United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
and	)	**Docket No. 09-126**
	)	**Issued: June 10, 2009**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Port Angeles, WA, Employer	)	

Appearances:
John E. Goodwin, Esq., for the appellant
Office of Solicitor, for the Director

Oral Argument April 21, 2009

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 17, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 22, 2008 nonmerit decision denying his request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision.[1]

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). Because more than one year has elapsed between the Office's last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.

FACTUAL HISTORY

This case was previously before the Board. By decision dated September 26, 2006, the Board affirmed the Office's March 24, 2006 decision denying appellant's claim for wage-loss compensation on or after July 21, 2002.[2] The Board reviewed reports dated October 25, 2004 and July 28, 2005 from appellant's treating physician, Dr. James G. Hopper. On October 25, 2004 Dr. Hopper indicated that he first examined appellant in December 2001 and that he had experienced recurrent radicular, low back pain since 1992. He noted that appellant had presented to the emergency room in July 2002 when he experienced pain, numbness and weakness in his left leg. Dr. Hopper stated that appellant had undergone a lumbar laminectomy on July 31, 2002 with microdiscectomy and that further recurrences of weakness required a second laminectomy operation in 2003. He indicated that appellant had some persisting numbness in the left leg and opined that appellant was unable to perform the duties of a laborer, which included bending and lifting heavy objects, and that performing these duties would exacerbate his condition. The Board found that, as Dr. Hopper did not provide an opinion on appellant's disability for work during any specific period of time, his report was irrelevant to the issue at hand.

In a July 28, 2005 attending physician's report, Dr. Hopper provided a diagnosis of lumbar radiculopathy and opined that appellant had been totally disabled since July 2, 2002. He stated that appellant had been hospitalized for his lumbar condition on July 31, 2002 and discharged on August 2, 2002. Dr. Hopper indicated that appellant was permanently restricted from working in a position which included bending, lifting, pushing or extended sitting or standing. In its September 25, 2006 decision, the Board found that, as his opinion on appellant's disability was unsupported by objective medical evidence or medical reasoning, it was of diminished probative value and insufficient to establish appellant's total disability due to his accepted employment condition. The Board noted that Dr. Hopper's report also contained inconsistencies, including the date of alleged disability, and the date he was discharged from the hospital in August 2002.

In an order dated January 22, 2008, the Board granted appellant's petition for reconsideration but reaffirmed the September 25, 2006 decision.[3] The facts and conclusions of law contained in the Board's decision and order are incorporated herein by reference.

On June 14, 2005 the Office accepted appellant's February 4, 2005 occupational disease claim for displaced lumbar invertebral disc. However, by decision dated March 24, 2006, it denied appellant's claim for wage-loss compensation commencing July 21, 2002 on the grounds that he submitted insufficient medical evidence to establish disability due to his accepted condition.

On August 15, 2008 appellant, through his representative, requested reconsideration before the Office from the March 24, 2006 decision.

[2] Docket No. 06-1354 (issued September 25, 2006).

[3] *Supra* note 2.

Appellant submitted a November 14, 2006 report from Dr. Hopper, in which he addressed errors and inconsistencies in previous reports. Dr. Hopper stated that he first examined appellant on July 21, 2002, rather than on July 2, 2002, and that his disability commenced on that date. He also indicated that appellant was discharged from the hospital on August 1, 2002, rather than August 2, 2002. Dr. Hopper stated that, "when [appellant] was first seen on July 26, 2002," he was in severe pain due to lumbar radiculopathy and left lower extremity weakness. After undergoing left decompression, appellant's symptoms improved, however, as he increased his activity, it became evident that degenerative changes throughout the lumbar spine were causing recurrence of the radicular pain and weakness. Dr. Hopper stated:

> "I have reviewed [appellant's] job description and feel that throughout the time of his injury through the time of my report. [Appellant] was totally disabled from his job of injury. This is because any repeated bending or lifting, which comprised the essence of his job [would] likely cause recurrent radicular pain, and possibly recurrent lumbar stenosis."

By decision dated September 22, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant further merit review. It found that, though new, Dr. Hopper's November 14, 2006 report was not relevant to the issue before the Office.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] the Office regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[5]

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[6] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[7] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[8] Further, evidence that repeats or duplicates

[4] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b)(2).

[6] *Id*. at 10.607(a).

[7] *Id*. at 10.608(b).

[8] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review.[9]

ANALYSIS

Appellant's August 15, 2008 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. 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).

In support of his request for reconsideration, appellant submitted a November 14, 2006 medical report from Dr. Hopper, noting errors and inconsistencies in his previous reports, including the date he first examined appellant and the date he was discharged from the hospital. Dr. Hopper opined that appellant had been disabled from his date-of-injury job since his injury occurred "because any repeated bending or lifting, which comprised the essence of his job [would] likely cause recurrent radicular pain, and possibly recurrent lumbar stenosis." The Board finds that his report does not constitute new and relevant evidence not previously considered by the Office. Rather, Dr. Hopper's report is substantially similar to earlier reports and merely reiterates information contained in documents previously received and reviewed by the Office. The report is therefore cumulative and duplicative in nature and does not constitute relevant new evidence.[10] Dr. Hopper's opinion that appellant was unable to perform the duties of a laborer, because such activity would exacerbate his lumbar condition should he return to his date-of-injury job, was expressed in both his October 25, 2004 and July 28, 2005 reports. His reports reiterated his opinion regarding causal relationship and he provided no additional rationale to support appellant's claim for total disability during the period in question.[11]

On appeal, appellant's representative argues that Dr. Hopper's report constitutes new and relevant evidence because it addresses errors and inconsistencies contained in previous reports. However, the submission of evidence which corrects typographical errors or other matters of fact does not automatically require approval of a request for merit review. Acceptance of such a bright-line rule would authorize myriad merit reviews based on the submission of new, but largely duplicative or irrelevant, evidence. In the instant case, the Board affirmed the Office's decision which found that appellant failed to meet his burden of proof to establish that he was totally disabled for work due to his accepted employment condition. The correction of factual

[9] *Denis M. Dupor*, 51 ECAB 482 (2000).

[10] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor, supra* note 9.

[11] Appellant's representative contends that the facts of *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989), require reversal of the Office's March 24, 2006 decision. In *Mroczkowski*, the Board found that an attending physician's report, which contained an unrationalized opinion on causal relationship, constituted new and relevant evidence, because the physician had not submitted any other similar report and required the Office to conduct a merit review. However, the facts of the instant case are distinguishable from *Mroczkowski.* In this case, Dr. Hopper's November 14, 2006 report contains information previously received and considered by the Office and is therefore insufficient to require merit review.

and typographical inaccuracies does not cure the deficiencies in Dr. Hopper's reports, which fail to provide a rationalized opinion explaining how appellant was disabled during the period in question.

An abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[12] Appellant has made no such showing here. The Board finds that the Office properly determined that he was not entitled to a review of the merits of his claim pursuant to section 10.606(b)(2) and properly denied his August 15, 2008 request for reconsideration.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 10, 2009
Washington, DC

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

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

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

[12] *Rebel L. Cantrell*, 44 ECAB 660 (1993).