

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

RAYMOND M. GARZA, Appellant

and

**DEPARTMENT OF THE ARMY, CORPUS
CHRISTI ARMY DEPOT, TX, Employer**

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**Docket No. 04-422
Issued: April 19, 2004**

Appearances:
Raymond M. Garza, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 8, 2003 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decision dated September 10, 2003, which denied her request for reconsideration. Because more than one year has elapsed between the last merit decision dated July 3, 2002 and the filing of this appeal on December 8, 2003 the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 28, 1994 appellant, a 51-year-old aircraft mechanical parts work leader, filed a traumatic injury claim alleging that he sprained his cervical and lumbar regions when he attempted to control an automated guided vehicle (AGV) that rammed against a stationary

scooter with a flat bed.¹ In a witness statement, Frank W. Quiroz, Jr. stated that appellant attempted to silence the AGV alarm beeper, but that he inadvertently pressed the reset button causing the AGV to start moving and push a scooter and flat bed into a work table. Mr. Quiroz noted that appellant complained of pain in his back after reaching to hit the emergency button.

The employing establishment controverted the claim on October 7, 1996 alleging an injury had not been established.

By decision dated March 23, 1995, the Office denied appellant's claim on the basis that he failed to establish an injury in the performance of duty. The Office found the evidence insufficient regarding whether the claimed incident occurred at the time, place and in the manner alleged. The Office also found that the record contained no evidence showing that a medical condition was caused by the alleged incident.

Appellant requested reconsideration by letter dated June 20, 1995.

By decision dated July 26, 1995, the Office denied modification of the March 23, 1995 decision. The Office found the medical evidence contained inconsistencies in the way the injury occurred when compared with the CA-1 form and the witness report.

On October 10, 1995 appellant filed an appeal with the Board. On December 14, 1995 the Board granted his request to dismiss the appeal and issued an order dismissing appeal.²

Appellant requested reconsideration by letter dated December 29, 1995 and submitted reports from Dr. John P. Masciale, an attending Board-certified orthopedic surgeon.

By decision dated May 14, 1996, the Office denied modification of the July 26, 1995 decision.

Appellant filed an appeal with the Board. In a decision dated April 27, 1998, the Board issued an order remanding the case as the case record had not been received by the Board.³

Subsequent to the Board's decision, the Office issued a decision on June 30, 1998 denying appellant's claim on the basis that the evidence failed to establish that he sustained an injury in the performance of duty.

¹ This was assigned claim number 16-0249308. The record contains evidence of four other claims filed by appellant. In claim number 16-107069, the Office accepted that he sustained a back injury on October 25, 1983 when he fell off his chair. In claim number 16-138192 the Office accepted that appellant sustained a back injury while lifting a heavy object on December 3, 1987. He filed a claim for an injury sustained on August 13, 1994 which was assigned claim number 16-0247014. In claim number 16-0270740, the Office accepted the condition of right carpal tunnel syndrome and authorized a right carpal tunnel release. The Office accepted that appellant sustained a contusion of the right knee on May 7, 1996 in claim number 16-0278973. He retired from the employing establishment effective August 2, 1997.

² Docket No. 96-197 (issued December 14, 1995).

³ Docket No. 97-339 (issued April 27, 1998).

In a letter dated April 29, 2000, appellant requested reconsideration.

By decision dated May 22, 2000, the Office denied modification of its prior decisions.

In a June 8, 2000 letter, appellant requested reconsideration.

In a nonmerit decision dated September 19, 2000, the Office denied appellant's request for reconsideration.

In a September 23, 2000 letter, appellant requested reconsideration.

By nonmerit decision dated November 27, 2000, the Office denied appellant's request for reconsideration.

Appellant requested reconsideration in a letter dated November 22, 2000 and was received by the Office on November 28, 2000.

By decision dated January 17, 2001, the Office denied modification of its prior decisions.

In a letter dated January 27, 2001, appellant requested reconsideration.

In a nonmerit decision dated March 1, 2001, the Office denied appellant's request for reconsideration.

Appellant requested reconsideration by letter dated May 9, 2001.

In a nonmerit decision dated August 24, 2001, the Office denied appellant's request for reconsideration.

Appellant requested reconsideration in a letter dated September 26, 2001 and submitted affidavits from Edward Evans and Mary J. Munoz, in support of his request.

By decision dated December 10, 2001, the Office denied modification of the prior decisions.

On May 3, 2002 appellant requested reconsideration.

In a decision dated July 3, 2002, the Office denied modification of its prior decisions.

Subsequent to the July 3, 2002 decision, the Office received reports dated June 28, July 25⁴ and October 17, 2002 from Dr. Masciale, appellant's attending physician. In the July 25, 2002 report, he reported the injury as occurring on September 28, 1994, when appellant

⁴ The July 25, 2002 report contains a notation that it was corrected August 8, 2002.

“was involved in an injury sustained in relationship to an automated government vehicle.” The physician provided additional details of the accident by stating:

“The vehicle was going approximately 5 mph when it rammed against a flat-bed, which was connected to a scooter and eventually was struck by the flat bed. (Emphasis in the original.) He landed on his back and the force of this injury, namely a hard fall served to aggravate a preexisting yet asymptomatic condition of his cervical spine, namely his C3 disc protrusion.”

Appellant requested reconsideration in letters dated July 3 and August 25, 2003.

By nonmerit decision dated September 10, 2003, the Office denied appellant’s request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees’ Compensation Act⁵ vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.⁷

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).⁸ The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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.⁹

Section 10.608(b) provides that, when a request for reconsideration is timely, but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.¹⁰

⁵ 5 U.S.C. § 8128(a) (“the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application”).

⁶ *Raj B. Thackurdeen*, 54 ECAB ____ (Docket No. 02-2392, issued February 13, 2003); *Veletta C. Coleman*, 48 ECAB 367, 368 (1997).

⁷ 20 C.F.R. § 10.608(a).

⁸ 20 C.F.R. § 10.606(b)(1)-(2); see *Sharyn D. Bannick*, 54 ECAB ____ (Docket No. 03-567, issued April 18, 2003).

⁹ 20 C.F.R. § 10.608(b).

¹⁰ 20 C.F.R. § 10.608(b).

ANALYSIS

Appellant's July 3 and August 25, 2003 requests for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. He also 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).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant did not submit relevant new evidence with his July 3 and August 25, 2003 requests for reconsideration. The Office denied appellant's claim for neck and back injuries of September 28, 1994 on the basis that fact of injury was not established due to the inconsistencies in statements regarding how the injury occurred and the failure by appellant to submit sufficient evidence resolving the inconsistencies. With his reconsideration request of July 3 and August 25, 2003, appellant submitted medical reports dated July 25, (corrected August 8, 2002) and October 17, 2002 from Dr. Masciale, who stated that appellant sustained an injury when he "was involved in an injury sustained in relationship to an automated government vehicle" and landed on his back. His report is irrelevant to the issue at hand, which is how the injury occurred and it does not resolve the inconsistencies in the evidence found by the Office. The Office advised appellant that the deficiency in his claim related to the differing account of how his injury occurred. His statement on the claims form describing how the injury occurred makes no mention of appellant falling on his back. In addition, the accompanying witness statement makes no mention of appellant falling onto his back. He subsequently stated that he fell on his back, which is inconsistent with his original statement and the accompanying witness statement. Appellant has provided no evidence with his July 3 and August 25, 2003 requests for reconsideration resolving the inconsistency found by the Office. The Board finds that the evidence submitted on reconsideration was insufficient to require reopening of appellant's case for further review of the merits of his claim as it fails to address the relevant issue in this case.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 10, 2003 is affirmed.

Issued: April 19, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member