

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERNARD HERRO and U.S. POSTAL SERVICE,
POST OFFICE, Milwaukee, WI

*Docket No. 02-214; Submitted on the Record;
Issued June 13, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for merit review.

On April 22, 1994 appellant, then a 37-year-old transitional letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 14, 1994 he injured his back in the performance of duty. The Office accepted appellant's claim for lumbar/thoracic sprain and temporary aggravation of degenerative disc disease at L4-5, L5-S1, which ceased by February 6, 1995. Appellant stopped work on April 15, 1994, and returned to work as a modified transitional letter carrier, effective February 25, 1997, with no loss of wage-earning capacity.

On February 18, 1998 appellant's employment ended when his contract was not renewed. On July 14, 1999 appellant filed a claim (Form CA-7) for lost wages beginning February 18, 1998, the date of his termination from employment.

In a decision dated August 10, 1999, the Office denied appellant's claim on the grounds that his termination from employment was due to a major contractual change in the bargaining unit agreement between the Union and the employing establishment, and was not related to appellant's work injury. Following an oral hearing, held at appellant's request, by decision dated April 20, 2000, an Office hearing representative affirmed the Office's prior decision.

By letter dated January 26, 2001, appellant, through counsel, requested reconsideration of the Office's decision and indicated that supporting documentary evidence was enclosed with his request. In a decision dated October 12, 2001, the Office denied appellant's request for reconsideration on the grounds that appellant's request neither raised substantive legal questions

nor included new and relevant evidence and, therefore, was insufficient to warrant review of the prior decision.

The Board finds, with respect to the Office's October 12, 2001 decision denying reconsideration, that the Office properly exercised its discretion in refusing to reopen appellant's case for merit review.

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.¹ 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.²

In his letter requesting reconsideration, appellant asserted that while he was allegedly terminated due to contractual requirements to phase out transitional employees, the employing establishment's records actually reflect that the number of transitional employees increased at one point. In addition, appellant asserted that as his modified transitional letter carrier job offer stated that his position would be eliminated if he vacated the position or his medical condition improved, he believed that these were the only circumstances under which he could be terminated. The Board notes, however, that both the fact that some transitional employees, but not appellant, were either retained or rehired and the wording of the modified transitional letter carrier job offer were addressed at the hearing and were discussed by the hearing representative in the April 20, 2000 decision. Therefore, appellant's January 26, 2001 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law, nor advanced 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). In addition, while appellant's request for reconsideration noted that new evidence supporting his allegations was enclosed, the copy of the request received by the Office did not contain any such enclosures. Consequently, appellant is not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(2).³

¹ 20 C.F.R. § 10.606(b)(2) (1999).

² 20 C.F.R. § 10.608(b) (1999).

³ On appeal, appellant, through counsel, asserted that the documentation supporting his request for reconsideration had in fact been enclosed with his request, and that the Office must have lost it. Appellant submitted copies of the documents said to have been enclosed with his request, together with affidavits from appellant and appellant's counsel's legal secretary, attesting to the fact that the enclosures were mailed to the Office together with the request for reconsideration. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. As the affidavits and enclosures submitted together with appellant's letter of appeal constitute new evidence which was not before the Office at the time it rendered its decisions, the Board has no jurisdiction to review it on this appeal; *see* 20 C.F.R. § 501.2(c); *Charles P. Mulholland, Jr.*, 48 ECAB 604 (1997); *Robert D. Clark*, 48 ECAB 422 (1997); *Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985). On remand appellant should submit this evidence to the Office for its consideration.

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

The October 12, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 13, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member