

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

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**L.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Newark, NJ, Employer**

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**Docket No. 10-1818  
Issued: May 12, 2011**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On July 1, 2010 appellant, through her attorney, filed a timely appeal from a March 15, 2010 nonmerit decision denying her request for reconsideration.<sup>1</sup> As the last merit decision of the Office was issued on April 3, 2007, pursuant to the Federal Employees' Compensation Act<sup>2</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.<sup>3</sup>

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<sup>1</sup> In a decision dated April 28, 2010, the Office suspended appellant's compensation as she had not returned a Form CA-1032. Appellant has not appealed this decision and thus it is not before the Board at this time. *See* 20 C.F.R. § 501.2(c).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> For final adverse decisions of the Office issued prior to November 19, 2008, a claimant had up to one year to file an appeal. *See* 20 C.F.R. § 501.3(d)(2). An appeal of final adverse Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. § 501.3(e).

## ISSUE

The issue is whether the Office properly denied appellant's request to reopen her case for further review of the merits under 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

This case has previously been before the Board. By decision dated December 18, 2008, the Board affirmed an April 3, 2007 decision finding that appellant had not established a recurrence of disability and a July 10, 2007 nonmerit decision denying reconsideration of the April 3, 2007 decision.<sup>4</sup> It reversed an August 1, 2007 loss of wage-earning capacity determination, however, after finding that the Office improperly based its determination on a part-time position. The Board further set aside an October 23, 2007 decision denying reconsideration of a wage-earning capacity decision on the grounds that the evidence submitted was insufficient to warrant further merit review. It found that appellant was requesting reconsideration of the April 3, 2007 merit decision finding that she failed to establish a recurrence of disability. The Board remanded the case for the Office to adjudicate her timely request for reconsideration of the April 3, 2007 decision. The facts and circumstances set forth in the prior appeal are hereby incorporate by reference.

The facts relevant to this appeal will again be set forth. On May 31, 2006 appellant, a full-time mail handler, filed a recurrence of disability claim on February 23, 2004 causally related to her accepted employment injury. By decision dated October 20, 2006, the Office determined that she had not established a recurrence of disability as the medical evidence was insufficient to show that she was unable to perform her part-time limited-duty employment beginning February 23, 2004. It noted that appellant had worked four hours per day since 2001 and received compensation for disability for four hours per day.

In a decision dated April 3, 2007, a hearing representative affirmed the October 20, 2006 decision finding that appellant had not established a recurrence of disability.<sup>5</sup> On May 25, 2007 appellant, through her attorney, requested reconsideration of the April 3, 2007 decision. Counsel submitted a medical report dated May 17, 2007 from Dr. David S. Wolkstein, a Board-certified orthopedic surgeon, in support of the reconsideration request. Dr. Wolkstein related that appellant could work limited duty until February 23, 2004, when her "condition worsened and deteriorated to the point where she could no longer continue working in a restricted capacity. She became totally disabled from performing her duties at work in any capacity on February 23, 2004."

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<sup>4</sup> Docket No. 08-1232 (issued December 18, 2008). The Office accepted that appellant sustained bilateral tendinitis of the arms and right carpal tunnel syndrome due to factors of her federal employment.

<sup>5</sup> The Office hearing representative found, however, that a conflict existed between Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, who provided a second opinion examination and Dr. Nagzar H. Haidri, an attending Board-certified neurologist, regarding whether appellant had any further residuals of her work injury. In a report dated July 6, 2007, Dr. Michael Wujciak, a Board-certified orthopedic surgeon and impartial medical examiner, noted that Dr. Haidri found that appellant could work with restrictions of four hours per day. He diagnosed persistent carpal tunnel syndrome, deconditioning and a "significant seizure disorder." Dr. Wujciak opined that appellant could work four hours per day with restrictions lifting under 25 pounds and under 10 pounds repetitively.

In a July 10, 2007 decision, the Office denied appellant's request for reconsideration after finding that the evidence was insufficient to warrant reopening the case for further merit review under 5 U.S.C. § 8128.<sup>6</sup> It determined that Dr. Wolkstein's May 17, 2007 report was immaterial as he did not provide objective findings or identify the disabling conditions.

On August 14, 2007 appellant, through her attorney, requested reconsideration of the April 3 and July 10, 2007 decision. He submitted an April 23, 2007 report from Dr. Wolkstein in support of his reconsideration request. Dr. Wolkstein described his treatment of appellant beginning in June 2000 and provided his findings on examination from 2000 until November 2005. He advised that when he evaluated her on August 6, 2002 her symptoms were unchanged and he found that she could continue working four hours per day. However, Dr. Wolkstein related that when he evaluated appellant on January 23, 2003 she had a positive Tinel's and Phalen's sign in her right wrist. Appellant underwent physical therapy. On November 24, 2003 she had a positive Tinel's sign bilaterally. Dr. Wolkstein stated:

“[Appellant] returned on February 5, 2004. Her condition was unchanged. [Appellant's] right wrist was more symptomatic than the left. I recommended low level laser treatments which [she] had in this office from February 9, 2004 through March 4, 2004. [Appellant] did not improve. I again recommended surgery for the carpal tunnel syndrome....

“[Appellant's] occupation required repetitive movements of her hands, wrists, and upper extremities. Her job as a mail handler required repetitive pushing, pulling, grasping, lifting and carrying of mail and parcels causing bilateral carpal tunnel syndrome. It is my opinion within a reasonable degree of medical certainty that the duties described above caused [appellant's] carpal tunnel syndrome and that her condition deteriorated to the point that she could no longer continue working at her job.”

By decision dated October 23, 2007, Office denied reconsideration of its August 1, 2007 wage-earning capacity determination. On December 18, 2008 the Board set aside the August 1, 2007 decision after finding that appellant had timely requested reconsideration of the April 3, 2007 rather than August 1, 2007 decision. The Board instructed the Office to consider her request for reconsideration of the April 3, 2007 decision finding that she had not established a recurrence of disability.

By decision dated March 15, 2010, the Office denied appellant's request for reconsideration of its April 3, 2007 decision after finding that the evidence submitted was cumulative in nature. It determined that the April 23, 2007 report from Dr. Wolkstein was substantially similar to his May 17, 2007 report and thus insufficient to warrant reopening the case for further merit review.

On appeal appellant's attorney argues that the weight of the medical evidence establishes that she sustained an employment-related recurrence of disability on February 23, 2004.

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<sup>6</sup> In a decision dated August 1, 2007, the Office found that appellant's actual earnings as a mail processor effective April 30, 2001 fairly and reasonably represented her wage-earning capacity.

## LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>7</sup> the Office's regulations provide that 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

In order to require merit review, it is not necessary that the new evidence be sufficient to discharge appellant's burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.<sup>11</sup>

## ANALYSIS

In its prior merit decision of April 4, 2007, an Office hearing representative found that appellant did not establish a recurrence of disability on or after February 23, 2004 causally related to her accepted work injury. On July 10, 2007 and March 15, 2010 the Office denied merit review of its April 4, 2007 decision.

As noted above, the Board does not have jurisdiction over the merits of this case. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2) requiring the Office to reopen the case for review of the merits of the claim. The Board finds that, in her request for reconsideration, she did not make any new argument that the Office erroneously applied or interpreted a specific point of law nor did she advance a relevant legal argument not previously considered by the Office. Instead, appellant submitted a new report from Dr. Wolkstein. The underlying issue is medical in nature, regarding whether she established an employment-related recurrence of disability. The evidence submitted in support of appellant's reconsideration request must address this issue in order to be relevant.

In his April 23, 2007 report, Dr. Wolkstein provided a detailed history of his treatment of appellant beginning in 2000. He further described the increased objective findings over time and concluded that "her condition deteriorated to the point that she could no longer continue working

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<sup>7</sup> 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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."

<sup>8</sup> 20 C.F.R. § 10.606(b)(2).

<sup>9</sup> *Id.* at § 10.607(a).

<sup>10</sup> *Id.* at § 10.608(b).

<sup>11</sup> *See F.D. (S.D.),* 58 ECAB 413 (2007); *Donald T. Pippin,* 53 ECAB 631 (2003).

at her job.” The Office determined that Dr. Wolkstein’s new report was similar to a previously received May 17, 2007 report in which he concluded that appellant sustained a recurrence of disability beginning February 23, 2004. However, the prior report from Dr. Wolkstein did not contain a history of treatment or objective findings supporting his conclusions. As discussed, the requirements for reopening a case for merit review do not include the requirement that a claimant submit all evidence that may be necessary to discharge her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.<sup>12</sup> As Dr. Wolkstein’s April 23, 2007 report constituted pertinent new and relevant medical evidence not previously considered by the Office, the Board finds that the Office improperly denied appellant’s request for review of the merits of the claim. The case will be remanded to the Office to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, the Office shall issue a merit decision on the claim.<sup>13</sup>

### **CONCLUSION**

The Board finds that the Office improperly denied appellant’s request to reopen her case for further review of the merits under 5 U.S.C. § 8128(a).

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<sup>12</sup> *Id.*

<sup>13</sup> On appeal appellant’s attorney argues that the weight of the evidence shows that appellant sustained a recurrence of disability on February 23, 2004. As discussed, however, the Board does not have jurisdiction over the merits of this case.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 15, 2010 is set aside and the case is remanded for further proceedings consistent with the decision of the Board.

Issued: May 12, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board