

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

C.Y., Appellant)
and) Docket No. 08-2308
U.S. POSTAL SERVICE, ERIE GENERAL) Issued: June 8, 2009
MAIL FACILITY, Erie, PA, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 19, 2008 appellant filed a timely appeal from a May 20, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. There is no merit decision within one year of the filing of this appeal. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

ISSUE

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

FACTUAL HISTORY

The Office accepted that on or before May 1, 2004 appellant, then a 49-year-old city carrier, sustained right lateral epicondylitis in the performance of duty. On September 28, 2006 she filed a claim to buy back 945.4 hours of leave used from March 21, 2005 to April 15, 2006 for work absences related to the accepted condition. In a February 22, 2007 letter, the Office advised appellant of the medical evidence needed to establish her claim for leave buyback.

Dr. Robert A. Lupo, an attending Board-certified orthopedic surgeon, diagnosed a common extensor tendon tear at the right elbow with a possible tear of the radial collateral ligament. He held appellant off work beginning November 1, 2005.¹ Dr. John M. Hood, an attending Board-certified orthopedic surgeon, held appellant off work from November 16, 2005 to April 3, 2006 due to right lateral epicondylitis. In a March 8, 2006 report, Dr. Hood stated that repetitive grasping and manipulating with the right arm created significant extensor tendon force, leading to tendon damage at the right elbow over a period of years.²

By decision dated March 26, 2007, the Office denied appellant's claim for leave buyback for the period March 21, 2005 to April 15, 2006. It found that she submitted insufficient medical evidence to establish total disability for the claimed period.

In a letter dated February 17, 2008, appellant requested reconsideration. She asserted that Dr. Hood held her off work from October 31, 2005 to June 12, 2006, encompassing a portion of the claimed period.

In a May 29, 2007 report, Dr. Hood explained that six months of rest allowed appellant's tendinosis to improve such that she was subsequently able to return to full duty for a year. In an October 30, 2007 report, he explained that he held appellant off work from October 31, 2005 to June 12, 2006 due to right lateral epicondylitis. The time off allowed inflammation and scar tissue to mature so that appellant could sustain daily work activities. Immobilization and physical therapy were necessary components of the treatment plan.

By decision dated May 20, 2008, the Office denied reconsideration on the grounds that appellant did not submit new, relevant evidence or substantive legal questions. It found that appellant's February 17, 2008 letter and accompanying evidence were irrelevant to the claimed period March 21, 2005 to April 15, 2006 as they discussed the period October 31, 2005 to June 12, 2006.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,³ section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute 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

¹ Appellant submitted physical therapy notes for December 27, 2005 and the following dates in 2006: January 3, 9, 13, 18, 20, 23, 26, 27 and 30; February 2, 13, 16, 20, 22 and 27; March 1, 2, 6, 8, 13, 15, 21 and 23; May 9 and 10.

² Appellant also consulted Dr. Anthony M. Ruffa, an osteopathic physician Board-certified in orthopedic surgery. In a March 9, 2006 report, Dr. Ruffa explained that repetitive upper extremity motion while sorting mail irritated the lateral epicondyle, leading to right lateral epicondylitis.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

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

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁶ The claimant need only submit relevant, pertinent evidence not previously considered by the Office.⁷ 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.⁸

ANALYSIS

Appellant claimed leave buyback for the period March 21, 2005 to April 21, 2006. The Office denied the claim on March 26, 2007 due to insufficient medical evidence. Appellant requested reconsideration on February 17, 2008. She submitted new reports from Dr. Hood, including an October 30, 2007 report explaining why he held appellant off work from October 31, 2005 to June 12, 2006 due to the accepted condition.

The Office denied reconsideration on May 20, 2008, finding Dr. Hood's new reports irrelevant as they did not address the claimed period. However, Dr. Hood's October 30, 2007 report did address a portion of the claimed period, October 31, 2005 to April 15, 2006. This interval was part of the March 21, 2005 to April 21, 2006 period denied by the March 26, 2007 decision. Because this evidence is new and goes directly to the basis of the Office's March 26, 2007 merit denial, the Board finds that appellant's February 17, 2008 request for reconsideration satisfies the third standard for obtaining a merit review of her claim.⁹ The Board will set aside the Office's decision denying reconsideration and remand the case for an appropriate final decision on the merits of appellant's claim for leave buyback for the period March 21, 2005 to April 21, 2006.

CONCLUSION

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

⁵ 20 C.F.R. § 10.608(b). *See also T.E.*, 59 ECAB ____ (Docket No. 07-2227, issued March 19, 2008).

⁶ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁷ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

⁸ *Annette Louise*, 54 ECAB 783 (2003).

⁹ *V.B.*, 58 ECAB ____ (Docket No. 07-1320, issued September 26, 2007).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 20, 2008 is set aside, and the case remanded to the Office for further action consistent with this decision.

Issued: June 8, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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