

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

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| <b>G.R., Appellant</b>  | ) |                             |
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| <b>and</b>  | ) | <b>Docket No. 10-2127</b>   |
|   | ) | <b>Issued: May 23, 2011</b> |
| <b>U.S. POSTAL SERVICE, BULK MAIL<br/>CENTER, Jersey City, NJ, Employer</b> | ) |                             |
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*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  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 12, 2010 appellant, through his attorney, filed a timely appeal of a May 17, 2010 decision of the Office of Workers' Compensation Programs, denying his application for reconsideration without merit review of the claim. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the May 17, 2010 nonmerit decision. Since more than 180 days elapsed between the last merit decision dated February 5, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. § 501.3(e).

**ISSUE**

The issue is whether the Office properly determined that appellant's application for reconsideration was insufficient to warrant merit review under 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On November 16, 2007 appellant, then a 54-year-old mail handler, filed a traumatic injury claim alleging that he sustained injuries on that date in the performance of duty. He stated that he was hit by a bulk mail container. On January 14, 2008 the Office accepted the claim for postconcussion syndrome, cervical and lumbosacral sprains, cervical radiculopathy and right retroperitoneum injury without open wound into cavity. It also accepted right carpal tunnel syndrome and right ulnar neuropathy.

Appellant returned to a full-time, light-duty position on March 18, 2008. He filed claims for intermittent periods of wage loss, stopped working on April 28, 2009 and filed a claim for a recurrence of disability.

The record indicates that appellant began receiving treatment from Dr. David Wolkstein, an orthopedic surgeon, on January 21, 2009. Dr. Wolkstein provided a history of the November 16, 2007 employment injury and noted bilateral knee pain. In a note dated April 28, 2009, he advised that appellant was totally disabled and right knee surgery was pending. In a May 14, 2009 report, Dr. Wolkstein stated that appellant had reported both knees were struck in the employment incident and he continued to have bilateral knee pain. Right knee symptoms were worse than the left and appellant needed surgery. In a July 2, 2009 report, Dr. Wolkstein stated that appellant was under treatment for injuries sustained on November 16, 2007, his right knee had progressively worsened and he was disabled since April 28, 2009.

By decision dated July 14, 2009, the Office denied claims for intermittent disability from January 19 to October 18, 2008.

In a report dated July 23, 2009, Dr. Wolkstein stated that appellant was disabled from April 28, 2009 due to a bilateral knee condition. On August 13, 2009 he stated that a magnetic resonance imaging (MRI) scan showed tears of the right medial and lateral menisci. Appellant had been totally disabled since April 28, 2009 as a direct result of injuries sustained on November 16, 2007.

In a decision dated August 17, 2009, the Office denied a recurrence of disability commencing April 28, 2009. By decision dated September 1, 2009, an Office hearing representative set aside the July 14, 2009 decision, finding that the dates of disability claimed should be clarified. In a decision dated October 29, 2009, the Office denied claims for intermittent disability from April 26 to October 24, 2008.

Appellant also received treatment from Dr. Nazar Haidri, a neurologist. In a report dated September 18, 2009, Dr. Haidri provided results on examination, noting that appellant was placed on disability by Dr. Wolkstein since April 28, 2009 and right knee surgery was pending. On December 11, 2009 he provided results on examination and indicated that appellant should not return to work pending right knee surgery.

By decision dated February 5, 2010, an Office hearing representative affirmed the August 17 and October 29, 2009 Office decisions. The hearing representative found the medical evidence was insufficient to establish the claims.

In a letter dated March 16, 2010, appellant requested reconsideration of his claim. He submitted a March 4, 2010 report from Dr. Wolkstein and argued that this clearly established a recurrence of disability from April 28, 2009. In the March 4, 2010 report, Dr. Wolkstein opined that appellant had been disabled since April 28, 2009. He stated that appellant's right knee had worsened, and surgery was planned, although not yet carried out. Dr. Wolkstein referred to his August 13, 2009 report, noting that he had stated that on April 28, 2009 he recommended appellant not return to work. He noted abnormal MRI scan findings and opined that appellant remained disabled due to his bilateral knee condition, right worse than left.

Appellant also submitted January 22 and March 5, 2010 treatment notes from Dr. Haidri, providing results on examination and noting that Dr. Wolkstein had placed appellant on disability and recommended right knee surgery. In an April 16, 2010 report, Dr. Haidri noted that appellant had been advised to return to light duty by Dr. Wolkstein. On May 8, 2010 he noted that appellant had returned to work. Appellant also submitted reports from Dr. Haidri from 2008 and 2009 that were previously of record.

By decision dated May 17, 2010, the Office denied appellant's application for reconsideration. It found that Dr. Wolkstein's March 4, 2010 report did not address the issue of causal relationship of his knee condition to his injury and a merit review of the case was unwarranted as the evidence was not considered pertinent or relevant new evidence.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>2</sup> the Office regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."<sup>3</sup> Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.<sup>4</sup>

### **ANALYSIS**

On reconsideration, appellant did not show that the Office erroneously applied or interpreted a specific point of law. He did not cite to a specific point of law or otherwise discuss the application of a point of law. Appellant did not advance a new and relevant legal argument. He submitted a March 4, 2010 report from Dr. Wolkstein to argue that the report clearly established a recurrence of disability. The issue on appeal is whether the March 4, 2010 report,

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<sup>2</sup> 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at anytime on his own motion or on application.")

<sup>3</sup> 20 C.F.R. § 10.606(b)(2).

<sup>4</sup> *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

or other evidence submitted, constitutes relevant and pertinent evidence not previously considered.

In reviewing the March 4, 2010 report, the Board finds that it does not contain any new and relevant information with respect to the issue presented. Dr. Wolkstein previously stated in an April 28, 2009 note, as well as in July 2, 23 and August 17, 2009 reports, that appellant had been disabled since April 28, 2009. He noted a bilateral knee condition, right worse than left, with right knee surgery recommended. Dr. Wolkstein discussed the MRI scan findings in his August 13, 2009 report. The March 4, 2010 report provided no new and relevant information, or offer any additional rationale regarding causal relationship between the diagnosed knee condition and the employment injury. Dr. Wolkstein opined that in the August 13, 2009 report that the disability was a direct result of the November 16, 2007 employment injuries. The March 4, 2010 report does not discuss causal relationship or provide any new, relevant and pertinent evidence on the causal relationship issue.

With respect to additional reports from Dr. Haidri, these reports do not discuss causal relationship between disability and the November 16, 2007 employment injury. Dr. Haidri notes that Dr. Wolkstein had placed appellant on disability since April 28, 2009, which he had noted in prior reports.

The Board accordingly finds that appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(2). Pursuant to 20 C.F.R. § 10.608(b), the Office properly denied the application for reconsideration without merit review.

On appeal, appellant discussed the merits of the recurrence of disability claim. The May 17, 2010 Office decision was not a decision on the merits; it found that his application for reconsideration was insufficient to warrant further merit review. The Board does not have jurisdiction over the February 5, 2010 merit decision.<sup>5</sup> For these reasons, the Board finds that the Office properly denied merit review of the claim.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim.

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<sup>5</sup> The 180 day period to timely file an appeal of the February 5, 2010 Office decision expired on August 4, 2010. The appeal in this case was dated August 10, 2010 and postmarked August 12, 2010. 20 C.F.R. § 10.501.3(f).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 17, 2010 is affirmed.

Issued: May 23, 2011  
Washington, DC

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

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

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