

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

W.C., Appellant

and

**DEPARTMENT OF THE ARMY, U.S. ARMY
CORPS OF ENGINEERS, Huntington, WV,
Employer**

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**Docket No. 07-296
Issued: May 1, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 14, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated October 26, 2006 denying reconsideration. Because more than one year has elapsed between the most recent merit decision of the Office dated October 12, 2005 and the filing of this appeal on November 14, 2006, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUE

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

¹ The most recent merit decision of record is the Board's July 17, 2006 decision. However, this decision became final 30 days after issuance and is not subject to further review. *See* 20 C.F.R. § 501.6.

FACTUAL HISTORY

This case is on appeal to the Board for the fourth time. In Office file number A13-264425, the Office accepted that appellant, then 29 years old, sustained a lumbosacral strain resulting from a February 23, 1967 work injury. Appellant underwent a laminectomy in 1960 and a spinal fusion in 1967. In Office file number A6-432868, the Office accepted a low back strain superimposed on preexisting degenerative disc disease when appellant was kicked in the back by a coworker on February 10, 1988. By decision dated July 29, 1998, the Board affirmed the Office's termination of appellant's compensation benefits effective November 12, 1994 finding that the weight of the medical evidence, as denoted by the April 5, 1994 report of Dr. Carl Roncaglione, a Board-certified orthopedic surgeon selected as the impartial medical examiner, established that he did not have residuals of his accepted injury.² On September 20, 2001 appellant claimed a recurrence of disability commencing February 10, 1988 which he attributed to his work injury of February 10, 1988 and the failure of his 1967 back surgery. In an April 18, 2005 order, the Board granted the Director's motion to set aside the September 4, 2003 Office's nonmerit decision denying appellant's reconsideration request and remand the case so that the case files could be doubled.³ By decision dated July 17, 2006, the Board affirmed the Office's October 12, 2005 decision which denied modification of a December 31, 2002 decision finding that appellant did not establish a recurrence of disability.⁴ The facts and the history surrounding the prior appeals are set forth in the prior decisions and are hereby incorporated by reference.

In a letter dated July 26, 2006, appellant requested reconsideration. He submitted an x-ray as well as a copy of his statement in his civil case before the United States District Court for the Southern District of West Virginia. In his statement in his civil case, appellant argued that the medical report of Dr. Roncaglione, the impartial medical examiner, was false. In a separate letter dated July 27, 2006, appellant advised that diagnostic testing proved that Dr. Roncaglione's report was false.

By decision dated October 26, 2006, the Office denied appellant's request for reconsideration finding that the evidence submitted neither raised legal questions nor included new and relevant evidence sufficient to warrant a review of the prior decision.

LEGAL PRECEDENT

Under section 8128(a) of the Act,⁵ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulation, which provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office

² Docket No. 96-1682 (issued July 29, 1998); *petition for recon. denied*, Docket No. 96-1682 (issued November 16, 1998).

³ Docket No. 04-764 (issued April 18, 2005).

⁴ Docket No. 06-195 (issued July 17, 2006).

⁵ 5 U.S.C. § 8128(a).

erroneously applied or interpreted a specific point of law; (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.⁶ Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

Appellant's July 26, 2006 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. In his July 26, 2006 request for reconsideration as well as in his statement in his civil case before the United States District Court for the Southern District of West Virginia, appellant argued that the medical report of Dr. Roncaglione, the impartial medical examiner, was false. The evidence of file reflects that the Office had previously addressed the argument pertaining to its reliance upon the opinion of Dr. Roncaglione in its October 12, 2005 decision, which the Board affirmed in its July 17, 2006 decision. Thus, appellant's argument pertaining to the Office's reliance on Dr. Roncaglione was previously considered by the Office and is repetitious of earlier arguments.⁸ Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).⁹

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted an x-ray film. However, no new medical report was submitted with the diagnostic study addressing whether appellant sustained a recurrence of disability on February 10, 1988 causally related to the work-related injury sustained on February 23, 1967. Because of this, the diagnostic study is not relevant to the issue in this case. Consequently, appellant is not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(2).¹⁰

Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office.¹¹ Accordingly, the Board finds that the Office properly determined that appellant was not entitled to a merit review.¹²

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ 20 C.F.R. § 10.608(b).

⁸ *Betty A. Butler*, 56 ECAB ____ (Docket No. 04-2044, issued May 16, 2005); *Daniel M. Dupor*, 51 ECAB 482 (2000).

⁹ 20 C.F.R. § 10.608(b)(2)(i) and (ii).

¹⁰ 20 C.F.R. § 10.606(b)(2)(iii).

¹¹ 20 C.F.R. § 10.606(b).

¹² *See James E. Norris*, 52 ECAB 93 (2000).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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