

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

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**L.C., Appellant**

**and**

**DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE,  
Holtsville, NY, Employer**

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**Docket No. 06-2030  
Issued: February 22, 2007**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 30, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated May 30, 2006 which denied her request for reconsideration. The last merit decision of record is the Board's August 9, 2005 decision.<sup>1</sup> The subject matter adjudicated by the Board in the August 9, 2005 decision is *res judicata* and not subject to further consideration by the Board.<sup>2</sup>

**ISSUE**

The issue is whether the refusal of the Office to reopen appellant's case for further reconsideration on the merits pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

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<sup>1</sup> According to Office procedure, the one-year period for requesting reconsideration begins on the date of the original Office decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including *inter alia*, any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (June 2002).

<sup>2</sup> See *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

## **FACTUAL HISTORY**

The case is on appeal to the Board for the second time.<sup>3</sup> On March 13, 2001 appellant, a 43-year-old data transcriber, filed a traumatic injury claim alleging that she injured her back on March 9, 2001 when she slipped and fell on ice in the parking lot. The Office accepted the claim for cervical and lumbar strains and paid appropriate compensation. Appellant was placed on the periodic rolls for temporary total disability by letter dated July 31, 2001.

By decision dated August 9, 2005, the Board affirmed the Office's September 21 and December 27, 2004 decisions terminating appellant's compensation effective September 5, 2004. The Board found that the weight of the medical evidence rested with Dr. Anthony G. Puglisi, an Office referral physician and Board-certified orthopedic surgeon, who found that appellant's work-related conditions had resolved. Subsequent to the September 21, 2004 decision, the Office found a conflict in the medical opinion evidence subsequent to the decision terminating appellant's compensation benefits. The Board found that the weight of the medical evidence rested with the impartial medical specialist, Dr. Arnold M. Illman, a Board-certified orthopedic surgeon, that appellant had no continuing residuals or disability due to her March 9, 2001 employment injury. The facts and the history surrounding the prior appeal are set forth in the initial decisions and are hereby incorporated by reference.

In a letter dated January 30, 2006, appellant requested reconsideration. She submitted a September 20, 2005 report by Dr. Frederic A. Mendelsohn, a Board-certified neurologist, a September 10, 2005 spinal impairment questionnaire and a report dated September 16, 2005, by Dr. Mitchell Goldstein, a Board-certified orthopedic surgeon. Dr. Mendelsohn diagnosed chronic lumbosacral and cervical strain/sprain. He noted that appellant has been out of work since her 2001 work-related slip and fall. Dr. Goldstein reported that she injured herself on March 9, 2001 when she slipped and fell on ice. He diagnosed cervical strain/sprain, lumbosacral herniated nucleus pulposus, radiculitis and lumbosacral and cervical myofascitis. Dr. Goldstein opined that these conditions were due to her 2001 employment injury as she had "[n]o previous history of neck or back problems." He reported that appellant's "trauma is compatible with subjective and objective findings with lumbar herniated disc." Dr. Goldstein stated that appellant's "objective findings are also compatible with the fall and with a lumbosacral herniated disc."

By decision dated May 30, 2006, the Office denied appellant's request for reconsideration finding that the medical evidence submitted was irrelevant and of no evidentiary value to warrant further merit review.<sup>4</sup> The Office found that, while the two reports were new, they failed to "provide sufficient objective findings and rationale" to support continuing disability.

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<sup>3</sup> Docket No. 05-778 (issued August 9, 2005), *petition for recon. denied* (issued December 7, 2005).

<sup>4</sup> The Board notes that, following the May 30, 2006 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. See 20 C.F.R. §§ 501.2(c); *Donald R. Gervasi*, 57 ECAB \_\_\_\_ (Docket No. 05-1622, issued December 21, 2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

## LEGAL PRECEDENT

The Federal Employees' Compensation Act<sup>5</sup> provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.<sup>6</sup> The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.<sup>7</sup>

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (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>8</sup>

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>9</sup> A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>10</sup>

## ANALYSIS

The Board notes that appellant's compensation benefits were terminated effective September 5, 2004 on the basis that the weight of the medical evidence was represented by Dr. Pugilisi, the Office referral physician, who opined that the accepted work-related conditions of cervical and lumbar strains had resolved. Subsequent to the termination of her benefits, the Office found a conflict in the medical opinion evidence and referred appellant to Dr. Illman. The Office found Dr. Illman's opinion sufficient to establish that appellant did not have any disability or residuals due to her accepted March 9, 2001 employment injury.

Appellant's January 30, 2006 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the

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

<sup>6</sup> 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB \_\_\_\_ (Docket No. 06-121, issued June 6, 2006).

<sup>7</sup> 20 C.F.R. § 10.605.

<sup>8</sup> 20 C.F.R. § 10.606. *See Susan A. Filkins*, 57 ECAB \_\_\_\_ (Docket No. 06-868, issued June 16, 2006).

<sup>9</sup> 20 C.F.R. § 10.607(a). *See Joseph R. Santos*, 57 ECAB \_\_\_\_ (Docket No. 06-452, issued May 3, 2006).

<sup>10</sup> 20 C.F.R. § 10.608(b). *See Candace A. Karkoff*, 56 ECAB \_\_\_\_ (Docket No. 05-677, issued July 13, 2005).

Office. In her January 30, 2006 request for reconsideration, appellant alleged that Dr. Pugilisi's report and opinion should not have been considered by the Office. The evidence of file reflects that the Office had previously addressed the argument pertaining to its reliance upon the opinion of Dr. Pugilisi in its September 21 and December 27, 2004 decisions. Thus, appellant's argument pertaining to the Office's reliance on Dr. Pugilisi was previously considered by the Office and is repetitious of earlier arguments. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).<sup>11</sup>

Appellant submitted reports by Dr. Mendelsohn and Dr. Goldstein in support of her request for reconsideration. The Office found that, while the two reports were new, they failed to "provide sufficient objective findings and rationale" to support continuing disability. The issue of whether the reports by Dr. Mendelsohn and Dr. Goldstein were supported by medical rationale and objective findings would go to the weight of the medical evidence, the standard to be applied when reopening a case for a review of the merits. The reports of Dr. Mendelsohn and Dr. Goldstein are relevant, pertinent and new to the issue of whether appellant continues to have residuals and disability due to her accepted employment injury. The requirement for reopening a claim for merit review does not include the requirement that a claimant shall submit all evidence necessary to discharge her burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.<sup>12</sup> Accordingly, the Office should have reviewed appellant's case on the merits and discussed this relevant and pertinent new evidence not previously considered.

### **CONCLUSION**

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

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<sup>11</sup> 20 C.F.R. § 10.608(b)(2)(i) and (ii).

<sup>12</sup> See *Sydney W. Anderson*, 53 ECAB 347 (2002).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 30, 2006 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: February 22, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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