.

<sup>4</sup> Dr. Mendelsohn ordered a January 5, 2005 lumbar MRI scan which showed bilateral L5-S1 foraminal stenosis with a small left-sided disc herniation. A January 11, 2005 nerve conduction velocity (NCV) test of the lower extremities showed bilateral L5-S1 radiculopathy and moderate to severe bilateral sensorimotor polyneuropathy consistent with diabetes.

1991. Dr. Mendelsohn recommended that appellant consult his own physician if the symptoms were “persistent or bothersome.”<sup>5</sup>

By decision dated October 4, 2005, the Office denied appellant’s claim on the grounds that it was not timely filed under the three-year time limitation of section 8122 of the Act. Also, there was no evidence that the employing establishment had actual knowledge that he sustained degenerative lumbar disc disease within 30 days of any of the alleged incidents.

In an October 21, 2005 letter, appellant requested reconsideration. He asserted that he continued to be exposed to injurious work factors through January 3, 2002 within three years of filing the claim on December 28, 2004.

On December 27, 2005 the Office held a teleconference with appellant’s last two supervisors. Both officials recalled that from December 28, 2001 to January 3, 2002, appellant performed clerical duties, packed items from his desk, returned his official vehicle and removed computers and documents from his domicile. He did not perform surveillance during that week.

By decision dated January 12, 2006, the Office denied modification of the October 4, 2005 decision. It found that appellant was not exposed to the identified work factors from December 28, 2001 to January 3, 2002. Therefore the December 28, 2004 claim was not timely filed.

In a January 4, 2007 letter, appellant requested reconsideration. He contended that the December 28, 2004 claim should be considered timely as he filed a claim for the March 23, 1991 motor vehicle accident on March 27, 1991. Appellant asserted that his supervisor knew he withdrew from firearms training on June 18, 2001 due to back pain. He alleged that carrying heavy boxes from December 26, 2001 to January 3, 2002 aggravated his lumbar degenerative disc disease. Appellant submitted a photograph showing 11 boxes of unknown size and weight.

By decision dated April 11, 2007, the Office again denied modification. It found that appellant’s January 4, 2007 statement was inconsistent with his previous accounts. Also, the December 19, 2005 teleconference established that he was not exposed to the identified factors from December 28, 2001 through January 3, 2002.

In an April 5, 2008 letter, appellant requested reconsideration. He submitted a December 7, 2001 e-mail from his supervisor confirming that he would turn in his accountable property on January 2, 2002 and remove additional property on January 3, 2002.

By decision dated June 2, 2008, the Office denied modification on the grounds that the new evidence did not establish that appellant filed his claim within three years of his exposure to the implicated work factors. It noted that the fitness-for-duty reports did not constitute actual knowledge by the employing establishment as they did not establish a work-related diagnosis.

In a May 26, 2009 letter, appellant requested reconsideration. He reiterated that the fitness-for-duty reports gave the employing establishment timely actual notice of a lumbar

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<sup>5</sup> October 25, 1991 and April 24, 1997 reports did not mention back pain or lower extremity symptoms.

condition. Appellant submitted an April 17, 2001 patient checklist from a fitness-for-duty examination in which he indicated that his back and foot symptoms were due to surveillance activities and unloading mail from planes in 1999. He also submitted duplicates of Dr. Keleman's April 19, May 14 and August 22, 2001 contract physician reports.

In a June 17, 2009 decision, the Office denied reconsideration on the grounds that appellant did not submit new, relevant argument or evidence establishing legal error by it. It found that the April 17, 2001 checklist was of no probative value.

### **LEGAL PRECEDENT**

To require the office to reopen a case for merit review under section 8128(a) of the Act,<sup>6</sup> section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>7</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>8</sup>

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>9</sup> He needs only to submit relevant, pertinent evidence not previously considered by the Office.<sup>10</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>11</sup>

### **ANALYSIS**

Appellant filed an occupational disease claim on December 28, 2004 for lumbar degenerative disc disease. He attributed this condition to a variety of work factors occurring between 1978 and January 3, 2002. Appellant contended that fitness-for-duty examination reports gave his supervisors timely actual notice of the claimed condition. The Office denied appellant's claim on October 4, 2005 on the grounds that the claim was not timely filed within three years of his last exposure to the identified work factors. Also, the record did not establish actual notice to the employing establishment within 30 days of any of the identified incidents.

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.606(b)(2).

<sup>8</sup> *Id.* at § 10.608(b). *See also T.E.*, 59 ECAB \_\_\_\_ (Docket No. 07-2227, issued March 19, 2008).

<sup>9</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>10</sup> *Id.* at § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

<sup>11</sup> *Annette Louise*, 54 ECAB 783 (2003).

Pursuant to requests for reconsideration, the Office denied modification on January 12, 2006, April 11, 2007 and June 2, 2008.

Appellant again requested reconsideration on May 26, 2009. He repeated prior arguments regarding actual notice and submitted medical evidence previously of record. Appellant also submitted an April 17, 2001 patient checklist from a fitness-for-duty examination indicting his belief that his symptoms were related to 1999 work duties and unspecified surveillance activities. The Office denied reconsideration by a June 17, 2009 decision on the grounds that appellant did not submit new, relevant argument or evidence or establish legal error by the Office.

The May 26, 2009 letter is repetitive of his prior arguments which were previously rejected. The medical reports are duplicates of previously considered evidence. While the medical checklist is new, it is nearly identical to fitness-for-duty documents previously of record. Evidence or argument which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.<sup>12</sup> Thus, appellant's letter, checklist and the medical reports do not require reopening the record for a merit review.

On appeal, appellant contends that reports from mandatory periodic fitness-for-duty examinations gave the employing establishment timely actual notice of the claimed lumbar condition. As set forth above, these reports, including the April 17, 2001 checklist, were insufficient to provide timely actual notice to the employing establishment.

Appellant has not established that the Office improperly refused to reopen his claim for a review of the merits under section 8128(a) of the Act. He did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's May 26, 2009 request for reconsideration.

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<sup>12</sup> *Denis M. Dupor*, 51 ECAB 482 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 17, 2009 is affirmed.

Issued: October 14, 2010  
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