

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

K.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 08-1292
Issued: November 10, 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 March 31, 2008 appellant filed a timely appeal of a September 12, 2007 decision of the Office of Workers' Compensation Programs, denying merit review of his claim. Since more than one year has elapsed between the last Office merit decision on November 15, 2005, which was reviewed by the Board on April 5, 2007, and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2) and 501.6(c) and (d).

ISSUE

The issue is whether the Office properly declined to reopen the case for merit review pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

FACTUAL HISTORY

The case was before the Board on a prior appeal. By decision dated April 5, 2007, the Board affirmed a November 15, 2005 Office decision denying the claim for compensation.¹ The

¹ Docket No. 07-247 (issued April 5, 2007).

Board found that appellant had not established an employment incident on January 12, 2005 as alleged. It was noted that appellant did not provide a detailed factual statement regarding the alleged forklift incident. In addition, the Board affirmed a March 15, 2006 Office decision denying merit review. The history of the case is provided in the Board's prior decision and is incorporated herein by reference.

By letter dated October 30, 2006, received by the Office on April 17, 2007, appellant requested reconsideration of his claim. He noted that the Office had requested a detailed statement as to the January 12, 2005 incident. Appellant stated that on that date he was loading a truck, and on his right the forklift driver, Mr. Smith, was unloading a truck. He stated that the forklift driver backed up, made a sharp turn and struck him on the back of his right ankle. A drawing was provided showing the relative positions of appellant, the trucks and the forklift.

By decision dated September 12, 2007, the Office denied further review of the merits of the case. It found that appellant had stated that an accident report was filed regarding the January 12, 2005 incident, but he did not submit a copy of the accident report.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that [the Office] erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by [the Office]; or (iii) constitutes relevant and pertinent evidence not previously considered by [the Office]."³ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁴

ANALYSIS

In the prior decision, the Board found that appellant had failed to establish an employment incident on January 12, 2005 as he had not provided a detailed factual statement as to the incident that included, for example, details such as where he was standing at the time of the incident. In its September 12, 2007 decision, the Office found that appellant did not submit any new and relevant evidence as he did not submit a copy of an accident report.

² 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.")

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.608; *see also Norman W. Hanson*, 45 ECAB 430 (1994).

Appellant did, however, provide a more detailed statement as to the alleged incident. He explained where he was standing, how the forklift moved and how it struck him on the ankle, with a diagram of the incident as well. This evidence is new and relevant to the issue of whether the first component of fact of injury is established. It addresses the deficiencies in the evidence as noted by the Board. As appellant has submitted “relevant and pertinent evidence not previously considered” by the Office, under 20 C.F.R. § 10.606(b)(2)(iii), he is entitled to a review of the merits of the claim. The case will be remanded to the Office for a merit decision.

CONCLUSION

Appellant submitted new and relevant evidence that is sufficient to require the Office to review the case on its merits.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated September 12, 2007 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 10, 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