



## **FACTUAL HISTORY**

On February 21, 1986 appellant, then a 42-year-old special agent, sustained an injury in the performance of duty while moving office furniture. The Office accepted his claim for low back strain and herniated discs at L3-4 and L4-5. Appellant received compensation for temporary total disability on the periodic rolls.

On January 9, 2008 Dr. Sami R. Framjee, a Board-certified orthopedic surgeon and impartial medical examiner, reported that appellant could work at a sedate desk job with a lifting limitation of 10 to 20 pounds. He stated, however, that a magnetic resonance imaging (MRI) scan was indicated to better delineate appellant's clinical picture.

On June 16, 2008 Dr. Framjee wrote that appellant at the present time could work at a sedate desk job only.

In a decision dated August 14, 2008, the Office reduced appellant's compensation for wage loss to reflect her capacity to earn wages in the selected position of contract clerk. It found that the weight of the medical evidence rested with Dr. Framjee, who reported that appellant was capable of working eight hours a day in a sedentary capacity.

On August 15, 2008, the day following the Office's decision to reduce compensation, the Office received Dr. Framjee's April 2, 2008 report. Dr. Framjee described appellant's complaints and his findings on physical examination. He also reviewed the MRI scan obtained that day.

On August 29, 2008 the Office informed appellant that it had received another medical report from Dr. Framjee that was not considered in the August 14, 2008 decision. "Therefore, your claim has been assigned to a senior claims examiner to review the new medical evidence. You will be notified in writing upon completion of the review."

On September 10, 2008 the Office requested clarification from Dr. Framjee as his April 2, 2008 report suggested that appellant was temporarily totally disabled due to severe spinal stenosis, which was not an accepted work condition. "If the claimant is totally disabled, be sure to indicate whether -- by the accepted work injury conditions or -- by a nonoccupational reason."

On September 10, 2008 the Office also informed appellant that it was seeking clarification from Dr. Framjee. It again stated that Dr. Framjee's report was under review. "Upon receipt and review of the clarification requested, you will be further advised and an amended decision will be made. The purpose of which is to protect any appeal rights that you may have if adverse, or if in your favor, a new finding and processing of benefits."

On October 16, 2008 the Office received Dr. Framjee's September 15, 2008 response to its request for clarification.

On March 3, 2009 appellant requested reconsideration "in light of Dr. Framjee's late report, dated 4-2-08 and his clarification response, dated 9-15-08." He submitted a copy of

Dr. Framjee's April 2, 2008 report, a copy of Dr. Framjee's January 9, 2008 work capacity evaluation and a February 23, 2009 report from a physician's assistant.

In a decision dated April 2, 2009, the Office denied appellant's request for reconsideration. It found that the evidence appellant submitted was cumulative and previously considered in the August 14, 2008 decision.

On appeal, appellant contests the Office's finding that he did not submit relevant and pertinent new evidence. He argued that the Office received at least two reports from Dr. Framjee after its August 14, 2008 decision.

### **LEGAL PRECEDENT**

The Office may review an award for or against payment of compensation at any time on its own motion or upon application.<sup>2</sup> The employee shall exercise this right through a request to the district Office.<sup>3</sup>

An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by the Office in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set 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>4</sup>

A request for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>5</sup> A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the request for reconsideration without reopening the case for a review on the merits.<sup>6</sup>

### **ANALYSIS**

After reducing appellant's compensation in an August 14, 2008 decision, the Office received new evidence from Dr. Framjee, the impartial medical specialist. On August 15, 2008 it received Dr. Framjee's April 2, 2008 report of his examination of appellant and his review of

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.605.

<sup>4</sup> *Id.* at § 10.606.

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608.

an MRI scan obtained that date. The Office informed appellant on August 29, 2008 that this report was not considered in the August 14, 2008 decision.

On October 16, 2008 the Office received Dr. Framjee's September 15, 2008 response to its September 10, 2008 request for clarification. This evidence is relevant and pertinent to the Office's August 14, 2008 decision. The Office determined that Dr. Framjee's opinion represented the weight of the medical evidence and supported the reduction of appellant's compensation. However, it subsequently decided that his opinion required clarification. The Office further developed the evidence of record by requesting Dr. Framjee to clarify his medical opinion. Having done so, the Office may not argue that such evidence is not relevant, pertinent or new.<sup>7</sup>

Appellant sent his March 3, 2009 request for reconsideration within one year of the Office's August 14, 2008 merit decision. His request is therefore timely. In addition, appellant requested reconsideration in light of Dr. Framjee's April 2 and September 10, 2008 reports. Because these reports constitute relevant and pertinent new evidence not previously considered by the Office, the Board finds that appellant's request meets at least one of the standards for obtaining a merit review of his case. The Board will set aside the Office's April 2, 2009 decision denying his request for reconsideration and will remand the case for an appropriate final decision on his entitlement to compensation for wage loss, as the Office informed him it would do on September 10, 2008.

### **CONCLUSION**

The Board finds that the Office improperly denied appellant's March 3, 2009 request for reconsideration. Appellant is entitled to a merit review of his case.

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<sup>7</sup> See *Joyce A. Fasanello*, 49 ECAB 490 (1998).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 2, 2009 decision of the Office of Workers' Compensation Programs is set aside and case remanded for further action consistent with this opinion.

Issued: January 14, 2010  
Washington, DC

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

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

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