

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

E.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Capitol Heights, MD, Employer**

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**Docket No. 09-1991
Issued: July 1, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 28, 2009 appellant filed an appeal from a July 13, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her reconsideration request. There is no merit decision within 180 days of the filing of this appeal. Therefore, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim. The Board has jurisdiction to review the July 13, 2009 nonmerit decision.¹

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration.

¹ Appellant submitted new evidence accompanying her request for appeal. The Board may not consider new evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

On appeal, appellant asserts that the Office should have accepted her claim as she remained disabled for work.

FACTUAL HISTORY

On January 16, 2008 appellant, then a 52-year-old mail handler, filed an occupational disease claim (Form CA-2) claiming that she sustained a low back and hip injury on or before December 30, 1987 due to lifting sacks of mail. She stated that the Office accepted a prior claim for a December 30, 1987 injury. A supervisor noted that appellant was last exposed to the identified work factors on July 18, 2007 and first reported the condition on January 30, 2008.

In a February 8, 2008 letter, the Office advised appellant of the type of additional evidence needed to establish her claim. Appellant was afforded 30 days to provide such evidence. She did not submit additional evidence prior to April 7, 2008.

By decision dated April 7, 2008, the Office denied appellant's claim on the grounds that fact of injury was not established. It found that appellant failed to establish that the December 30, 1987 injury occurred at the time, place and in the manner alleged. The Office noted that the claim was timely filed.

In an April 2, 2009 letter, appellant requested reconsideration. She stated that the effects of the December 30, 1987 injury disabled her for work on and after July 25, 2007. Appellant submitted a June 16, 1994 report, from Dr. Jasbir Chowdhary, an attending Board-certified family practitioner, noting a history of back pain since a 1987 occupational injury. She provided July 20, 2007 reports from Dr. William L. Burner, an attending Board-certified orthopedic surgeon, noting a 1987 back sprain due to lifting heavy mail. Dr. Kidest Assegued, an attending Board-certified internist, submitted chart notes dated August 9, 2007 to April 17, 2008 holding appellant off work. Appellant also provided an August 15, 2005 position description and an August 27, 2007 disability retirement form.

By decision dated July 13, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted on reconsideration was irrelevant. It found that although the April 7, 2008 decision denied appellant's claim as fact of injury was not established, the actual issue in the case was timeliness. The Office found that appellant's January 16, 2008 claim was not filed within three years of the December 30, 1987 injury. Therefore, it was not timely under the three-year time limitation under 5 U.S.C. § 8122. The Office acknowledged that on reconsideration, appellant submitted "some substantial medical documentation." This new medical evidence was irrelevant, as it did not address the threshold issue of timeliness.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,² section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a

² 5 U.S.C. § 8128(a).

relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.³ Section 10.608(b) provides that when an application for review of the merits of a claim 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.⁴

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁵ Appellant need only submit relevant, pertinent evidence not previously considered by the Office.⁶ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.⁷

ANALYSIS

The Office denied appellant's occupational disease claim on April 7, 2008, finding that appellant failed to establish fact of injury regarding a December 30, 1987 work incident. Appellant requested reconsideration by letter dated April 2, 2009. She submitted new medical reports in which two attending physicians mentioned a 1987 occupational back injury. In its July 13, 2009 decision, the Office acknowledged that appellant submitted "substantial medical documentation" on reconsideration. It did not evaluate the merits of this new evidence. Instead, the Office denied reconsideration on the grounds that the original claim was not timely filed within the three-year time limitation of 5 U.S.C. § 8122. The medical evidence submitted on reconsideration was irrelevant to the issue of timeliness.

The Board finds that the July 13, 2009 decision clearly and totally changed the basis of denial set forth in the April 7, 2008 decision, which found that appellant's claim was timely filed but did not establish fact of injury. The Office did not clearly set forth the basis for this change. Therefore, the Board will remand the case to the Office for clarification of the legal and factual basis for its July 13, 2009 decision. After such development as deemed necessary, the Office will issue an appropriate decision in the case.

On appeal, appellant asserts that the Office should have accepted her claim as she remained disabled for work. As the case must be remanded for additional development, it is premature for the Board to address appellant's argument.

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.608(b). *See also T.E.*, 59 ECAB ____ (Docket No. 07-2227, issued March 19, 2008).

⁵ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁶ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

⁷ *Annette Louise*, 54 ECAB 783 (2003).

CONCLUSION

The Board finds that the case is not in posture for a decision. The Office's July 13, 2009 decision requires clarification.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 13, 2009 is set aside and the case remanded for further action consistent with this decision and order.

Issued: July 1, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board