United States Department of Labor
Employees' Compensation Appeals Board

G.G., Appellant	)	
and	)	**Docket No. 10-748**
	)	**Issued: December 3, 2010**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Pikeville, KY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 25, 2010 appellant filed a timely appeal from a July 27, 2009 decision of the Office of Workers' Compensation Programs, which denied merit review.[1] Because more than one year has elapsed since the most recent merit decision dated July 9, 2008 and the filing of this appeal on January 25, 2010, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2 and 501.3.[2]

ISSUE

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

[1] The 180th day following the Office decision date was January 24, 2010. As this falls on a Sunday the next business day is January 25, 2010, rendering the appeal timely. 20 C.F.R. § 501.3(f)(2).

[2] For Office decisions issued prior to November 19, 2008 a claimant had one year to file an appeal. 20 C.F.R. § 501.3(d) (2008). An appeal, of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2009).

FACTUAL HISTORY

On February 28, 2006 appellant, then a 58-year-old coalmine safety and health inspector, was injured when his vehicle struck a slow moving coal truck in the rear. He sustained injuries to his right shoulder, right ankle, back of neck and left arm. Appellant went to the emergency room for treatment and remained off work on the advice of his physician, Dr. Van S. Breeding, a Board-certified family practitioner, who ordered a period of physical therapy. The Office accepted the claim for cervical sprain and paid wage-loss compensation benefits. Appellant returned to regular duty before taking disability retirement for another condition.[3]

On March 7, 2008 the Office received appellant's request for authorization of a cervical discectomy and fusion. On March 21, 2008 an Office medical adviser reviewed his request along with the medical evidence of file and determined that additional medical opinion was needed before a determination could be made on the request.

In an April 15, 2008 letter, the Office advised appellant that the evidence of record was not sufficient to authorize the proposed surgery because the request was not supported by history, examination findings or diagnostic studies. It requested that he provide medical reports from all caregivers as well as all diagnostic studies performed on his cervical spine and right upper extremity, including any electrophysiologic studies, electromyogram/nerve conduction (EMG/NCS) study.

The Office received notes from Mountain Comprehensive Health Corporation dated March 2 to July 25, 2007; treatment notes from Dr. Breeding dated March 2, 2006 to May 16, 2007; a June 4, 2007 EMG/NCS; a May 23, 2007 cervical magnetic resonance imaging (MRI) scan; x-ray reports for the right foot, right ankle, right shoulder and cervical spine; a May 16, 2007 report from Dr. Mahmood Alam, a Board-certified internist; and a June 20, 2006 treatment note from Dr. Fares Khater, a Board-certified internist. The record reflects that appellant underwent surgery for a cervical discectomy and fusion on April 9, 2008.

On June 15, 2008 an Office medical adviser reviewed the medical evidence and found that the requested surgery should not be authorized. He noted that the Office had accepted a cervical sprain on February 28, 2006. An MRI scan of the cervical spine obtained 15 months later was consistent with appellant's age. Further, there was a gap in appellant's report of neck pain from March 2006 to May 2007, during while Dr. Breeding treated him for a burn injury and chest pain without any reference to the cervical spine. The Office medical adviser found that appellant's accepted cervical sprain was not responsible for appellant's cervical degenerative disease or disc condition that required the April 9, 2008 two-level surgical procedure.

By decision dated July 9, 2008, the Office denied appellant's request for authorization and payment of the April 9, 2008 surgery. It found that the medical evidence of file was not sufficient to establish that the need for surgery resulted from the February 28, 2006 work injury.

[3] The record reflects appellant has other claims which the Office accepted. Under case number xxxxxx006, the Office accepted a cervical strain for an April 24, 2003 work injury. Under case number xxxxxx367, the Office accepted binaural hearing loss which developed on July 19, 1989.

On July 3, 2009 appellant requested reconsideration. In a June 30, 2009 statement, he noted his various claims before the Office and indicated that he was referred to a pain management clinic as a result of his work injuries. With regard to the April 9, 2008 surgery, appellant stated that the last thing he wanted was to have back surgery and that he tried to work as long as he could. He also stated that he had bariatric surgery.

Appellant submitted documents related to his various claims. In an October 21, 2008 treatment note, Dr. Duane Densler, a neurosurgeon, addressed appellant's progress following his anterior cervical discectomy and fusion.

In a July 27, 2009 decision, the Office denied appellant's reconsideration request on the grounds that it did not raise any substantive legal questions or include new and relevant evidence sufficient to warrant review of the prior decision.

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's 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] 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.[6]

ANALYSIS

Appellant's reconsideration request did not show 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. Appellant's request for reconsideration addressed his various work injuries and that he was referred to a pain management clinic as a result. His letter did not show that the Office erroneously applied or interpreted a point of law or advance a point of law or fact not previously considered by the Office. Appellant did not identify any particular point of law or fact that the Office had not considered or establish that the Office had erroneously interpreted a point of law. Consequently, he 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).

Appellant also did not submit relevant and pertinent new evidence not previously considered by the Office. The relevant issue in this case is whether the cervical surgery he underwent on April 9, 2008 resulted from his February 28, 2006 cervical strain. This is a question that must be addressed by medical evidence. Evidence pertaining to appellant's gastric

[4] 5 U.S.C., §§ 8101-8193. Under section 8128 of the Act, [t]he 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 § 10.608(b).

bypass and hearing loss conditions and evidence predating the current claim are not relevant to the issue of his cervical surgery denial. 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.[7] The Board notes much of the remaining evidence submitted is duplicative of that already of record and previously considered by the Office in its July 9, 2008 decision.[8] Therefore, this evidence is insufficient to warrant a merit review.

The Office properly denied a merit review as appellant did not show that the Office erroneously applied or interpreted a point of law; advance a point of law or fact not previously considered by the Office and did not submit relevant and pertinent evidence not previously considered by the Office.

On appeal, appellant asserts that he is still being treated for his work injury and that pictures he submitted confirmed how much damage was done during his accident. The Board only has jurisdiction to consider whether the Office properly denied further merit review of his claim. As explained, appellant did not meet one of the three regulatory requirements for reopening his claim.

CONCLUSION

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

[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. *Patricia G. Aiken*, 57 ECAB 441 (2006).

[8] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; *see Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 3, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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