United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 10-1300**
	)	**Issued: February 1, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Savannah, GA, Employer	)	

Appearances:
C.B. Weiser, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 6, 2010 appellant filed a timely appeal of an October 21, 2009 decision of the Office of Workers' Compensation Programs, denying merit review of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the last merit decision dated February 4, 2009.[1]

ISSUE

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

[1] For Office decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of its decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

The case was before the Board on a prior appeal. By decision dated May 8, 2007, the Board affirmed a November 20, 2006 merit decision finding the Office properly terminated appellant's compensation as of June 12, 2004 for refusal of suitable work pursuant to 5 U.S.C. § 8106(c)(2).[2] The history of the case as provided in the Board's prior decision is incorporated herein by reference.

By letter dated December 21, 2007, appellant, through his representative, requested reconsideration of his claim. He argued that he did not refuse the job offer, as he went to the employing establishment on two occasions but was told by his supervisors that no job was available.

In a decision dated March 12, 2008, the Office reviewed the case on its merits and denied modification.

Appellant requested reconsideration and submitted an August 30, 2008 statement from a coworker, Tony Pass, who indicated that on May 6 and 27, 2004 he witnessed appellant come to the employing establishment to accept a job offer. He was told they had no job for him because of his permanent disability.

By decision dated February 4, 2009, the Office reviewed the case on its merits and denied modification. With respect to the August 30, 2008 statement, it held "Based on Mr. Pass' statement, he did not actually observe the conversation between [appellant] and the supervisors. Therefore, his statement does not support that the position as a modified [m]ail [p]rocessing [c]lerk was not available to [appellant]."

In a letter dated September 27, 2009, appellant requested reconsideration. In a June 15, 2009 statement, Mr. Pass noted that on May 6 and 27, 2004, he heard Supervisors Mary Mosely and Walter Miles tell appellant that no limited-duty job was available because of his permanent disability and appellant was told to go home.

By decision dated October 21, 2009, the Office denied further merit review of the claim. It did not specifically acknowledge that a June 15, 2009 statement from Mr. Pass had been submitted. According to the Office, the September 27, 2009 reconsideration request argued that statements from Mr. Pass were sufficient to modify the decision. It stated, "This statement was first received in the office [June 30, 2006], and your argument concerning this statement is repetitious to evidence and argument previously considered."

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant may

[2] Docket No. 07-544 (issued May 8, 2007).

[3] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

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 [the Office] erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by [the Office]; or (iii) constitutes relevant and pertinent evidence not previously considered by [the Office]."[4] 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.[5]

ANALYSIS

With his September 27, 2009 application for reconsideration, appellant submitted a June 15, 2009 statement from a coworker, Mr. Pass. In its October 21, 2009 decision, the Office listed specific evidence received after the last merit decision, but did not list the June 15, 2009 statement. It refers to a statement being received on June 30, 2006, without further explanation. The case record does not contain evidence received by the Office on June 30, 2006.

To the extent the Office is referring to the August 30, 2008 statement from Mr. Pass, which was submitted prior to the last merit decision, the Board notes that the Office had found this statement of limited value because the witness "did not observe the conversation" between appellant and the supervisors. The June 15, 2009 statement, however, clearly stated that the witness did hear the conversation alleged on May 6 and 27, 2004, regarding the availability of the offered position. It is, therefore, evidence not previously considered. The statement is relevant as it concerns the availability of the modified clerk job that the Office found was a suitable position.

Pursuant to 20 C.F.R. § 10.606(b)(2), the submission of relevant and pertinent evidence not previously considered by the Office is sufficient to require the Office to review the merits of the claim. The case will accordingly be remanded for an appropriate merit decision.

CONCLUSION

The Board finds that the Office improperly denied appellant's application for reconsideration without merit review of the claim. The case will be remanded for a merit decision.

[4] 20 C.F.R. § 10.606(b)(2).

[5] *Id*. at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 21, 2009 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: February 1, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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