

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

C.S., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Kirkland, WA, Employer)

**Docket No. 07-1712
Issued: January 3, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 12, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated May 18, 2007 which denied her request for reconsideration. Because more than one year has elapsed from the last merit decision dated May 25, 2006 to the filing of this appeal, 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 denied appellant's request for reconsideration without conducting a merit review.

FACTUAL HISTORY

On May 23, 2005 appellant, then a 46-year-old clerk, filed an occupational disease claim alleging that she aggravated a preexisting military service-connected injury, a partially herniated disc, in the performance of duty. She stated that she first became aware of her condition on April 25, 2005 and first related it to her employment on May 6, 2005. Appellant stopped work

on May 17, 2005 and returned on May 18, 2005 but her employment was formally terminated on June 2, 2005. The employing establishment controverted the claim.

In a May 31, 2005 statement, appellant's supervisor, Sheila D. Fermon, noted that on May 6, 2005 appellant informed her that she had a nonemployment-related back injury. On May 21, 2005 Ms. Fermon explained that appellant submitted her claim form noting that her physical therapist had told her that her injury was work related.

In a May 23, 2005 duty status report, Dr. Christopher Chan, a family practitioner, diagnosed lumbar disc herniation and noted findings of sciatica and lower back pain with left sided radicular symptoms. He advised that appellant could work her normal 10-hour daily schedule with restrictions. In a March 10, 2005 report, Dr. Mario Alinea, a family practitioner, opined that appellant was physically able to perform the duties of a career clerk, the position for which the employing establishment was at that time considering her. He noted that appellant's history included right shoulder surgery, two meniscal debridements of the left knee and cervical spine and lumbar conditions. Dr. Alinea diagnosed right shoulder rotator cuff tear and adhesive capsulitis, status post decompression and debridement as well as asymptomatic and stable cervical and lumbar degenerative disc disease, left knee meniscal tears, status post debridement and right knee patellofemoral syndrome.

In a May 2, 2005 progress report, Dr. Chan noted a one-week history of progressively worsening left lower back pain with radiation and numbness into the left anterior thigh. He diagnosed lower back pain radiating into the left anterior thigh with suspected lumbar disc herniations and also noted that appellant could not recall a triggering injury. In a May 2, 2005 lumbar magnetic resonance imaging (MRI) scan report, Dr. Robert Handy, a neuroradiologist, diagnosed a moderate sized extruded far left posterolateral disc herniation at L2-3 with left L2 nerve impingement within the neural foramen, mild central spinal canal narrowing, mild to moderate spinal canal narrowing at L4-5, mild posterior disc protrusion at L5-S1 and small right paracentral disc protrusion at T12-L1. On May 5, 2005 Dr. Chan reviewed the MRI scan findings. He stated that appellant's employment "does involve fair amounts of heavy lifting" and diagnosed lumbar disc herniation. On May 11, 2005 Dr. Chan noted that appellant's pain began at the end of April 2005 but was not triggered by a specific incident and that the May 2, 2005 MRI scan revealed diffuse degenerative changes and a small bulge at L2-3 with a moderate extrusion displacing the left L2 nerve root. On May 16, 2005 he diagnosed sciatica. In a June 12, 2005 note, Dr. Chan explained that appellant was working light duty at the employing establishment, despite his concern about her job. He diagnosed left low back and thigh pain and noted that the disc protrusion impinging on the left L2 nerve root likely caused radicular pain down into the leg.

By decision dated September 19, 2005, the Office denied appellant's claim, finding that the medical evidence was insufficient to establish a causal relationship between her diagnosed back condition and factors of her employment.¹

¹ The decision was initially dated September 7, 2005 but was improperly mailed to an incorrect address. The Office corrected its error and reissued the decision on September 19, 2005.

On October 4, 2005 appellant requested an oral hearing, which was conducted on February 9, 2006. In an October 3, 2005 report, Dr. Robert Chinnapongse, a physiatrist, noted findings of lumbar disc protrusion that was likely impinging on a nerve and causing radiculopathy. He opined: “Although there was no specific injury that caused this pain, I feel that this is an ‘occupational disease’ related to the repetitive activity, especially the bending and lifting that occurs in her job in the [employing establishment]. This is more likely than not the cause.”

Following the hearing, appellant submitted February 13 and March 30, 2006 statements describing her job duties. The employing establishment also provided a statement concerning appellant’s job duties.

By decision dated May 25, 2006, the hearing representative affirmed the September 19, 2005 decision.

In a May 30, 2006 lumbar MRI scan report, Dr. Kathy Ahi² diagnosed status post left hemilaminectomy at L2-3, broad based left lateral disc protrusion with potential exiting L1 nerve root impingement and borderline central canal stenosis at L2-3 and L4-5 due to circumferential disc bulging.

On May 3, 2007 appellant requested reconsideration. In a March 8, 2007 report, Dr. Jayashree Srinivasan, a Board-certified neurosurgeon, stated: “Based on [appellant’s] description of her job duties, it is reasonable to conclude that these job duties ... have caused and contributed to the disability condition diagnosed as findings of disc protrusion impinging on the left L2 nerve root, diagnosis per medical records, on a more probable than not basis.”

By decision dated May 18, 2007, the Office denied appellant’s request for reconsideration without conducting a merit review.

LEGAL PRECEDENT

Under section 8128 of the Federal Employees’ Compensation Act, the Office has discretion to grant a claimant’s request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing federal regulations provides guidance for the Office in using this discretion.³ The regulations provide that the Office should grant a claimant merit review when the claimant’s request for reconsideration and all documents in support thereof:

“(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

² The Board was unable to ascertain Dr. Ahi’s specialty from the record.

³ 20 C.F.R. § 10.606(b)(2).

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”⁴

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.⁵ When reviewing an 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.⁶

ANALYSIS

The Board finds that the Office erred in denying appellant’s reconsideration request without conducting a merit review. Appellant did not assert that the Office misapplied or misinterpreted a specific point of law, nor did she advance a new and relevant legal argument. However, she did submit new and relevant medical evidence. In a March 8, 2007 report, Dr. Srinivasan stated: “Based on [appellant’s] description of her job duties, it is reasonable to conclude that these job duties ... have caused and contributed to the disability condition diagnosed as findings of disc protrusion impinging on the left L2 nerve root ... on a more probable than not basis.” Dr. Srinivasan’s report is new as the physician had not previously submitted a report and is relevant because the physician supported a causal relationship between appellant’s claimed condition and her job duties. Although the Office asserted that Dr. Srinivasan’s report was repetitive of Dr. Chinnapongse’s report, the Board notes that Dr. Srinivasan’s report had not previously been considered by the Office and the record contains no other report from Dr. Srinivasan. Thus, Dr. Srinivasan’s report is not repetitive. The fact that Dr. Chinnapongse had previously offered a similar opinion without explanation or rationale⁷ does not render Dr. Srinivasan’s report either irrelevant or repetitious. The Board finds that appellant submitted new and relevant evidence with her request for reconsideration, in compliance with section 10.606(b)(2) of the regulations.⁸ The case will be remanded for the Office to review the merits of the claim.

CONCLUSION

The Board finds that the Office improperly denied appellant’s request for reconsideration without conducting further merit review.

⁴ *Id.*

⁵ 20 C.F.R. § 10.608(b).

⁶ *Annette Louise*, 54 ECAB 783 (2003).

⁷ *See Helen E. Tschantz*, 39 ECAB 1382 (1988) (to be entitled to a merit review upon reconsideration, a claimant need not submit all evidence that is necessary to meet her burden of proof; the claimant need only submit evidence that is relevant and pertinent and not previously considered by the Office).

⁸ *See supra* note 3.

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: January 3, 2008
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board