

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

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A.C., Appellant )

and )

U.S. POSTAL SERVICE, BULK MAIL )  
CENTER, Jersey City, NJ, Employer )

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**Docket No. 09-238  
Issued: September 9, 2009**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*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 November 3, 2008 appellant, through his attorney, filed a timely appeal from a December 7, 2007 merit decision of the Office of Workers' Compensation Programs denying his traumatic injury claim and a March 21, 2008 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the March 21, 2008 nonmerit decision.

**ISSUES**

The issues are: (1) whether appellant has established that he sustained an injury on January 25, 2002, as alleged; and (2) whether the Office properly denied his request for further merit review of his claim pursuant to 5 U.S.C. § 8128.

**FACTUAL HISTORY**

On July 18, 2002 appellant, then a 50-year-old employee in charge of vehicle operation assistance, filed a claim alleging that on January 25, 2002 he sustained an injury in the performance of duty. He retired on disability on June 4, 2002. Appellant's supervisor indicated

that he had not been informed of an injury. On the claim form, Donald Mahon, a witness, related that he “was called to help [appellant] and arrived and saw him in pain....” He noted that a door that he was operating had jammed.

On August 6, 2002 the Office requested that appellant submit additional factual information and supporting medical evidence. In an August 26, 2002 response, appellant related that he experienced severe back and right shoulder pain when a trailer door that he was opening suddenly jammed.

By decision dated September 6, 2002, the Office denied appellant’s claim on the grounds that the medical evidence was insufficient to establish that he sustained an injury due to the January 25, 2002 employment incident. It noted that appellant had not submitted any supporting medical evidence.

On September 4, 2003 appellant, through his attorney, requested reconsideration of the September 6, 2002 decision and indicated that he was submitting supporting medical evidence. No further action was taken. On August 20, 2007 counsel requested that the Office provide him with the decision issued on his September 4, 2003 reconsideration request. In correspondence dated November 16, 2007, it informed him that there was no medical evidence in the file and requested that he resubmit the documents listed in his initial reconsideration request.

By decision dated December 7, 2007, the Office denied modification of its September 6, 2002 decision. It noted that the record contained no medical evidence. The Office reviewed the merits of the claim due to the delay in acting on the reconsideration request.

On December 28, 2007 appellant, through his attorney, requested reconsideration and submitted additional factual and medical evidence. In a statement dated May 18, 2002, appellant related that he resumed work after a back operation in July 2000. He described his work duties and noted that around January 25, 2002 he injured his back and right shoulder when a trailer door he was opening jammed.

An October 4, 2002 magnetic resonance imaging (MRI) scan of appellant’s lumbar spine revealed recurrent posterior disc herniations at L4-5 and L5-S1, a lateral bulging of the annulus at L3-4 and degenerative joint disease from L1 to S1. A March 21, 2003 computerized tomography (CT) scan of the lumbar spine revealed “Dallas Grade 3 at all levels L3-4, L4-5 and L5-S1.” On March 21, 2003 Dr. Asim Khan, a Board-certified anesthesiologist, performed a disc stimulation discogram at L3-4, L4-5 and L5-S1 and diagnosed discogenic pain at L4-5 and L5-S1.

In a report dated March 31, 2003, Dr. Frank N. Moore, a Board-certified neurosurgeon evaluated appellant on behalf of the Office in connection with another claim, assigned file number xxxxxx365. He found that appellant was disabled due to a July 5, 1998 work injury and completed a work restriction evaluation.

By decision dated March 21, 2008, the Office denied appellant’s request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review of the prior decision. It noted that it had previously determined that the claimed incident occurred as alleged. The Office found that the submitted medical evidence was not relevant as it

did not address causal relationship to the January 25, 2002 work incident. It indicated that it had reviewed a March 31, 2003 narrative report from Dr. Moore and a June 20, 2003 narrative report from Dr. Richard Pelosi, a Board-certified neurosurgeon.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>2</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>3</sup>

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.<sup>4</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.<sup>5</sup> An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

Appellant alleged that he sustained an injury to his right shoulder and back on January 25, 2002 when a trailer door that he was opening jammed unexpectedly. He submitted a witness statement from Mr. Mahon, who noted that he assisted appellant and that he was in pain after a trailer door jammed. The Office accepted that appellant established that the January 25, 2002 incident occurred at the time, place and in the manner alleged. The issue is whether the medical evidence establishes that appellant sustained an injury as a result of this incident.<sup>7</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Tracey P. Spillane*, 54 ECAB 608 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>3</sup> *See Ellen L. Noble*, 55 ECAB 530 (2004).

<sup>4</sup> *Barbara R. Middleton*, 56 ECAB 634 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

<sup>5</sup> *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

<sup>6</sup> *Larry D. Dunkin*, 56 ECAB 220 (2004).

<sup>7</sup> *See Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

The Board finds that appellant has not established that the January 25, 2002 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.<sup>8</sup> Appellant did not submit any medical evidence in support of his claim prior to the most recent merit decision December 7, 2007. On August 6, 2002 the Office advised him of the type of medical evidence required to establish his claim. Appellant did not, however, respond to its request for supporting medical evidence. On November 16, 2007 it again requested but did not receive medical evidence in support of his claim. As appellant did not provide the medical evidence necessary to substantiate his claim, he has not met his burden of proof. The Office, therefore, properly denied his claim for compensation.

### **LEGAL PRECEDENT -- ISSUE 2**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>9</sup> the Office's regulations provide 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.<sup>10</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>11</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>12</sup>

The Board has held that the submission of evidence that repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>13</sup> The Board also has held that the submission of evidence, which does not address the particular issue involved, does not constitute a basis for reopening a case.<sup>14</sup> While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>15</sup>

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<sup>8</sup> *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

<sup>9</sup> 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides 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.”

<sup>10</sup> 20 C.F.R. § 10.606(b)(2).

<sup>11</sup> *Id.* at § 10.607(a).

<sup>12</sup> *Id.* at § 10.608(b).

<sup>13</sup> *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

<sup>14</sup> *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>15</sup> *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

## ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision on the issue of whether the Office properly denied appellant's request for reconsideration. The Office denied appellant's traumatic injury claim on the grounds that he did not establish that he sustained an injury causally related to the January 25, 2002 work incident. In support of appellant's request for reconsideration, he submitted a May 18, 2002 statement describing the factual circumstances surrounding his injury. The Office, however, has accepted that the January 25, 2002 employment incident occurred at the time, place and in the manner alleged. The relevant issue is whether the medical evidence establishes that appellant sustained an injury. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.<sup>16</sup>

Appellant submitted an October 4, 2002 MRI scan of the lumbar spine and a lumbar CT scan and discogram dated March 21, 2003. He further submitted a March 31, 2003 medical report from Dr. Moore. None of the medical evidence, however, addressed the relevant issue of whether appellant sustained a work injury on January 25, 2002. Consequently, as this evidence is not pertinent to the underlying issue of whether appellant has established an injury due to the January 25, 2002 employment incident, it is insufficient to meet the regulatory criteria for reopening his claim.<sup>17</sup>

On appeal, appellant's attorney noted that he had submitted a June 20, 2003 report from Dr. Pelosi. The Office indicated in its March 21, 2008 decision that it had reviewed Dr. Pelosi's report; however, it is not contained in the case record as assembled before the Board. Consequently, the Board is unable to make an informed adjudication of the issue of whether the Office properly denied appellant's request for reconsideration under section 8128. The case is, therefore, remanded for reconstruction of the case record to include Dr. Pelosi's June 20, 2003 report to be followed by an appropriate decision.

## CONCLUSION

The Board finds that appellant has not established that he sustained an injury on January 25, 2002 in the performance of duty. The Board further finds that the case is not in posture for decision on the issue of whether the Office properly denied appellant's request for further merit review of his claim pursuant to section 8128.

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<sup>16</sup> *Richard Yadron*, 57 ECAB 207 (2005); *Freddie Mosley*, 54 ECAB 255 (2002).

<sup>17</sup> *See Johnny B. Causey*, 57 ECAB 359 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 21, 2008 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board. The decision dated December 7, 2007 is affirmed.

Issued: September 9, 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