

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOUGLAS M. BYRD and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Washington, DC

*Docket No. 02-1053; Submitted on the Record;
Issued March 19, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim.

On March 24, 1997 appellant, then a 54-year-old modified clerk, filed a claim for a traumatic injury to his middle lower back sustained that day while taking down a hamper from a stack of two. The Office accepted that appellant sustained a lumbar strain and also accepted that he sustained a recurrence of disability beginning January 26, 1998. Appellant returned to his modified clerk position, thereafter missing intermittent time from work. The Office paid compensation for this absence; the most recent of which ended February 25, 2000.

On October 23, 2000 appellant filed a claim for compensation for disability during the period October 23 to November 20, 2000. On November 22, 2000 appellant filed a claim for compensation for disability during the period November 20 to December 20, 2000. Appellant did not work from October 23 to December 20, 2000.

By letter dated December 18, 2000, the Office advised appellant that it appeared that he was claiming a recurrence of disability and if he was, he should file a Form CA-2a.

By decision dated February 5, 2001, the Office found that the medical evidence failed to establish that appellant's disability beginning October 23, 2000 was causally related to his March 24, 1997 employment injury.

By decision dated February 28, 2001, the Office found that appellant failed to provide probative evidence to support that he was totally disabled from October 23 to December 20, 2000 or that his alleged recurrent condition was causally related to his March 24, 1997 employment injury. The Office's decision also noted that a report by Dr. Robert O. Gordon, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion evaluation, concluded that he had no residuals from his March 24, 1997 employment injury.

By letter dated October 22, 2001,¹ appellant requested reconsideration, contending that, contrary to advice provided in the Office's December 18, 2000 letter, a flareup of his condition while he was off work could be compensable as a consequential injury. Appellant expressed his disagreement with statements contained in Dr. Gordon's report and contended that this report created a conflict of medical opinion with the reports of his attending physician.

Appellant submitted a report dated September 17, 2001 from his attending physician, Dr. William Dorn III, a Board-certified orthopedic surgeon,² who stated that he had seen and treated appellant for "injuries causally related to his industrial work accident on March 24, 1997." Dr. Dorn described appellant's March 24, 1997 injury and stated: "Since that time, [appellant] has been treated with physical therapy treatments and medications. His condition has improved; however, he does have residual disability that has prevented his return to his usual and customary work activities." Dr. Dorn stated that appellant's examination was "essentially unchanged from prior examinations" and diagnosed strains of the lower back and psychiatric disorders.

By decision dated February 22, 2002, the Office found: "Because your letter neither raised substantive legal questions nor included new and relevant evidence, it is insufficient to warrant a review of our prior decision at this time."

The only Office decision before the Board on this appeal is the Office's February 22, 2002 decision finding that appellant's application for review was not sufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent merit decision on February 28, 2001 and the filing of appellant's appeal on March 1, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.³

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

¹ This letter was first received by the Office on November 29, 2001 when it was transmitted by fax. It was hand carried to the Office on November 30, 2001.

² This report was received by the Office on January 30, 2002.

³ 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board is filed within one year of the date of the Office final decision being appealed. 20 C.F.R. § 501.10(d)(2) provides that a notice of appeal served on the Board by mail is timely "if the envelope containing the paper is postmarked within the period allowed..." Appellant's notice of appeal was dated February 27, 2002, but the postmark date of the envelope containing this notice was March 1, 2002.

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 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), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. Evidence or argument that repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁴ Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁵

The September 17, 2001 report from Dr. Dorn that appellant submitted with his October 22, 2001 request for reconsideration is not relevant, as it does not address whether appellant was totally disabled from October 23 to December 20, 2000, the period at issue in the decision from which reconsideration was requested. This report, like Dr. Dorn's October 23, 2002 report, does not provide a basis for a finding of total disability or differentiate whether appellant's disability is due to his accepted lumbar strain or to a diagnosed psychiatric condition.

Appellant's October 22, 2001 request for reconsideration also does not advance a relevant legal argument not previously considered by the Office. His argument regarding what constitutes a consequential injury is irrelevant, as there is no indication that such an injury resulted in appellant's disability from October 23 to December 20, 2000. His argument that Dr. Gordon's report created a conflict with the reports of Dr. Dorn is also irrelevant, as the Office determined in its February 28, 2001 decision that appellant had not submitted any probative evidence to support that he was totally disabled from October 23 to December 20, 2000 or that his alleged recurrent condition was causally related to his March 24, 1997 employment injury. Although the September 17, 2000 report from Dr. Dorn negated causal relation and disability, it was not essential to this determination.

⁴ *Helen E. Paglinawan*, 51 ECAB 591 (2000).

⁵ *Kevin M. Fatzer*, 51 ECAB 407 (2000).

The February 22, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
March 19, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member