

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

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A.T., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Naples, FL, Employer )

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**Docket No. 09-510  
Issued: September 8, 2009**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On December 12, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated September 16, 2008 denying his request for reconsideration. As the Office's most recent merit decision on his claim was issued on September 7, 2007, the Board does not have jurisdiction to review the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether the refusal of the Office to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

**FACTUAL HISTORY**

On May 15, 2007 appellant, a 53-year-old modified distribution clerk, filed an occupational disease claim alleging that he developed bursitis, tendinitis and osteoarthritis of the shoulders as a result of repetitive employment activities. He stated that his duties since 1997

involved lifting, scanning and sorting hundreds of pieces of letters, flats and panels eight hours per day, five days per week.

Appellant submitted medical reports for the period January 7, 1997 to July 20, 2007 from his treating physician, Dr. Richard A. Saitta, a Board-certified internist, who diagnosed bilateral frozen shoulder tendinitis, degenerative joint disease and severe rheumatoid arthritis conditions which were aggravated by his repetitive job activities. He also provided reports of magnetic resonance imaging (MRI) scans, position descriptions for his jobs as mail processing clerk and modified distribution clerk, copies of documents related to his 1997 employment application and leave analysis forms.

The employing establishment controverted the claim contending that appellant handled only about 105 pieces of mail per day and that he was not disabled as a result of work activities.

By decision dated September 7, 2007, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that he had sustained an injury. It found that appellant had failed to establish that the events occurred as alleged or that the diagnosed conditions were causally related to his employment.

On September 7, 2007 appellant requested reconsideration. In an accompanying letter, he contended that his claim should be approved and had been denied only because Dr. Saitta had failed to respond to a request for additional information. Appellant stated that he was including reports from Dr. Saitta and Dr. Michael Havig, a Board-certified orthopedic surgeon, which he believed would clarify the issues in his case.

By decision dated September 16, 2008, the Office denied appellant's request for reconsideration, finding that the information submitted was insufficient to warrant a merit review.

### **LEGAL PRECEDENT**

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."<sup>1</sup>

The application for reconsideration sets forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>2</sup>

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meet at least one of these standards. If

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<sup>1</sup> 20 C.F.R. § 10.605.

<sup>2</sup> *Id.* at § 10.606.

reconsideration is granted, the case is reopened and the case is reviewed on its merits.<sup>3</sup> 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.<sup>4</sup>

### ANALYSIS

On September 7, 2007 the date that the Office issued its merit decision, appellant submitted an appeal request form requesting reconsideration. Although the request was received on September 9, 2007, it did not issue a decision until September 16, 2008, more than one year after the date of the merit decision. The Board finds that the Office's delay constituted an abuse of discretion.

Office procedures provide that, if a reconsideration decision is delayed beyond 90 days, and the delay would jeopardize a claimant's ability to seek a merit review of his claim before the Board, the Office should conduct a merit review and issue a decision so as to protect appellant's right to appeal.<sup>5</sup> In this case, although the Office did not issue its decision within 90 days, it denied appellant's request for reconsideration without conducting a merit review. This action was not consistent with the provisions of the Office's procedure manual. By delaying its decision for more than one year, the Office effectively prevented appellant from obtaining merit review of the September 7, 2007 decision by the Board.<sup>6</sup>

The Board will set aside the September 16, 2008 decision and remand the case to the Office for a merit review of its September 7, 2007 decision. Following this and such other development of the record as it deems necessary, the Office shall issue an appropriate merit decision.

### CONCLUSION

The Board finds that the Office abused its discretion in refusing to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

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<sup>3</sup> *Donna L. Shahin*, 55 ECAB 192 (2003).

<sup>4</sup> 20 C.F.R. § 10.608.

<sup>5</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (May 1996); see also *Ronald A. Eldridge*, 53 ECAB 218 (2001).

<sup>6</sup> See *Carlos Tola*, 42 ECAB 337 (1991).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' September 16, 2008 decision is set aside and the case is remanded for action consistent with the terms of this decision.

Issued: September 8, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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