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

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| **R.I., Appellant** | ) | |
| **and** | ) | **Docket No. 09-1926** |
| | ) | **Issued: April 7, 2010** |
| **U.S. POSTAL SERVICE, POST OFFICE, San Carlos, CA, Employer** | ) | |

*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
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On July 22, 2009 appellant timely appealed the January 29, 2009 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration. He also timely appealed the October 28, 2008 merit decision denying his claim. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of the claim.[1]

### ***ISSUES***

The issues are: (1) whether appellant sustained an injury in the performance of duty on September 13, 2008; and (2) whether the Office properly denied appellant's December 12, 2008 request for reconsideration under 5 U.S.C. § 8128(a).

[1] The record on appeal contains evidence submitted after the Office issued its January 29, 2009 decision. The Board may not consider evidence that was not in the case record when the Office rendered its final decision. 20 C.F.R. § 501.2(c) (2008).

## ***FACTUAL HISTORY***

Appellant, a 60-year-old maintenance worker, has an accepted claim for lumbar sprain, which arose on November 26, 2007 (xxxxxx115). On September 13, 2008 he reportedly pulled muscles in his lower back and experienced a back spasm. Appellant explained that, while exiting his personal vehicle, he had an allergy attack and sneezed while in a bent over position. According to him, the sneeze triggered his low back complaints. The employing establishment indicated that appellant was off duty when the September 13, 2008 sneezing incident occurred.[2] Because of his claimed injury, appellant was off work from September 15 until October 5, 2008. When he returned to work on October 6, 2008, he filed a recurrence (Form CA-2a) of disability under claim number xxxxxx115.[3] The Office, however, processed the claim as a new traumatic injury based on appellant's description of the September 13, 2008 sneezing incident.[4]

Appellant submitted medical records from Dr. Moshe Lewis, a Board-certified physiatrist, who examined appellant on September 18, 2008 and noted that he was having a significant flare up of his pain. His back reportedly "went out over the weekend." Dr. Lewis diagnosed lumbar strain and lumbar herniated disc at L4-5, and advised appellant to take off work for the next week. The September 18, 2008 report identified November 26, 2007 as the date of injury and referenced claim number xxxxxx115. Dr. Lewis did not specifically mention a September 13, 2008 sneezing incident. In a September 25, 2008 follow-up evaluation, he reported "extremely slow improvement over the past week due to ... recent exacerbation of [appellant's] lumbar spine." Dr. Lewis also noted that a September 11, 2008 electrodiagnostic study showed evidence of left S1 radiculopathy. Accordingly, he added chronic S1 radiculopathy to appellant's prior diagnoses of lumbar strain and herniated disc at L4-5. Dr. Lewis also advised appellant to remain off work until reevaluation on October 2, 2008. When he next saw appellant on October 2, 2008, he diagnosed lumbar disc disease. Dr. Lewis also released appellant to return to work with restrictions effective October 6, 2008.

In an October 28, 2008 decision denying appellant's claim, the Office found that the September 13, 2008 injury had not arisen in the performance of duty. It explained that appellant's lower back injury was due to a nonindustrial incident -- sneezing.

On December 12, 2008 appellant requested reconsideration. He did not provide any new evidence or present any arguments, but merely submitted a copy of the Office's October 28, 2008 decision. By decision dated January 29, 2009, the Office denied reconsideration.

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[2] September 13, 2008 fell on a Saturday. The employing establishment indicated that appellant regularly worked Monday through Friday, from 10:00 a.m. until 7:00 p.m.

[3] The employing establishment had advised appellant on October 1, 2008 that he "must submit" a claim for recurrence of disability.

[4] In a letter dated October 28, 2008, the Office explained that a recurrence was defined as a spontaneous worsening of a work-related condition without new injury or exposure to work factors. It informed appellant that the October 6, 2008 recurrence claim he filed with respect to his November 26, 2007 employment injury would be treated as a new traumatic injury (xxxxxx000) with a September 13, 2008 date of injury.

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

The Federal Employees' Compensation Act provides for the payment of compensation for the disability or death of an employee resulting from personal injury sustained "while in the performance of ... duty."[5] In order to be covered, an injury must occur at a time when the employee may reasonably be said to be engaged in his master's business, at a place where he may reasonably be expected to be in connection with his employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[6]

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

The record indicates that appellant was off duty Saturday, September 13, 2008, when he reportedly injured his lower back. At the time of the alleged injury, appellant claimed he was exiting his personal vehicle. He attributed his low back injury to having "sneezed while in a bent over position." Although appellant originally filed a claim for recurrence of disability causally related to his November 26, 2007 low back injury, the Office considered the September 13, 2008 incident as a new traumatic injury.

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[7] Based on appellant's description of the September 13, 2008 sneezing incident, the Office properly treated his October 6, 2008 recurrence claim as a new traumatic injury. Appellant did not describe a spontaneous change in his condition, but instead a new or intervening injury that was precipitated by a sneeze.

Having properly characterized the type of injury, the next inquiry was whether appellant was in the performance of duty on September 13, 2008. As previously indicated, appellant was off duty at the time of his alleged injury. September 13, 2008 was a Saturday, and according to the employing establishment, he was not scheduled to work that day. There is no evidence of record indicating that appellant was engaged in an employment-related activity at the time of the September 13, 2008 sneezing incident. Accordingly, the Office properly denied his claim for an employment-related low back injury.[8]

[5] 5 U.S.C. § 8102(a) (2006).

[6] *Roma A. Mortenson-Kindschi*, 57 ECAB 418, 423-24 (2006).

[7] 20 C.F.R. § 10.5(x).

[8] *See Roma A. Mortenson-Kindschi*, *supra* note 6.

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

The Office has the discretion to reopen a case for review on the merits.[9] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain 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 new evidence not previously considered by the Office.[10] When an application for reconsideration does not meet at least one 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.[11]

## ***ANALYSIS -- ISSUE 2***

Appellant's December 12, 2008 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Appellant merely submitted the appeal request form that accompanied the October 28, 2008 decision. He placed an "x" in the space indicating that he desired reconsideration and returned the form along with a copy of the Office's decision. Appellant made no specific argument at the time. Accordingly, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[12] Appellant also failed to satisfy the third requirement under section 10.606(b)(2). He did not submit any relevant and pertinent new evidence with his December 12, 2008 request for reconsideration. Consequently, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[13] Because he failed to establish a basis for merit review, the Office properly declined to reopen his case under 5 U.S.C. § 8128(a).

## ***CONCLUSION***

Appellant failed to establish that he was injured in the performance of duty on September 13, 2008. The Board further finds that the Office properly denied his December 12, 2008 request for reconsideration.

[9] 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.606(b)(2) (2009).

[11] *Id.* at § 10.608(b).

[12] *Id.* at § 10.606(b)(2)(i) and (ii).

[13] *Id.* at § 10.606(b)(2)(iii).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the January 29, 2009 and October 28, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 7, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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