

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RENÉ J. MIRAND and U.S. POSTAL SERVICE,
POST OFFICE, White Plains, NY

*Docket No. 01-1244; Submitted on the Record;
Issued February 11, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review.

Appellant, a 66-year-old mailhandler, sustained an employment-related lumbosacral sprain-strain on May 3, 1998. He resumed his regular duties on July 13, 1998. Appellant subsequently filed a claim for recurrence of total disability beginning February 7, 1999. On April 4, 1999 he returned to work in a part-time, limited-duty capacity.¹

After further development of the record, the Office denied appellant's claim for recurrence of total disability in a decision dated September 20, 1999. The Office also terminated appellant's wage-loss compensation and medical benefits.²

On October 5, 1999 appellant requested reconsideration and submitted additional medical evidence from his treating physician, Dr. Satish R. Modugu. By decision dated January 3, 2000, the Office denied appellant's application for review of the prior decision.

Appellant also requested reconsideration on February 17, 2000 and submitted additional medical evidence. On April 28, 2000 the Office found that the evidence submitted was insufficient to warrant review of the prior decision and consequently denied reconsideration.

By letter dated October 5, 2000, appellant's representative requested reconsideration and submitted a nine-page brief dated September 15, 2000. In a decision dated January 9, 2001, the Office denied appellant's request for reconsideration without addressing the merits of his claim.

¹ Appellant subsequently retired effective January 31, 2000.

² The Office previously advised appellant on February 17, 1999 of its proposal to terminate compensation and medical benefits based on the December 7, 1998 opinion of Dr. John S. Mazella, a Board-certified orthopedic surgeon and Office referral physician, who concluded that appellant's accepted condition had resolved.

The Board finds that the Office properly exercised its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.³ Section 10.608(b) provides that 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.⁴

Neither the February 17, 2000 request for reconsideration nor appellant's October 5, 2000 request and accompanying brief demonstrate that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

Although appellant did not submit any relevant and pertinent new evidence with his most recent request for reconsideration,⁵ the February 17, 2000 request for reconsideration was accompanied by a January 21, 2000 report from Dr. Douglas S. Cohen, a neurosurgeon, who found that appellant had a resolving radiculopathy secondary to a herniated disc. While Dr. Cohen indicated that appellant's current condition was consistent with a work injury, he did not provide a specific history of injury or even a date of injury.

The requirement for reopening a claim for merit review does not include the requirement that a claimant submit all evidence necessary to discharge his burden of proof.⁶ Section 10.606(b) only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁷ If the Office should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.⁸ While the Office characterized Dr. Cohen's report as "not well rationalized" and of diminished "probative value," the Office ultimately found that his January 21, 2000 report did not constitute "relevant new evidence." Evidence that does not address the particular issue involved does not constitute a basis for reopening the claim for merit

³ 20 C.F.R. § 10.606(b)(2) (1999).

⁴ 20 C.F.R. § 10.608(b) (1999).

⁵ In its January 9, 2001 decision denying reconsideration, the Office mistakenly characterized the September 15, 2000 brief prepared by appellant's representative as new evidence. Although the brief references attached exhibits, no additional evidence was submitted.

⁶ *Paul Kovash*, 49 ECAB 350, 354 (1998).

⁷ 20 C.F.R. § 10.606(b)(2)(ii).

⁸ *Paul Kovash*, *supra* note 6.

review.⁹ In view of the fact that Dr. Cohen did not specifically identify appellant's May 3, 1998 employment injury as a causative factor of his current condition, his January 21, 2000 report is not relevant to the issue on reconsideration.

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office did not abuse its discretion in denying appellant's February 17 and October 5, 2000 requests for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated January 9, 2001 and April 28, 2000 are hereby affirmed.

Dated, Washington, DC
February 11, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ *Richard L. Ballard*, 44 ECAB 146, 150 (1992).