

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES A. URBONAS and DEPARTMENT OF THE AIR FORCE,
SACRAMENTO AIR LOGISITICS CENTER, Sacramento, CA

*Docket No. 02-1943; Submitted on the Record;
Issued January 31, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On August 16, 1993 appellant, then a 36-year-old electronics mechanic, filed a traumatic injury claim alleging that on that date, he was attempting to pull out a drawer that was jammed and felt pain in his lower back.¹ The Office eventually accepted the claim for low back strain² and bulging disc. Appellant received appropriate compensation and benefits.³

In a March 18, 1998 merit decision, the Office denied appellant's claim for continuing compensation on the grounds that appellant no longer had any ongoing disability causally related to the accepted injury of August 16, 1993.⁴

By letter dated March 16, 1998,⁵ appellant's representative requested reconsideration.

By decision dated July 10, 1998, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

¹ The record reflects that appellant had a previous back injury in July 1992, from which he recovered and returned to full duty in November or December 1992.

² Lumbar strain.

³ The record reflects that appellant stopped work on December 17, 1994.

⁴ A decision was initially issued on February 20, 1998; however, no appeal rights were attached and it was reissued.

⁵ The record reflects these dates although a typographical error appears with respect to the date of reconsideration as it predates the decision.

In an October 5, 1998 letter, appellant's representative requested reconsideration and enclosed additional evidence.

By merit decision dated October 22, 1998, the Office denied modification of the March 18, 1998 decision.

In an October 22, 1999 letter, appellant's representative requested reconsideration and enclosed additional evidence.

In a December 29, 1999 merit decision, the Office denied modification of the March 18, 1998 decision on the grounds that the medical evidence submitted was insufficient to warrant such modification.

By letter dated December 28, 2000, appellant's representative requested reconsideration and enclosed additional evidence with her request.

By merit decision dated April 16, 2001, the Office denied modification of the December 29, 1999 decision finding that appellant's work-related disability had ceased.

In an April 15, 2002 letter, appellant's representative requested reconsideration and enclosed reports of Dr. Thomas W. Ormiston, a Board-certified family practitioner, dated May 3 and 22, July 3, August 23, September 24 and November 5, 2001; the reports of Dr. Jules Preudhomme, a Board-certified anesthesiologist, dated March 6, 12 and 23, April 10 and December 27, 2001 and January 25 and February 25, 2002; the reports from Dr. Vidya P. Kini, Board-certified in physical medicine and rehabilitation, dated February 15, March 13, February 5, 6 and January 10, 2001, and appellant's medical chart from Dr. Kini. Appellant's representative alleged that these reports demonstrated that appellant's condition was a result of his August 16, 1993 work injury. Further, she proceeded to interpret the contents of the doctors' reports and repeated that appellant continued to suffer from his August 16, 1993 injury.⁶

The additional evidence received by the Office was comprised of physical therapy reports, treatment plans⁷ or prescriptions for physical therapy from mainstream rehabilitation dating from April 10, 1998 and January 17, 2001.

In a May 17, 2002 decision, the Office denied merit review of appellant's request for reconsideration on the grounds that the evidence submitted was immaterial and therefore insufficient to warrant review of its prior decision.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.⁸ As

⁶ The record reflects that the above-referenced physician's reports were not received by the Office until after the May 17, 2002 decision. The Board may not consider this evidence for the first time on appeal as it was not before the Office as of May 17, 2002, the time it issued the final binding decision in the case. 20 C.F.R. § 501.2(c)

⁷ The plans dated September 4 and October 4, 1998 were illegible.

⁸ 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

appellant filed his appeal with the Board on June 26, 2002, the Board lacks jurisdiction to review the Office's most recent merit decision dated April 16, 2001. Consequently, the only decision properly before the Board is the Office's May 17, 2002 decision denying appellant's request for reconsideration.

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

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.606(b)(2) (1999), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) (1999) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁹

In the present case, relevant and pertinent new medical evidence did not accompany appellant's requests for reconsideration. This is important since the underlying issue in the claim, whether appellant has a work-related disability, is essentially medical in nature.

In its May 17, 2002 decision, the Office correctly noted that appellant did not submit relevant and pertinent new evidence not previously considered by the Office. Appellant's representative argued the probative value of the medical evidence and reports not in the record and expressed her disagreement with the Office decision; however, these reports were not a part of the record as they were not received prior to the May 17, 2002 decision and they are not entitled to any probative value. Further, appellant's representative did not show that the Office erroneously applied or interpreted a point of law, nor did she advance a point of law or a fact not previously considered by the Office. Accordingly, appellant may not obtain a merit review of his claim based on the first or second requirement set forth above. Further, appellant provided prescriptions for physical therapy and physical therapy reports but this evidence contains no reasoned medical opinion on the critical issue in the case, namely, whether appellant continued to suffer residuals due to his August 16, 1993 work injury. Additionally, the reports of physical therapists are of no probative value as a physical therapist is not a physician as defined under the

⁹ 20 C.F.R. § 10.608(b) (1999).

Act and, therefore, is not competent to give a medical opinion.¹⁰ The evidence submitted with appellant's request is, therefore, irrelevant. Because appellant failed to submit relevant and pertinent evidence not previously considered by the Office, he is not entitled to a merit review of his claim under the third requirement noted above. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the above-noted requirements under 10.606(b)(2) (1999). Accordingly, the Board finds that the Office properly denied appellant's August 15, 2002 request for reconsideration.¹¹

The May 17, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 31, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

¹⁰ See 5 U.S.C. § 8101(2); *Jennifer L. Sharp*, 48 ECAB 209 (1996); *Thomas R. Horsfall*, 48 ECAB 180 (1996).

¹¹ The Board again notes that subsequent to the Office's May 17, 2002 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).