

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

RONALD NANCE, Appellant

and

**U.S. POSTAL SERVICE, Long Island, NY,
Employer**

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**Docket No. 05-350
Issued: July 1, 2005**

Appearances:
Ronald Nance, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On November 23, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated November 4, 2004, denying his request for further merit review of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision.

ISSUE

The issue is whether 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).

FACTUAL HISTORY

This case has previously been on appeal before the Board.¹ In a June 14, 2004 decision, the Board found that, with the exception of the dates of October 4, November 7 and 24, 2000 and April 24, 2001, appellant had not met his burden of proof to establish that he sustained disability

¹ Docket No. 04-125 (issued June 14, 2004), *petition for recon denied*, issued October 19, 2004.

for intermittent hours for the period March 25 through December 17, 2000 or a recurrence of total disability from January 19 through August 4, 2001. The Board also found 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). The facts and history contained in the prior appeal are incorporated by reference.

Appellant submitted additional evidence. Based on a July 26, 2001 lumbosacral spine magnetic resonance imaging (MRI) scan, Dr. Robert M. Vandemark, Board-certified in emergency medicine, diagnosed moderate degenerative disc disease at L4-5 with early degenerative disc disease at L3-4 (without disc space loss at that level).

In an April 23, 2003 report, Dr. David L. Simel, Board-certified in internal medicine, advised that appellant's last workday was November 29, 2002 due to the "previously noted condition."

Appellant also submitted numerous progress notes, from physician's assistants and nurses and a laboratory report from a physician's assistant.

In a January 5, 2004 report, Dr. Michael Bienfeld, a physician of unknown specialty, advised that appellant's blood pressure had not returned to preinjury status and that he had poor blood pressure control. He advised that appellant lift no greater than 20 pounds until his blood pressure was lower. In separate treatment notes, also dated January 5, 2004, Dr. Bienfeld listed intermittent dates that he had stopped work from September 1999 to December 1, 2002 and present.

A May 27, 2004 MRI scan of the cervical spine, read by Dr. James D. Eastwood, a Board-certified diagnostic radiologist, revealed resolution of the posterior central protrusion of the C6-7 intervertebral disc. He also noted findings that were consistent with ossification of the posterior longitudinal ligament.

In a May 28, 2004 report, Dr. Surendrapal S. Mac, a Board-certified orthopedic surgeon and second opinion physician, advised that appellant could return to his usual job and that there were no restrictions. In a separate report also dated May 28, 2004, he advised that appellant's work injury had resolved, although he continued to have problems secondary to cervical spondylosis and degenerative arthritis of the lumbar spine.

In an August 19, 2004 progress note, Dr. Jaspal Singh, Board-certified in internal medicine, diagnosed mild persistent asthma, not fully controlled and allergic rhinitis.

By letter dated October 26, 2004, appellant requested reconsideration. He repeated his previous arguments and alleged that he had new and relevant evidence to show that he was disabled for the times he was taken off work.

By decision dated November 4, 2004, the Office denied appellant's request for reconsideration without a merit review on the grounds that his request neither raised substantial legal questions nor included new and relevant evidence.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,² the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(1) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(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 [the Office].”³

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁴

ANALYSIS

In the instant case, appellant disagreed with the denial of his claim for compensation for disability from March 25 to December 17, 2000 and for a recurrence of disability on January 19, 2001 and requested reconsideration.

The underlying issue is medical in nature, whether appellant was disabled for intermittent periods from March 25 through December 17, 2000 and for recurrent total disability from January 19 to August 4, 2001. However, he did not provide any relevant or pertinent new evidence to the issue of whether he was disabled during these time frames due to his accepted employment-related conditions.

Appellant submitted several new reports which included an April 23, 2003 report, in which Dr. Simel, advised that his last workday was November 29, 2002 due to the previously noted condition. However, this report is not relevant as he did not provide any opinion regarding whether appellant's employment caused any disability for any period of time from March 25 to December 17, 2000 or commencing on January 19, 2001 and thus, Dr. Simel's report is insufficient to require the Office to reopen his case for further review of the merits.

In a January 5, 2004 report, Dr. Bienfeld discussed appellant's blood pressure. However, he did not indicate that appellant was disabled from work. The submission of evidence that does

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b).

⁴ 20 C.F.R. § 10.608(b).

not address the particular issue involved does not constitute a basis for reopening a case.⁵ In separate treatment notes, also dated January 5, 2004, Dr. Bienfeld listed intermittent dates that appellant had stopped work from September 1999 to December 1, 2002 and present. However, these notes are not relevant and pertinent as they did not contain any discussion or opinion explaining why he had stopped work.

Appellant also submitted copies of the second opinion physician's reports dated May 28, 2004 and an August 19, 2004 progress note, in which Dr. Jaspal Singh, Board-certified in internal medicine, diagnosed mild persistent asthma, not fully controlled and allergic rhinitis. However, these reports are not relevant as neither Dr. Mac nor Dr. Singh indicated that appellant was disabled from March 25 to December 17, 2000 or whether he had a recurrence of disability commencing January 19, 2001 and thus, these reports are of no probative value.

Appellant included several diagnostic reports comprised of a July 26, 2001 lumbosacral spine MRI scan and a May 27, 2004 cervical spine MRI scan. However, these reports merely reported findings and are not relevant and pertinent new evidence as they did not contain an opinion regarding whether he was disabled for intermittent periods from March 25 through December 17, 2000 and for recurrent total disability from January 19 to August 4, 2001.

Appellant also submitted copies of documents that were previously submitted. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.⁶ Appellant did not provide any relevant and pertinent new evidence to establish that he was disabled during these time frames due to his accepted employment-related conditions.

Additionally, the record also contains progress notes and a laboratory report from physician's assistants and a nurse. Section 8101(2) of the Act⁷ provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by the applicable state law. Consequently, this evidence is not relevant as it cannot be considered medical evidence and, as noted above, the underlying point at issue is medical in nature.

Consequently, the evidence submitted by appellant on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review.

Appellant also has not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant new argument not previously submitted. Therefore, the Office properly denied his request for reconsideration.

⁵ *Robert P. Mitchell*, 52 ECAB116 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Alan G. Williams*, 52 ECAB 180 (2000).

⁶ *David J. McDonald*, 50 ECAB 185 (1998); *John Polito*, 50 ECAB 347 (1999); *Khambandith Vorapanya*, 50 ECAB 490 (1999).

⁷ See 5 U.S.C. § 8101(2). See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

CONCLUSION

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).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 4, 2004 is affirmed.

Issued: July 1, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member