

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

E.D., Appellant

and

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

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**Docket No. 08-716
Issued: July 3, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 14, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 15, 2007 nonmerit decision denying his request for merit review. The Office's last merit decision of record was its September 28, 2006 decision denying his claim for an employment-related occupational disease. Because more than one year has elapsed between the last merit decision and the filing of this appeal on January 14, 2008, the Board lacks jurisdiction to review the merits of this claim.¹

ISSUE

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

¹ See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On October 17, 2005 appellant, then a 39-year-old window clerk, filed a claim alleging that he sustained injury to his back and legs due to sitting in a nonergonomic chair at work between August 30 and September 7, 2005.² Appellant stopped work from September 9 to 18, 2005, worked for a few hours on September 19, 2005 and then stopped work again.

In support of his claim, appellant submitted several reports of an attending chiropractor, Dr. Scott Reiner. He also submitted reports of two physician's assistants. A September 15, 2005 clinical note indicates that appellant reported feeling something pop in his back on September 7, 2005 when he placed his dog on the floor while at a veterinarian's office.

In a November 21, 2005 letter, appellant argued that he filed a claim for an "aggravated injury" and not a claim for a new injury in that his "existing medical conditions" were aggravated by sitting in a nonergonomic chair. He indicated that he further aggravated his condition on September 7, 2005 when he pulled his dog down from the examining table to the floor but asserted that he already had an employment-related injury at that point.

In a December 8, 2005 decision, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained an employment-related occupational disease of his back and legs. Appellant requested a hearing before an Office hearing representative. At the July 26, 2006 hearing, he repeated his prior arguments. In a September 28, 2006 decision, the Office hearing representative affirmed the Office's December 8, 2005 decision. She found that appellant's claim was appropriately considered to be a claim for an employment-related occupational disease as he alleged that his injury occurred due to sitting in a chair over the course of several days.³

In a September 27, 2007 reconsideration request, appellant, through his attorney, argued that his claim was for "aggravation of an existing injury" and that the Office impermissibly "changed this case into an occupational disease case." He stated, "The hearing representative erred in finding that because the claimant worked from August 30, 2005 to September 6, 2005 intermittently and had problems everyday that this was an occupational disease case instead of an injury (aggravation) case." Appellant acknowledged aggravating his condition on September 7, 2005 when he handled his dog but asserted that he already had an employment-related injury at that point. In an October 15, 2007 decision, the Office denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

² After approximately a year and a half off work, appellant returned to work on August 30, 2005 in a limited-duty position which involved sitting in a chair for most of the day and responding to customer inquiries. He had the freedom to alternate between sitting, standing and walking if he wished.

³ The Office hearing representative discussed the September 7, 2005 dog-lifting incident, but denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish an employment-related occupational disease.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ the Office's regulations provide that the evidence or argument submitted by 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.⁵ 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.⁶ 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.⁷ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.⁸

ANALYSIS

On October 17, 2005 appellant filed a claim alleging that he sustained injury to his back and legs due to sitting in a nonergonomic chair at work between August 30 and September 7, 2005. The Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained an employment-related occupational disease of his back and legs.

In his September 2007 reconsideration request, appellant argued that the Office should have considered his case to be a claim for an employment-related aggravation of an existing injury rather than a claim for a new employment-related occupational disease. He also acknowledged that he aggravated his medical condition on September 7, 2005 when he handled his dog at the veterinarian's office, but argued that he already had an employment-related injury at that point.

The Board finds that the arguments do not require reopening of appellant's claim on the merits because he previously made these arguments and the Office has already considered them.⁹ In a September 28, 2006 decision, the Office hearing representative found that appellant's claim was appropriately considered to be a claim for an employment-related occupational disease as he alleged that his injury occurred due to sitting in a chair over the course of several days. She

⁴ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[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." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ 20 C.F.R. § 10.607(a).

⁷ 20 C.F.R. § 10.608(b).

⁸ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

⁹ See *supra* note 8 and accompanying text.

discussed the September 7, 2005 dog-lifting incident, but denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish an employment-related occupational disease.

Appellant has not established that the Office improperly denied his request for further review of the merits of its September 28, 2006 decision under section 8128(a) of the Act, because the argument or evidence he submitted did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' October 15, 2007 decision is affirmed.

Issued: July 3, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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