United States Department of Labor
Employees' Compensation Appeals Board

E.L., Appellant	)	
	)	**Docket No. 08-2194**
and	)	**Issued: September 2, 2009**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Atlanta, GA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 6, 2008 appellant filed a timely appeal from a July 14, 2008 decision of the Office of Workers' Compensation Programs which denied his request for reconsideration. Because more than one year has elapsed between the most recent merit decision dated July 6, 2007 and 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 under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 29, 2002 appellant, then a 37-year-old mail processor, injured his back at work when his chair collapsed. He stopped work on that day. The Office accepted his claim for lumbosacral sprain and strain and paid compensation benefits.

Appellant sought treatment from Dr. Ralph D'Auria, a Board-certified orthopedic surgeon, from June 30 to October 28, 2003. Dr. D'Auria diagnosed a large and extruded herniated disc at L3-4 with radiculopathy at L3 and L4. He returned appellant to work in a full-time sedentary position. In an October 15, 2003 report, Dr. D'Auria found that, under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[1] (A.M.A., *Guides*) appellant had a 15 percent impairment of the whole person. An electromyogram (EMG) dated July 15, 2003 revealed L3-4 right-sided lumbosacral radiculopathy. The Office subsequently referred appellant to a second opinion physician and an impartial medical examiner.

On July 2, 2004 appellant filed a claim for a schedule award. He submitted an August 23, 2004 report from Dr. D'Auria who opined that appellant had a 38 percent permanent impairment of the lower extremities. An Office medical adviser reviewed Dr. D'Auria's findings and opined that appellant had no impairment of either lower extremity.

In an April 29, 2005 decision, the Office denied appellant's claim for a schedule award.

Appellant requested an oral hearing which was held on February 22, 2006. In a May 19, 2006 decision, the hearing representative affirmed the April 29, 2005 decision.

On May 17, 2007 appellant requested reconsideration and submitted a May 3, 2006 report from Dr. D'Auria who noted that appellant reached maximum medical improvement and opined that he had five percent whole person impairment under the A.M.A., *Guides.*

In a decision dated July 6, 2007, the Office denied modification of the May 19, 2006 decision. It found that the medical evidence did not establish that appellant had a ratable permanent impairment due to his accepted low back condition.

In a letter dated June 26, 2008, appellant requested reconsideration. He submitted a June 25, 2008 affidavit from Dr. Yirga Takeste, a Board-certified internist, who treated him since July 2002 for work-related injuries occurring on July 29, 2002. Dr. Takeste noted that appellant injured his back in 1995 while in the military and on July 29, 2002 while at work. He diagnosed herniated discs at L3-4 and L4-5. Dr. Takeste noted that appellant experienced symptoms and injuries from his work injury which included chronic low back pain with occasional numbness and tingling in the lower extremities. He limited appellant to performing only light duty. Dr. Takeste concurred with the disability rating of Dr. D'Auria of October 15, 2003. He circled "yes" to the question of whether, within a reasonable degree of medical certainty, appellant's lower extremity impairment was related to the July 29, 2002 work injury. Dr. Takeste circled "no" in response to a question as to whether he agreed with the medical adviser with regard to whether there was evidence of radiculopathy in appellant's lower extremities. He noted "yes" that he disagreed with the medical adviser who found that there was no evidence of impairment to the spinal nerve roots causing sensory loss, pain or motor deficits.

[1] A.M.A., *Guides* (5th ed. 2001).

In a decision dated July 14, 2008, the Office denied appellant's reconsideration request on the grounds that his letter did not raise substantive legal questions or include new and relevant evidence and was insufficient to warrant further merit review.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[3] which provide that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain 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 Office]."

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.[4]

ANALYSIS

The Office's July 14, 2008 decision denied appellant's reconsideration request, without conducting a merit review, on the grounds that the evidence submitted did not raise substantive legal questions or include new and relevant evidence.

However, with his June 26, 2008 reconsideration request, appellant submitted relevant and pertinent evidence not previously considered by the Office. The July 6, 2007 decision denied appellant's claim for a schedule award on the grounds that the medical evidence was insufficient to establish work-related permanent impairment. Appellant submitted a June 25, 2008 affidavit from Dr. Takeste who had not previously rendered an opinion regarding permanent impairment. Dr. Takeste concurred with the disability rating of Dr. D'Auria of October 15, 2003. He circled "yes" to the question of whether, within a reasonable degree of medical certainty appellant's lower extremity impairment was related to the July 29, 2002 work injury. Dr. Takeste noted appellant's treatment and diagnosis and advised that his symptoms and injuries from the work injury caused chronic low back pain with occasional numbness and

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b).

[4] *Id*. at § 10.608(b).

tingling in the lower extremities. He circled "yes" to a question asking whether he disagreed with the medical adviser who found that there was no evidence of impairment to the spinal nerve roots causing sensory loss, pain or motor deficits. This particular evidence is relevant as the opinion of Dr. Takeste in the report addresses the underlying point at issue, specifically whether appellant established that he had a ratable impairment due to the work-related condition of lumbosacral strain. This is especially important because the Office in its decision dated July 6, 2007 denied appellant's claim on the grounds that the evidence submitted was insufficient to establish that he had a ratable impairment due to his work-related injury of July 29, 2002. While this evidence may be of limited probative value, the Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[5] The Board finds that, in accordance with 20 C.F.R. § 10.606(b)(2)(iii), the new evidence submitted by appellant was sufficient to require reopening of his claim for further review on its merits.

Therefore, the Office in its decision dated July 14, 2008 improperly refused to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128. Consequently, the case must be remanded for the Office to reopen his claim for a merit review. Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision on appellant's claim.

CONCLUSION

The Board finds that the Office, in its decision dated July 14, 2008, improperly denied appellant's request for reconsideration of his case on its merits.

[5] *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

ORDER

IT IS HEREBY ORDERED THAT the July 14, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further development in accordance with this decision.

Issued: September 2, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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