

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

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| <b>J.R., Appellant</b>                   | ) |                                   |
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| <b>and</b>                               | ) | <b>Docket No. 10-399</b>          |
|  | ) | <b>Issued: September 16, 2010</b> |
| <b>DEPARTMENT OF THE AIR FORCE, HILL</b> | ) |                                   |
| <b>AIR FORCE BASE, UT, Employer</b>      | ) |                                   |

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*Appearances:* *Case Submitted on the Record*  
*Alan J. Shapiro, Esq.,* for the appellant  
*Office of Solicitor,* for the Director

**DECISION AND ORDER**

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

**JURISDICTION**

On November 30, 2009 appellant filed a timely appeal from an October 30, 2009 decision of the Office of Workers' Compensation Programs which denied merit review. Because more than one year has elapsed since the most recent merit decision dated October 15, 2008 and the filing of this appeal on November 30, 2009, the Board lacks jurisdiction to review the merits of appellant's claim 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.

**FACTUAL HISTORY**

On June 18, 2004 appellant, then a 49-year-old mail processing clerk, filed an occupational disease claim alleging that she developed herniated discs as a result of performing her clerk duties. She became aware of her condition on November 10, 2004 and realized it was caused by her employment on January 8, 2007. Appellant stopped work on November 17, 2006 and did not return.

In a June 18, 2007 statement, appellant indicated that she worked as a mail processing clerk since 1988 and her duties consisted of heavy lifting, prolonged standing, pulling, pushing, dispatching and feeding mail into a machine, 8 to 10 hours daily. She noted developing acute and debilitating pain in her neck and back radiating into her head and shoulders.

In a September 24, 2007 decision, the Office denied the claim. It found that the claimed work events were not established and that the medical evidence was insufficient.

Appellant submitted reports from Dr. Prisco I. Olaya, a Board-certified internist, from 2004 to 2007, who treated her for respiratory problems, hypothyroidism, severe headaches, neck pain and arthrosis of the thoracic and lumbar spine. She also submitted reports from Dr. Bruce J. Montella, a Board-certified orthopedist. On September 5, 2007 Dr. Montella noted appellant's symptoms commenced in November 2006 and arose from her job as a clerk. He diagnosed work-related overuse syndrome and recommended anti-inflammatories and physical therapy.

On October 11, 2007 appellant requested an oral hearing that was held on January 30, 2008. She submitted a January 15, 2008 report from Dr. Lawrence M. Rugg, a chiropractor, who diagnosed cervical spine intervertebral disc syndrome with spondylosis, lumbar spinal stenosis and thoracic spine pain. Dr. Rugg opined that appellant's current complaints were due to a work injury that occurred on November 1, 2006. Appellant submitted a February 11, 2008 report from Dr. Montella who diagnosed herniated disc and degenerative arthrosis of the mid to lower thoracic spine. Dr. Montella noted that appellant's job required her to perform repetitive lifting, pushing and pulling and opined that appellant's injuries were related to her work activities.

On April 10, 2008 the hearing representative set aside the September 24, 2007 decision finding that the evidence established that appellant performed her work duties as reported. The hearing representative instructed the Office to refer appellant to a second opinion physician to address whether the accepted employment activities contributed to the diagnosed conditions.

Appellant continued to submit medical certificates and return to work slips from Dr. Olaya from March 18, 2003 to November 14, 2006, who treated her for weakness in her extremities, a herniated disc and spinal stenosis and returned her to work with restrictions.

Pursuant to the hearing representative's instruction, the Office referred appellant to a second opinion physician. Thereafter, it also referred her to an impartial medical examiner who, on September 8, 2008, opined that her claimed condition was not caused or aggravated by her job duties.

In a decision dated October 15, 2008, the Office denied appellant's claim on the grounds that the weight of the medical evidence as established by the referee physician who determined that her condition was not caused by her work duties.

On September 1, 2009 appellant, through her attorney, requested reconsideration. She asserted that the Office's decision should be vacated and her claim approved. Appellant indicated that her request for reconsideration was based on a medical report from Midwest Sports Medicine dated June 11, 2009. She attached a signed attorney authorization form authorizing her attorney to represent her before the Office. No additional medical evidence accompanied appellant's request.

By letter dated September 16, 2009, the Office acknowledged receipt of appellant's September 1, 2009 reconsideration request. It indicated that appellant's reconsideration request referenced medical evidence from Midwest Sports Medicine dated June 11, 2009; however, the Office informed her that no report was enclosed. The Office requested that appellant forward a copy of the medical evidence within 20 days. This correspondence was sent to appellant and her attorney.

In an October 30, 2009 decision, the Office denied appellant's reconsideration request on the grounds that her request neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision. It advised that her reconsideration request of September 1, 2009 referenced a medical report dated June 11, 2009; however, no report was enclosed nor was it received prior to issuing this decision.

### **LEGAL PRECEDENT**

Under section 8128(a) of the Federal Employees' Compensation Act,<sup>1</sup> the Office has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(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].”<sup>2</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>3</sup>

### **ANALYSIS**

The Office's October 30, 2009 decision, denied appellant's reconsideration request, without conducting a merit review, on the grounds that the evidence submitted neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision. Appellant's September 1, 2009 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> 20 C.F.R. § 10.606(b)(2).

<sup>3</sup> *Id.* at § 10.608(b).

interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office.

Appellant's request for reconsideration asserted that the Office's decision should be vacated and her claim approved based on the medical evidence from Midwest Sports Medicine dated June 11, 2009. Although her reconsideration request referenced a June 11, 2009 report from Midwest Sports Medicine, no such report was enclosed. By letter dated September 16, 2009, the Office advised appellant that the referenced medical evidence did not accompany her request for reconsideration and it allowed her 20 days to submit this evidence. Appellant did not respond to the Office's letter prior to the October 30, 2009 decision. This is important since the underlying basis for the Office's denial of her claim is medical in nature. The Board also notes that appellant did not otherwise submit any new and relevant medical evidence following the Office's October 15, 2008 decision.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim as she did not present evidence or argument satisfying any of the three regulatory criteria, under section 10.606(b)(2), for obtaining a merit review.

**CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 30, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 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