

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

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**N.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Wilson, NC, Employer**

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**Docket No. 10-1219  
Issued: January 21, 2011**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On March 23, 2010 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated March 5, 2010, which denied her request for reconsideration. Because more than 180 days has elapsed from the most recent merit decision dated June 9, 2009 to the filing of this appeal, the Board lacks jurisdiction to review the merits of her case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.<sup>1</sup> The only decision properly before the Board is the nonmerit March 5, 2010 decision denying appellant's request for reconsideration.

**ISSUE**

The issue is whether the Office properly denied appellant's June 25, 2009 request for reconsideration pursuant to section 8128(a) of the Federal Employees' Compensation Act.

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<sup>1</sup> For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

## **FACTUAL HISTORY**

On April 2, 2009 appellant, then a 42-year-old mail clerk, submitted a claim for occupational disease. She alleged that she suffered from a lower spine disc slip due to factors of her employment such as excessive lifting of heavy tubs of mail and standing for long periods of time at the window. Appellant did not submit any medical evidence along with her CA-2 form, but noted that her doctors would be submitting medical records.

The employing establishment controverted appellant's claim in an April 3, 2009 letter. The employing establishment stated that she received discipline shortly before requesting a CA-2 form for occupational disease, and thus, opined that her claim was a reaction to the administrative action taken against her. In addition, the employing establishment noted that appellant did not provide any medical evidence to support her claim.

In a supplemental statement dated April 27, 2009, appellant stated that the tubs she lifted while boxing mail weighed up to 30 to 40 pounds and that she performed these duties up to two to three hours per day for the 11 years that she worked for the postal service. She further stated that another work duty included standing continuously on the window to wait on customers, which required her to lift packages sometimes weighing up to 70 pounds. Appellant also responded to her employing establishment's controversion to her claim. She stated that her supervisor was aware of her alleged condition beginning in December 2008 but refused to process the paperwork.

In addition, appellant submitted the following medical records: a December 2, 2008 lumbar x-ray impression, which revealed normal alignment and no evidence of other abnormalities; a January 29, 2009 nerve conduction study, which revealed mild to moderate neuropathy of the right lower extremity; February 23, 2009 magnetic resonance imaging (MRI) scan results, which showed normal alignment with no subluxation and a central disc herniation in appellant's L4-5 and an April 22, 2009 report regarding an epidural steroid injection.

Appellant submitted a March 18, 2009 medical report from Dr. K. Stuart Lee, a Board-certified neurologist, who reported that appellant denied any inciting event or trauma and that her MRI scan and lumbar x-rays revealed a large L4-5 disc herniation with some central stenosis and asymmetry to the right. Dr. Lee ultimately diagnosed her with low back pain with radiation into the right lower extremity due to L4-5 disc herniation.

In his medical report dated May 6, 2009, Dr. Lee diagnosed appellant with a herniated disc at L4-5 on the right and described the cause as "unknown." He then opined that he suspected her herniated disc was primarily degenerative in nature because she did not report a specific injury. Dr. Lee further noted that it was "possible" that chronic lifting and chronic wear and tear changes of the back predisposed appellant to this injury.

Appellant also submitted medical reports from Dr. Richard L. Burdick, a Board-certified internist. In the January 14, 2009 medical report, Dr. Burdick stated that appellant complained of pain in her right leg but his examination revealed no abnormalities and her straight leg raising test was negative bilaterally. He further noted that the right leg pain was of "unclear etiology."

In his May 3, 2009 medical report, Dr. Burdick diagnosed appellant with severe degenerative disc disease (arthritis of the back) including a herniated disc. He reviewed her medical history and concluded that her condition was the result of a degeneration of the intervertebral discs of her back, exacerbated by prolonged standing and lifting heavy objects at work. Dr. Burdick further described appellant's back condition as a "wear and tear" condition.

Appellant further submitted an April 16, 2009 report from Anthony P. Briscoe, a physician's assistant, who noted that she suffered from lumbar disc herniation at L4-5 on the right side and recommended a series of epidural steroid injections.

On June 9, 2009 the Office issued a decision denying appellant's claim on the grounds that the medical evidence failed to establish that her alleged medical condition was related to her employment at the postal service. It stated that Dr. Lee's medical reports were speculative and not well rationalized. The Office pointed out that, in his May 6, 2009 report, Dr. Lee stated that the cause of appellant's herniated disc was "unknown" and that it was "possible" that chronic lifting and wear and tear predisposed appellant to this injury. Furthermore, it determined that Dr. Burdick's reports were unsupported by medical reasoning. The Office noted that, in his January 14, 2009 report, he stated that appellant's right leg pain was of "unclear etiology" but in his May 3, 2009 report, he stated that appellant's back condition was exacerbated by prolonged standing and lifting heavy objects at work. Accordingly, it concluded that the medical evidence was insufficient to establish causal relationship between appellant's alleged condition and work-related duties.

On February 12, 2010 the Office received a request for reconsideration dated June 25, 2009.<sup>2</sup> The request for reconsideration included a CA-17 form, duty status report dated August 24, 2009, signed by Dr. Jeff Pierce, an osteopathic physician, Board-certified in physical medicine. The report included a diagnosis of herniated L4-5 disc and restricted appellant's work to light duty.

On March 5, 2010 the Office issued a decision denying appellant's request for reconsideration and merit review. It observed that the basis for denying appellant's claim was lack of medical evidence establishing causal relationship and that the only additional medical evidence submitted by appellant was the August 24, 2008 Form CA-17 duty status report. The Office determined that the duty status report failed to provide a physician's opinion, supported by proper rationale, as to whether appellant's herniated disc was causally related to factors of her employment. Thus, the duty status report did not constitute new and pertinent evidence sufficient to warrant merit review.

### **LEGAL PRECEDENT**

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether to review an award for or against compensation.<sup>3</sup> The Office's regulations provide that

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<sup>2</sup> A scanned portion of a postmark indicates that the request for reconsideration was mailed on February 8, 2010.

<sup>3</sup> 5 U.S.C. § 8128(a); *see also D.L.*, 61 ECAB \_\_ (Docket No. 09-1549, issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

the Office may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his right through a request to the district Office.<sup>4</sup>

To require the Office to reopen a case for merit review pursuant to the Act, the claimant must provide evidence or an argument that: (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>5</sup>

A request for reconsideration must also be submitted within one year of the date of the Office decision for which review is sought.<sup>6</sup> A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If the Office chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>7</sup> If the request is timely but fails to meet at least one of the requirements for reconsideration, it will deny the request for reconsideration without reopening the case for review on the merits.<sup>8</sup>

### ANALYSIS

The Board finds that the Office properly denied appellant's request for reconsideration because appellant failed to meet any of the criteria for reopening a case for review on the merits. Appellant did not allege that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument, nor submit pertinent evidence not previously considered.

In this case, the only new evidence appellant submitted was a Form CA-17, duty status report. The report did not contain a physician's opinion as to the cause of appellant's back condition or whether a causal relationship existed between her back condition and factors of her employment. The Office had denied the claim on the basis of insufficient medical evidence to establish that appellant's back condition was the result of or related to factors of her employment. Thus, the report failed to address the particular issue in this case and did not constitute relevant and pertinent evidence sufficient to warrant reconsideration. The Board has held that evidence that does not address the particular issue involved in the claim does not constitute a basis for reopening a case.<sup>9</sup> As appellant has not met any of the requirements for

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<sup>4</sup> 20 C.F.R. § 10.605; *see also R.B.*, 61 ECAB \_\_ (Docket No. 09-1241, issued January 4, 2010); *A.L.*, 60 ECAB \_\_ (Docket No. 08-1730, issued March 16, 2009).

<sup>5</sup> *Id.* at § 10.606(b); *see also L.G.*, 61 ECAB \_\_ (Docket No. 09-1517, issued March 3, 2010); *C.N.*, 60 ECAB \_\_ (Docket No. 08-1569, issued December 9, 2008).

<sup>6</sup> *Id.* at § 10.607(a).

<sup>7</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>8</sup> *Id.* at § 10.608(b); *E.R.*, 61 ECAB \_\_ (Docket No. 09-1655, issued March 18, 2010); *Y.S.*, 60 ECAB \_\_ (Docket No. 08-440, issued March 16, 2009).

<sup>9</sup> *C.N.*, *supra* note 5; *D.I.*, 59 ECAB 158 (2007); *Kevin M. Fatzer*, 51 ECAB 407 (2000).

reopening her case for merit review under section 8128(a) of the Act, the Office properly denied reconsideration of her case on the merits.

**CONCLUSION**

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).<sup>10</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the nonmerit decision of the Office of Workers' Compensation Program dated March 5, 2010 is affirmed.

Issued: January 21, 2011  
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

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<sup>10</sup> The Board notes that appellant submitted additional evidence following the March 5, 2010 nonmerit decision. Since the Board's jurisdiction is limited to evidence that was before the Office at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).