

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

B.O., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Indianapolis, IN, Employer**

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**Docket No. 07-2427
Issued: April 16, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 25, 2007 appellant filed a timely appeal from a December 5, 2006 nonmerit decision of the Office of Workers' Compensation Programs which denied his request for reconsideration on the grounds that the request was not timely filed and failed to establish clear evidence of error. The most recent merit decision is the Office's May 23, 2005 decision. Because more than one year has elapsed from the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of the appeal pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On June 10, 2004 appellant, then a 43-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that he injured his back due to repetitive heavy lifting on May 12 and 13, 2004. Appellant stopped work on May 13, 2004 and sought medical treatment on May 31, 2004. The record reflects that appellant has a preexisting degenerative joint

condition and, under claim number 092041200, has accepted lumbar and cervical strains for a December 12, 2003 work-related injury.

In a July 2, 2004 letter, the Office requested additional factual and medical information, including a comprehensive medical report.

In an August 6, 2004 decision, the Office denied the claim on the grounds that fact of injury had not been established.

On September 5, 2004 appellant requested reconsideration. By decision dated September 24, 2004, the Office found that appellant established that the work exposure occurred, but affirmed the denial of his claim on the basis that a causal relationship between the diagnosed condition of cervical radiculopathy due to C5-6 disc herniation and his work factors had not been established.

On October 21, 2004 appellant disagreed with the Office's September 24, 2004 decision and requested reconsideration. By decision dated November 8, 2004, the Office denied modification of its September 24, 2004 decision. It found that the new medical evidence, which included a medical progress note of July 27, 2004 from Dr. Ronald L. Young, II, a Board-certified neurosurgeon, failed to provide a well-rationalized medical opinion explaining how appellant's May 13, 2004 work injury caused, aggravated, accelerated or precipitated his herniated disc condition.

On May 1, 2005 appellant requested reconsideration. By decision dated May 23, 2005, the Office denied modification of its prior decision. It found that the medical evidence from Dr. Young lacked a discussion regarding the relationship between the diagnosed condition and the claimed employment factors of May 13, 2004.

On September 8, 2005 appellant requested reconsideration of the Office's May 23, 2005 decision. The Office also received an additional report from Dr. Young and physical therapy notes from June 2004, previously of record. By decision dated October 18, 2005, the Office denied appellant's request for reconsideration on the grounds that the evidence was cumulative in nature.

On May 15, 2006 appellant requested reconsideration. In a separate statement, he indicated that someone from Dr. Young's office would be contacting the Office.

In a May 24, 2006 letter to Dr. Young, the Office provided a history of appellant's December 12, 2003 work injury and the alleged injury of heavy lifting on May 13, 2004 and requested that the physician respond to the various questions provided regarding the extent of appellant's disability in relation to the May 13, 2004 injury. Dr. Young was afforded 30 days from the date of the correspondence to respond. Dr. Young, however, did not respond.

By decision dated July 24, 2006, the Office denied appellant's request for reconsideration finding that the evidence submitted was cumulative in nature.

In a letter dated August 23, 2006, appellant requested reconsideration of the Office's decision. He acknowledged that Dr. Young did not respond to the Office's May 24, 2006

questions until July 18, 2006, which was past the Office's deadline of June 24, 2006. Appellant noted that, since Dr. Young did not meet the Office's deadline, the Office advised him to file another request for reconsideration.

In a July 18, 2006 report, Dr. Young stated that appellant had a sudden onset of cervical radiculopathy on May 13, 2004 while doing repeated lifting of heavy objects at work. He noted appellant's preexisting degenerative disc disease, but explained that appellant did not have any arm pain or indication of cervical radiculopathy prior to May 2004. Dr. Young explained that symptoms of a degenerative condition may be aggravated by a specific activity which may cause the disc herniation, which, in turn, resulted in appellant's cervical radiculopathy. He advised that appellant did not require treatment for his underlying degenerative disc disease. Dr. Young opined that the evidence of appellant's cervical spine condition being work related was the temporal relationship between the onset of symptoms, which were attributable to the disc herniation and caused by a repeated strain.

By decision dated December 5, 2006, the Office denied reconsideration on the grounds that his request was untimely filed and did not present clear evidence of error.

On appeal, appellant contends that the Office reopened his case by sending the May 24, 2006 letter to Dr. Young. He therefore argued that the Office should consider the new evidence from Dr. Young and reopen his case.

LEGAL PRECEDENT

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.¹ The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.² When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.³

ANALYSIS

On May 23, 2005 the Office denied modification of appellant's claim on the grounds that the evidence of record failed to demonstrate a causal relationship between the diagnosed condition and the claimed employment factors of May 13, 2004. Following the May 23, 2005 decision, appellant requested reconsideration on May 15, 2006. In the May 24, 2006 letter to Dr. Young, the Office then conducted further development of appellant's claim by requesting that Dr. Young respond to various questions regarding appellant's May 13, 2004 injury. In soliciting this information, the Office proceeded to exercise its discretionary authority under 5 U.S.C. § 8128. The Office's May 24, 2006 letter to Dr. Young was in further development of

¹ 5 U.S.C. § 8128(a).

² *Alberta Dukes*, 56 ECAB 247 (2005); 20 C.F.R. § 10.607.

³ *Id.*

appellant's claim by having Dr. Young respond to various questions regarding appellant's claimed injury. While Dr. Young did not submit a July 18, 2006 report within the 30-day deadline provided by the Office in its May 24, 2006 letter, as the record currently stands, the Office has not issued a merit decision evaluating the evidence it solicited and eventually obtained from Dr. Young. This case is analogous to *David F. Garner*,⁴ in which the Board found that, after soliciting and receiving new evidence on reconsideration, the Office did not conduct a proper review of the case and erred in finding that the reconsideration request was untimely.

Because the Office reopened appellant's case by soliciting additional medical evidence, it cannot now deny appellant's reconsideration request using the clear evidence of error standard. Rather, the Office should have issued an appropriate merit decision under section 8128(a) of the Act.⁵

CONCLUSION

The Board finds that the Office improperly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated December 5, 2006 is set aside and the case remanded for further proceedings consistent with this decision.

Issued: April 16, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁴ 43 ECAB 459 (1992); *see also Joyce A. Fasanello*, 49 ECAB 490 (1998).

⁵ *See id.* at 462.