

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

MICHAEL R. DE LA GARZA, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Long Beach, CA Employer**

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**Docket No. 06-399
Issued: May 15, 2006**

Appearances:

*Michael R. De La Garza, pro se
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 12, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated September 12, 2005, denying his request for further merit review of his claim. Because more than one year has elapsed between the merit decision dated September 9, 2004 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this 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 under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 5, 2004 appellant, then a 28-year-old letter carrier, filed a traumatic injury claim alleging that on January 3, 2004 he was injured when his motor vehicle was rear-ended while in the performance of duty. Appellant claimed that he strained his back and left foot. He stopped work on January 7, 2004. The employing establishment controverted the claim, noting

that appellant's injury did not appear to coincide with the evidence related to the motor vehicle collision which it characterized as minor.

Appellant submitted a statement, medical reports and physical therapy reports in support of his claim. In a January 3, 2004 report, Dr. Thomas Roccapalumbo, an osteopath Board-certified in family practice and an employing establishment physician, noted that appellant related that he was involved in an automobile accident. He diagnosed lower back and left foot pain. In a January 19, 2004 duty status report, Dr. Tal M. Malhis, a Board-certified orthopedic surgeon, diagnosed thoracic strain and contusion to the left foot and prescribed light-duty restrictions for appellant. In a February 3, 2004 report, Dr. Malhis checked the box "yes" in response to the question regarding whether he believed appellant's condition was caused or aggravated by an employment activity.

In a January 9, 2004 statement, Joe Santana, the supervisor of customer services, confirmed that appellant was rear-ended while in the performance of duty. He noted that the vehicles did not sustain any damage and that "[b]oth of the parties acknowledged the fact that there were no damages to either vehicle. I then again asked both parties if they were ok[ay]. The driver of the other party responded and said he was fine, while employee [appellant] responded saying he was just shaken up due to the jolt and said he was fine." In a January 20, 2004 memorandum of interview, Dr. Roccapalumbo indicated that it appeared that appellant was magnifying his symptoms. In a January 15, 2004 statement, Karen Meilo, a clerk, noted that she observed appellant during a meeting at the employing establishment and that he appeared "to have no problem with his upper or lower body...." The employing establishment provided additional evidence controverting appellant's claim.

By decision dated March 9, 2004, the Office denied appellant's claim. The Office found that the medical evidence did not demonstrate an injury accepted incident.

In a January 15, 2004 report, Dr. Malhis noted that appellant's left foot did not show any swelling or bruising. The thoracic and cervical spine did not exhibit any findings with the exception of tenderness over the paraspinal muscles of the thoracic spine. Dr. Malhis recommended physical therapy and restricted appellant to working inside for two weeks. On February 19, 2004 Dr. Malhis released appellant to regular duty. In an April 9, 2004 report, he described appellant's accident and noted that the injuries had resolved.

By letter dated June 30, 2004, appellant requested reconsideration asserting that he sustained an employment-related injury. He submitted a statement from Dr. Ronald G. Galbreath, a Board-certified family practitioner and treating physician, who noted that appellant did not have any record of prior instances related to thoracic or upper back pain, and no record for foot pain with the exception of the January 7, 2004 visit.

By decision dated September 9, 2004, the Office denied modification of the March 9, 2004 decision.

By letter dated September 1, 2005, appellant requested reconsideration. He submitted photographs of a postal vehicle, and a billing code sheet on physical medicine.

On September 12, 2005 the Office denied appellant's request for reconsideration. It found that his request neither raised substantial legal questions nor included new and relevant evidence and, thus, was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,¹ the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence which:

“(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 [the Office].”²

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.³

ANALYSIS

In the instant case, appellant disagreed with the denial of his claim for an injury sustained while in the performance of duty on January 3, 2004 and requested reconsideration. The underlying issue is medical in nature, whether appellant sustained an injury as a result of the motor vehicle incident of January 3, 2004. However, appellant did not provide any relevant or pertinent medical evidence to support that he sustained an injury in the performance of duty on January 3, 2004.

Appellant submitted several photographs of postal vehicles and a code sheet on physical medicine. This evidence is not relevant to the underlying medical issue of whether the January 3, 2004 incident caused an injury. This evidence is insufficient to require the Office to reopen his case for further review of the merits.

Consequently, the evidence submitted by appellant on reconsideration does not satisfy the third criterion for reopening a claim for merit review. Appellant has not shown that the Office

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.606(b).

³ 20 C.F.R. § 10.608(b).

erroneously applied or interpreted a specific point of law, or advanced a relevant new argument not previously submitted. Therefore, the Office properly denied his request for reconsideration.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 12, 2005 is affirmed.

Issued: May 15, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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