

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

E.R., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Phoenix, AZ, Employer**

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**Docket No. 09-1655
Issued: March 18, 2010**

Appearances:
Mark Coby, Esq., for the appellant
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 June 22, 2009 appellant, through his representative, filed a timely appeal from a January 15, 2009 decision of the Office of Workers' Compensation Programs denying his request for reconsideration. Because more than one year has elapsed from the most recent merit decision dated March 27, 2008, the Board lacks jurisdiction over the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant's representative contends that the October 15, 2008 medical report from Dr. Dale Ratcliffe, Board-certified in physical medicine and rehabilitation, constituted new and relevant evidence establishing that appellant sustained an internal disc disruption due to the September 21, 2003 employment injury and that this disc injury caused the subsequent findings of spinal radiculopathy and the claimed emotional condition. He argued that the report directly addressed the findings of the Office hearing representative, who stated that there was no

objective evidence to establish that the diagnosed radiculopathy or chronic lumbar pain was caused by the work injury.

FACTUAL HISTORY

On September 21, 2003 appellant, then a 44-year-old transportation security screener, sustained a low back injury while lifting a heavy bag at work. The Office accepted the claim for a low back strain. Appellant stopped working on September 21, 2003. On May 5, 2004 he underwent an interforaminal block at the L5-S1 nerve root. Based on the recommendations of a second opinion physician, Dr. Robert Dunn, a Board-certified neurosurgeon, the employing establishment offered appellant a light-duty position. Appellant briefly returned to light duty on May 31, 2005 but stopped working after two hours due to a claimed back problem.¹

On August 31, 2007 appellant's representative requested that appellant's claim be expanded to include chronic depression with generalized anxiety, which appellant experienced due to his ongoing chronic back condition. He submitted an August 6, 2007 medical report from Jessie Garcia, Ph.D., a clinical psychologist, who diagnosed severe, chronic depression combined with generalized anxiety. Dr. Garcia opined that the depression was associated with appellant's chronic back condition and back pain, as well as his preoccupations about unemployment and money issues.

In a September 5, 2007 letter, the Office notified appellant of the deficiencies in his claim for a consequential emotional condition and advised him of the evidence required to establish the claim.

By decision dated October 11, 2007, the Office denied appellant's claim for a consequential emotional condition. It found that he did not submit sufficient medical evidence to establish that he sustained depression or anxiety condition causally related to his employment injury.²

On October 31, 2007 appellant, through his representative, requested an oral hearing before an Office hearing representative. The oral hearing took place on February 5, 2008.

Appellant subsequently submitted a February 4, 2008 medical report from Dr. Garcia who opined that appellant's psychological conditions of depression and anxiety were exacerbated by his September 21, 2003 back condition. Dr. Garcia stated that appellant's poor

¹ Appellant filed a separate claim for a May 31, 2005 traumatic back injury under Office file number xxxxxx528, which the record reveals has not been accepted by the Office. Further, the record reveals that he also has several other unaccepted workers' compensation claims, including a September 16, 2005 occupational disease claim for depression due to threats by the employing establishment, unfair denial of benefits and withholding of pay under Office file number xxxxxx518. Appellant also filed a May 11, 2003 traumatic injury claim for a lower back and right arm injury due to transporting heavy bags at work under Office file number xxxxxx684.

² By decision dated October 22, 2007, the Office found that appellant incurred an overpayment in the amount of \$896.47, for which he was at fault, after receiving total disability compensation from May 29 through June 11, 2005 after he returned to work.

mental health apparently began in September 2003 and was further complicated by his physical and financial difficulties.

By decision dated March 27, 2008, the Office hearing representative affirmed the October 11, 2007 decision. He found that appellant did not submit a rationalized medical opinion explaining how his employment-related low back strain caused depression and anxiety. The Office hearing representative also noted that the medical evidence of record was insufficient, as it related appellant's emotional condition to employment-related chronic back pain and radiculopathy. He stated that appellant's injury was only accepted for a soft-tissue injury and that chronic back pain and radiculopathy were not accepted conditions.

On October 27, 2008 appellant, through his representative, requested reconsideration. He submitted an October 15, 2008 medical report from Dr. Dale Ratcliffe, Board-certified in physical medicine and rehabilitation, who briefly described appellant's medical and occupational history. Based on a review of appellant's medical records, Dr. Ratcliffe found that appellant sustained a disc injury on September 21, 2003 and likely sustained internal disc disruption. He stated that the internal disc disruption could account for the documented electromagnetic findings of left L5 radiculopathy. Further, Dr. Ratcliffe opined that appellant's depression was secondary to his September 2003 injury with associated chronic pain syndrome.

By decision dated January 15, 2009, the Office denied appellant's request for reconsideration on the grounds that he did not submit any new evidence, advance a relevant legal argument or show an "error in fact or law." It found that Dr. Ratcliffe's medical report did not constitute new evidence as it reiterated evidence previously considered and was not probative to the issue in the case.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁶

³ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

ANALYSIS

In support of his reconsideration request, appellant submitted an October 15, 2008 medical report from Dr. Ratcliffe. Based on a review of appellant's medical records, Dr. Ratcliffe stated that appellant sustained a disc injury on September 21, 2003 and also likely sustained a disc disruption. Dr. Ratcliffe advised that the disc injury could likely account for the documented findings of radiculopathy at L5. He also opined that appellant's depression was secondary to his September 21, 2003 injury with associated chronic pain syndrome.

The Office denied merit review on the grounds that this evidence was cumulative as it reiterated previously submitted evidence and was not probative on the instant issue in the case. However, in determining whether to reopen a case for reconsideration, it is improper for the Office to evaluate the probative value of the evidence submitted.⁷ If the Office should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.⁸

Dr. Ratcliffe provided an opinion on the relevant issue of whether appellant sustained a consequential emotional condition due to his employment injury. The Board finds that this evidence is new and was not previously considered by the Office. It is sufficient to warrant a further review of the case on its merits.⁹ The Office abused its discretion in finding that the evidence reiterated that of record. The case is remanded to the Office to consider Dr. Ratcliffe's medical report and, following any necessary further development, issue an appropriate decision on the merits of the case.

CONCLUSION

The Board finds that the Office abused its discretion by denying appellant's request for reconsideration.

⁷ *Maggie Moore*, 41 ECAB 334 (1989). See *Helen E. Tschantz*, 39 ECAB 1382, 1386 (1988).

⁸ *Dennis J. Lasanen*, 41 ECAB 933 (1990).

⁹ See *R.M.*, 59 ECAB ___ (Docket No. 08-734, issued September 5, 2008); *Donald T. Pippin*, 54 ECAB 631 (2003).

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision.

Issued: March 18, 2010
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