

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

PAMELA W. DOBBINS, Appellant

and

**U.S. POSTAL SERVICE, MUNGER STATION,
Wichita, KS, Employer**

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**Docket No. 05-1323
Issued: November 9, 2005**

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On June 4, 2005 appellant, through counsel, filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated December 29, 2004 which denied her request for a merit review. Because more than one year has elapsed from the last merit decision dated November 19, 2003 and the filing of this appeal on June 4, 2005, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

contends the Office erred in failing to reopen the case for merit review as it neglected to consider new and relevant evidence.¹

FACTUAL HISTORY

The case is on appeal to the Board for the second time.² On August 23, 1996 appellant, a 38-year-old distribution clerk filed an occupational disease claim alleging that on August 1, 1996 she first realized the tendinitis in her shoulders and arms was employment related.³ The Office accepted the claim for bilateral tendinitis of the shoulders and arms. By decision dated November 19, 2003, the Board affirmed the Office hearing representative's October 11, 2002 decision which found that the medical evidence was not sufficient to establish that appellant sustained a recurrence of disability on and after May 26, 2001 due to her accepted August 23, 1996 employment injury.⁴ The Board noted that new evidence was submitted both subsequent to the October 11, 2002 hearing representative's decision and with her appeal.⁵ The facts and history contained in the prior appeal are incorporated by reference.

On November 15, 2004 appellant's counsel requested reconsideration and submitted evidence in support of her request. She also requested that the Office expand her claim to include carpal tunnel syndrome. The evidence submitted in support of her request included, reports dated October 23, 2002, May 23, October 23 and November 14, 2004 by Dr. Jerry E Niernberger, a Board-certified family practitioner, March 10 and May 23, 2003 light-duty

¹ Appellant's counsel specifically states that appellant is appealing the December 29, 2004 Office decision. This is the only decision referred to on appeal in both the initial notice of appeal and the subsequent brief submitted by her counsel. The Board notes that she filed a recurrence claim alleging a recurrence of total disability beginning July 1, 2004. The Office issued a merit decision dated April 7, 2005 denying her request for modification of a September 3, 1998 loss of wage-earning decision. Should appellant wish to file an appeal from the April 7, 2005 decision, she has up to one year from the date of issuance to file an appeal with this Board. See 20 C.F.R. § 501.3(d)(2).

² Docket No. 03-1539 (issued November 19, 2003).

³ This was assigned claim number A11-0152314. The Office also accepted that appellant sustained a contusion of the left hand due to an injury sustained on March 3, 1997. This was assigned claim number A11-0155819. The Office accepted a cervical strain due to an injury sustained on May 31, 2003. This was assigned claim number A11-0157359.

⁴ Appellant accepted a June 19, 1998 limited-duty position offer on June 25, 1998. The position was as a modified general clerk working eight hours a day with Sunday and Wednesday off. Restrictions included lifting up to 15 pounds for 8 hours, 6 hours sitting, 8 hours standing, 3 hours of intermittent walking, 4 hours of continuous stooping and bending, 8 hours continuous twisting, 2 hours fine manipulation 2 hours of "reaching above the shoulder level intermittent with 5 pounds," overhead work was prohibited as was no working more than 18 inches from body." Duties included distributing accountable mail, maintaining general delivery mail; answering dutch door and customer telephone inquiries, verifying CFS mail, liaisoning "between CCFS and carrier," ordering station supplies, maintaining AVUS, checking in carriers, working on return mail; entering hold mail orders, walling box mail and "[o]ther duties may be assigned as necessary and appropriate." On September 3, 1998 the Office issued a loss of wage-earning capacity decision which found that appellant had no loss of wages.

⁵ This evidence include an October 23, 2002 report by Dr. Jerry E Niernberger, a Board-certified family practitioner, which restricted appellant from walling mail, an October 14, 2003 treatment note by David R. Reinsch, physician's assistant.

assignment forms, a March 10, 2003 family medical leave certification signed also by him, a March 10, 2004 report by David R. Reinsch, a physician's assistant.

In an October 23, 2002 report, Dr. Niernberger informed the Office that he had limited appellant to "to what she normally does. Apparently 'walling mail' is a primary duty in her job." He opined that appellant stated that he "would require her not to 'wall mail' since this is a repetitive motion that will just exacerbate her shoulder pain" and "[t]his type of work will further exacerbate her pain and should not be done."

In a November 14, 2004 report, Dr. Niernberger stated with regards to a worsening of appellant's condition prior to April 23, 2001:

"I think that this has seemed to aggravate and actually exacerbated [appellant's] preexisting condition due to repetitive use throughout the day of the arms and hands, which causes inflammation to tendons, ligaments, muscles. Continued use of the arms, hands and shoulders causes more inflammation, pain. At the time, the patient will overcompensate certain muscle groups, which they in turn causes weakening of antagonistic muscle groups, tendons, ligaments. Overall, what this means is, just worsens her condition."

By decision dated December 29, 2004, the Office denied appellant's request for reconsideration without a merit review on the grounds that her request neither raised substantial legal questions nor included new and relevant medical evidence. The Office found the evidence insufficient to establish that appellant could not perform her modified clerk position.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁶ vests the Office with discretionary authority to determine whether it will review an award for or against compensation. Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.⁷

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide 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) constituting relevant and pertinent new evidence not previously considered by the Office.⁸ 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.⁹ When reviewing an

⁶ 5 U.S.C. § 8128(a) ("[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").

⁷ *Jeffrey M. Sagrecy*, 55 ECAB ____ (Docket No. 04-1189, issued September 28, 2004); *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁸ 20 C.F.R. § 10.606(b)(2).

⁹ 20 C.F.R. § 10.608(b).

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.¹⁰

ANALYSIS

In an October 11, 2002 decision, which the Board affirmed on November 19, 2003 the Office hearing representative affirmed the Office's determination that appellant failed to establish that she sustained a recurrence of disability beginning May 26, 2001, due to her accepted August 23, 1996 employment injury. Specifically, the Office found that she failed to establish that she could not perform the light-duty work or that there was a change in the nature and extent of appellant's accepted condition or a change in the nature and extent of the light-duty requirements. Subsequent to the Board's November 19, 2003 decision appellant requested reconsideration on November 15, 2004. Thus, the relevant underlying issue in this case is whether appellant established that she sustained a recurrence of disability.

Appellant's November 15, 2004 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. She had previously contended that the Office erred in failing to include a low back condition as an accepted condition. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).¹¹

In an October 23, 2002 report, Dr. Niernberger informed the Office that he had limited appellant "to what she normally does. Apparently 'walling mail' is a primary duty in her job." He opined that she stated that he "would require her not to 'wall mail' since this is a repetitive motion that will just exacerbate appellant's shoulder pain" and "[t]his type of work will further exacerbate her pain and should not be done."

Dr. Niernberger, in his October 23, 2002 report, related that appellant informed him that she was require to wall mail as part of her duties. He stated that she could not wall mail due to its repetitive nature which "will further exacerbate her pain. In his November 14, 2004 report, Dr. Niernberger opined that appellant suffers from bilateral tendinitis and the repetitive nature of her duties "has seemed to aggravate and actually exacerbated her preexisting condition due to repetitive use throughout the day of the arms and hands, which causes inflammation to tendons, ligaments, muscles." He further noted that appellant's "[c]ontinued use of the arms, hands and shoulders causes more inflammation, pain."

The Board finds that Dr. Niernberger's October 23, 2002 and November 14, 2004 reports constitute relevant and pertinent new medical evidence sufficient to reopen the case as to the issue of whether appellant sustained a recurrence of disability. As this evidence was not previously of record or reviewed by the Office and pertained directly to the issue of the case, the

¹⁰ *Annette Louise*, 54 ECAB ____ (Docket No. 03-335, issued August 26, 2003).

¹¹ 20 C.F.R. §§ 10.606(b)(2)(i) and (ii).

Board finds that appellant met the requirements for requesting reconsideration under 20 C.F.R. § 10.606(b)(2)(iii).¹²

In order to require merit review, it is not necessary that the new evidence be sufficient to discharge appellant's burden of proof, but only that it be relevant and new evidence. Accordingly, the Board finds that the Office's denial of her request for review of the merits of her claim constituted an abuse of discretion. The case will be remanded for the Office to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, the Office shall issue a merit decision on the claim.

CONCLUSION

The Board finds that the Office improperly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 29, 2004 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: November 9, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹² See *Claudio Vazquez*, 52 ECAB 496 (2001).