

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

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<b>HOWARD Y. MIYASHIRO, Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 04-622</b>
	)	<b>Issued: September 7, 2004</b>
<b>U.S. POSTAL SERVICE, POST OFFICE, Kailua, HI, Employer</b>	)	
	)	
	)	

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*Appearances:* *Case Submitted on the Record*  
*Kerstin E. Miyashiro*, for the appellant  
*Office of the Solicitor*, for the Director

**DECISION AND ORDER**

Before:  
WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On January 7, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated December 18, 2003, denying his request for reconsideration without merit review of the claim. The last decision on the merits is a decision of the Board dated December 19, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board's jurisdiction on this appeal is limited to the denial of reconsideration issue.

**ISSUE**

The issue is whether the Office properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

**FACTUAL HISTORY**

The case has been before the Board on prior appeals. In a decision dated August 27, 1992, the Board found that the weight of the medical evidence established that appellant's employment-related disability had ceased as of August 27, 1989.<sup>1</sup> In a decision dated

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<sup>1</sup> 43 ECAB 1101 (1992).

October 24, 1994, the Board found that there was sufficient evidence to require further development of the evidence with respect to a shoulder injury as a consequence of authorized surgery in 1986.<sup>2</sup> Following the Board's remand, the Office accepted a consequential left shoulder impingement injury with disability commencing April 20, 1993.<sup>3</sup> By decision dated December 23, 1999, the Board found that the Office properly terminated appellant's compensation as of March 25, 1996 on the grounds that he had refused an offer of suitable work.<sup>4</sup> The Board also determined that appellant had not established an employment-related disability commencing August 1989, and that appellant's March 8, 1996 request for reconsideration was untimely and failed to show clear evidence of error.

In a decision dated December 19, 2002, the Board again affirmed that the Office properly terminated appellant's compensation on the grounds that he refused an offer of suitable work.<sup>5</sup> The Board also determined that appellant had not established an employment-related disability from August 1989 to April 1993. In this regard the Board noted that, an attending orthopedic surgeon, Dr. Steven Kay, had submitted a July 11, 2001 report stating that appellant would have been symptomatic from 1989 to 1993 due to the staple in his shoulder. The Board found that Dr. Kay did not address the issue of disability for work as of August 1989.

In a letter dated September 11, 2003, appellant requested reconsideration of his claim. Appellant submitted a report dated June 30, 2003 from Dr. Kay, who noted that appellant underwent left shoulder surgery on May 22, 1995. Dr. Kay stated that the tissue damage noted in the shoulder at the time of surgery had taken many years to accumulate, and he opined that "with reasonable medical probability the patient was incapable of performing the usual and customary work of a mail carrier as of August 1989 through April 1993." He reiterated that the symptoms in the left shoulder were the direct result of the initial surgery in 1986 when the metal staple was placed in the shoulder. Dr. Kay indicated that his opinions had not changed since his July 11, 2001 report but that he hoped the current report clarified his opinions with respect to appellant's need for disability from August 1989 to April 1993 on the basis of his work injury.

By decision dated December 18, 2003, the Office determined that the evidence submitted was not sufficient to warrant merit review of the claim. The Office noted that Dr. Kay stated that his opinion had not changed, "which is indicative that he is not providing any new information." The Office concluded that the new evidence was repetitious and not sufficient to reopen the claim for merit review.

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<sup>2</sup> Docket No. 93-2383 (issued October 24, 1994).

<sup>3</sup> The Office had previously accepted a left shoulder glenoid tear.

<sup>4</sup> Docket No. 97-1002 (issued December 23, 1999).

<sup>5</sup> Docket No. 02-319 (issued December 19, 2002).

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>6</sup> the Office's regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.<sup>7</sup> Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.<sup>8</sup>

### **ANALYSIS**

In the present case, the Office found that Dr. Kay's June 30, 2003 report was repetitious as he indicated that his opinion had not changed since his prior report. The issue is not whether his opinion had changed but whether his new report provided new and relevant evidence with respect to the issues raised in the claim. As the Board noted in the prior appeal, the July 11, 2001 report had failed to address the issue of disability for work from August 1989 to April 1993. In the June 30, 2003 report, Dr. Kay provides an opinion on an employment-related disability for the mail carrier position during this period. He attempted to clarify his prior report and in the June 30, 2003 report Dr. Kay for the first time provided an opinion on disability for the mail carrier position during the relevant period.

The issue is not whether appellant has submitted sufficient evidence to warrant modification of the claim, but whether he submitted "relevant and pertinent new evidence not previously considered by the Office." The June 30, 2003 report is new and relevant evidence on the issue of an employment-related disability from August 1989 to April 1993. Accordingly, appellant has satisfied the requirement of 10.606(b)(2)(iii) and is entitled to a merit review on the issue.

### **CONCLUSION**

The Board finds that the Office improperly determined that appellant's request for reconsideration was insufficient to warrant a merit review. The case will therefore be remanded for an appropriate merit decision.

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<sup>6</sup> 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

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

<sup>8</sup> 20 C.F.R. § 10.608(b); *see also* Norman W. Hanson, 45 ECAB 430 (1994).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 18, 2003 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: September 7, 2004  
Washington, DC

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member