

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

_____)	
L.C., Appellant)	
)	
and)	Docket No. 10-954
)	Issued: November 15, 2010
U.S. POSTAL SERVICE, POST OFFICE,)	
Jamaica, NY, Employer)	
_____)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 23, 2010 appellant, through his attorney, filed a timely appeal of a January 21, 2010 decision of the Office of Workers' Compensation Programs denying further merit review. Because over 180 days elapsed between the most recent merit decision of January 14, 2009 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's 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 on the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant's attorney argued that the Office's failure to perform a merit review in the face of new and relevant legal arguments constituted an abuse of discretion.

FACTUAL HISTORY

On May 13, 2004 appellant, then a 39-year-old mail handler, filed a traumatic injury claim alleging that he injured both hands and shoulders on May 12, 2004 lifting a bag of mail in

the performance of duty. He also worked for the Department of Homeland Security beginning in 2002 as a transportation supervisor screener. The Office accepted appellant's claim for bilateral shoulder sprain. Appellant's attending physician, Dr. Frank Carr, a Board-certified orthopedic surgeon, diagnosed torn rotator cuff of the right shoulder with impingement syndrome and indicated that appellant could perform sedentary work only. Appellant returned to full-time light duty with the Department of Homeland Security on August 19, 2004.

The Office referred appellant for a second opinion evaluation with Dr. Salvatore Corso, a Board-certified orthopedic surgeon. In a report dated December 20, 2007, Dr. Corso found that appellant could return to full duty without restrictions.

The Office found a conflict in medical opinion arose between Dr. Carr and Dr. Corso as to appellant's residuals and work capacity. It selected Dr. Richard M. Savino, a Board-certified orthopedic surgeon, to resolve the conflict. In a September 25, 2008 report, Dr. Savino found that appellant could not return to full duty due to his rotator cuff tear and provided work restrictions. He advised that appellant could not perform his usual job but could work eight hours a day with restrictions. Dr. Savino recommended that appellant could sit, stand, walk, twist, bend, stoop, squat and kneel for eight hours a day. He found that appellant could reach above the shoulder, perform repetitive movements, push, pull and lift for two hours a day. Dr. Savino indicated that appellant should not lift more than 15 pounds.

The limited-duty position offered by the employing establishment included: lifting up to 15 pounds for two hours, no reaching above the shoulder, no climbing or operating machinery, pushing and pulling up to 5 pounds for two hours and repetitive movements of the wrists and elbows for two hours.

In a letter dated November 17, 2008, the Office advised appellant that the employer had offered him suitable work as a modified mail handler and allowed him 30 days to accept or offer his reasons for refusal. Appellant responded on December 15, 2008. He stated that he had not received a job offer from the employing establishment. Appellant contended that the offered position would worsen the nerve damage in his neck, arms and hands while the required lifting would increase pain and numbness. In a letter dated December 22, 2008, the Office notified appellant that the reasons for refusing the job were inadequate and allowed an additional 15 days for him to accept the offered position.

By decision dated January 14, 2009, the Office terminated appellant's monetary compensation benefits effective January 12, 2009 based on his refusal to accept the suitable work position.

Appellant requested an oral hearing on February 4, 2009. In a letter dated May 28, 2009, appellant's attorney withdrew his request for an oral hearing and requested reconsideration. The Branch of Hearings and Review accepted the withdrawal of appellant's hearing request on June 11, 2009.

Appellant, through counsel, requested reconsideration on October 29, 2009 and asserted that this request was based on new legal argument, medical evidence and the Office's interpretation of the medical evidence of record. Counsel contended that the Office failed to

properly develop the evidence by failing to accept the conditions of partial rotator cuff tear, bilateral carpal tunnel syndrome and bilateral ulnar neuropathy. This failure rendered the reports from Drs. Corso and Savino of little probative value. Counsel further argued that the Office improperly determined the need for a second opinion physician creating the appearance of doctor shopping. He alleged that there was no conflict of medical opinion evidence and that Dr. Savino's report was not entitled to special weight. Appellant further alleged that the offered position was not consistent with Dr. Savino's work restrictions. Counsel also asserted that appellant was entitled to additional compensation benefits due to his dual employment.

By decision dated January 21, 2010, the Office declined to reopen appellant's claim for consideration of the merits on the grounds that the arguments submitted were not relevant to the issue under consideration.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides in section 8128(a) that the Office may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.¹ Section 10.606(b) of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that the Office erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by the Office; or includes relevant and pertinent new evidence not previously considered by the Office.² Section 10.608 of the Office's regulations provide that when a request for reconsideration is timely, but does meet at least one of these three requirements, the Office will deny the application for review without reopening the case for a review on the merits.³

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.

ANALYSIS

The Board finds that the Office properly denied appellant's request for reconsideration as the arguments submitted were not substantiated by the facts and circumstances of the case. Appellant's attorney argued that there was no conflict of medical evidence, that the report of Dr. Savino was not entitled to special weight, that there was evidence of "doctor shopping," that appellant was entitled to additional compensation because of dual compensation and that the offered position was not suitable. These arguments are not supported by the factual and medical evidence in the record. While the reopening of a case may be predicated solely on a legal

¹ 5 U.S.C. §§ 8101-8193, 8128(a).

² 20 C.F.R. § 10.606.

³ *Id.* at § 10.608.

premise not previously considered, such reopening is not required where the arguments are not supported by the evidence of record.⁴ Counsel further argued that appellant had established additional medical conditions and that he was entitled to additional compensation benefits. The Board finds that these arguments are not relevant to the issue of whether appellant refused an offer of suitable work. As appellant failed to submit any new evidence to support his arguments and as he relied solely on legal arguments which were either not relevant to the central issue or without a sound basis in fact and law, the Board finds that the Office properly determined that appellant was not entitled to further review of the merits of his claim.

CONCLUSION

The Board finds that the arguments submitted by appellant were not sufficient to require the Office to reopen his claim for consideration of the merits.

ORDER

IT IS HEREBY ORDERED THAT January 21, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 13, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

⁴ *M.E.*, 58 ECAB 694 (2007).