

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

D.A., Appellant)

and)

U.S. POSTAL SERVICE, LOGISTICS &)
DISTRIBUTION CENTER, Sterling, VA,)
Employer)

**Docket No. 10-370
Issued: August 17, 2010**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 23, 2009 appellant timely appealed the October 23, 2009 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the October 23, 2009 nonmerit decision.

ISSUE

The issue is whether the Office properly denied appellant's September 29, 2009 request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

The case was previously before the Board.¹ Appellant, a 41-year-old former mail handler, has an accepted claim for right lower leg contusion, which arose on September 5, 2002.

¹ Docket No. 09-617 (issued September 18, 2009).

He resigned from the employing establishment “on or about” November 16, 2002 and later obtained employment in the private sector. On March 26, 2008 appellant filed a claim for recurrence of disability beginning October 22, 2002. His condition had reportedly worsened and he was experiencing constant pain, numbness and swelling in his foot. Appellant submitted medical records for treatment received between September and December 2002, but nothing more recent.² He reported that he had worked in the private sector for approximately 2½ years between January 2003 and October 2005. Appellant indicated that he had been unemployed since October 31, 2005 “due to injury.” The Office denied his claim for recurrence of disability by decision dated May 16, 2008. The Branch of Hearings and Review affirmed the Office’s decision on November 18, 2008. When the case was previously on appeal, the Board affirmed the Office’s denial of appellant’s claimed recurrence of disability beginning October 22, 2002. The Board’s September 18, 2009 decision is incorporated herein by reference.

On September 29, 2009 appellant’s counsel requested reconsideration. He premised his request on a medical report dated December 29, 2008. The Office originally received this report on January 22, 2009, while the case was on appeal before the Board.³ The document does not bear a signature; however, the December 29, 2008 report indicates that it is from the office of “Mark S. Davids, D.P.M.” Appellant’s chief complaints were right foot pain, numbness and stiffness. The right foot injury reportedly occurred in 2002 when a stapler was thrown at appellant’s tendon. Dr. Davids noted a history of cramps and sharp pain “daily” since 2002, which had progressively worsened.⁴ Appellant’s right foot condition periodically awakened him at night. Dr. Davids noted that it “comes [and] goes.” He also noted that appellant previously received treatment at the “end of 2002.” Dr. Davids further noted that in 2008 the Department of Health referred appellant for an x-ray and a magnetic resonance imaging scan. He also referenced six weeks of therapy during the summer and a referral from a “Dr. Chauhan” to see a podiatrist. Dr. Davids did not provide a specific diagnosis regarding appellant’s right lower extremity or indicate what, if any, physical limitations appellant’s right foot condition posed.

In a decision dated October 23, 2009, the Office denied appellant’s request for reconsideration. Appellant’s counsel argues that the Office’s decision denying reconsideration is “[c]ontrary to fact and law.”

² The latest medical evidence at the time was a December 3, 2002 follow-up report from Dr. Christopher J. Walters, a podiatrist. Appellant had complained of occasional numbness in his right foot, but no pain. Dr. Walters indicated that appellant had a history consistent with tendinitis and contusion. He characterized appellant’s condition as “improved.”

³ At that time counsel also submitted a copy of the December 29, 2008 “office notes” directly to the Board. The Board noted in its September 18, 2009 decision that the record on appeal included additional medical records dated December 29, 2008. As this evidence clearly postdated the Office’s November 18, 2008 decision, then on appeal, the Board advised appellant that pursuant to 20 C.F.R. § 501.2, it could not consider such evidence for the first time on appeal.

⁴ Additional information in the right margin of the document appears to have been omitted either when faxed or when the document was scanned into the record by the Office. Whatever the cause, certain information is illegible.

LEGAL PRECEDENT

The Office has the discretion to reopen a case for review on the merits.⁵ 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.⁶ 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.⁷

ANALYSIS

On September 29, 2009 appellant's counsel filed a request for reconsideration of the prior disallowance of the recurrence claim. He noted that the request was submitted within one year of September 18, 2009; the date of the latest merit decision. Counsel further noted that the request for reconsideration was based on the December 29, 2008 medical report, which had already been submitted. The Office denied the request for reconsideration without reviewing the merits of the claim. On appeal, counsel claims that the Office's October 23, 2009 decision denying reconsideration is "[c]ontrary to fact and law." The Board disagrees.

Appellant's September 29, 2009 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. Therefore, appellant 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).⁸

Appellant's counsel indicated that the September 29, 2009 request for reconsideration was premised on Dr. Davids' December 29, 2008 report. Further merit review is appropriate where appellant submits relevant and pertinent new evidence not previously considered by the Office.⁹ In the October 23, 2009 nonmerit decision, the Office acknowledged that Dr. Davids' December 29, 2008 report was the only new medical evidence received since the case was reviewed by the hearing representative on November 18, 2008. The issue before the Office was whether appellant sustained a recurrence of disability on October 22, 2002, causally related to his September 5, 2002 employment injury. Dr. Davids' December 29, 2008 report does not address this particular issue or otherwise provide any insight regarding appellant's claimed recurrence of disability. He did not provide a current diagnosis with respect to appellant's right lower

⁵ 5 U.S.C. § 8128(a) (2006).

⁶ 20 C.F.R. § 10.606(b)(2) (2009).

⁷ *Id.* at § 10.608(b).

⁸ *Id.* at § 10.606(b)(2)(i) and (ii).

⁹ *Id.* at § 10.606(b)(2)(iii).

extremity. Dr. Davids also did not address the existence and extent of any current or prior employment-related disability. Because his report did not address the relevant issue on reconsideration, appellant failed to satisfy the third requirement under section 10.606(b)(2).¹⁰ Dr. Davids did not submit any relevant and pertinent new evidence with his September 29, 2009 request for reconsideration. Consequently, appellant is not entitled to a review of the merits of his claim.¹¹

CONCLUSION

The Office properly denied appellant's September 29, 2009 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the October 23, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 17, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁰ *Id.* at § 10.608(b).

¹¹ *Id.* at § 10.608(b).