U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNY W. BELL and DEPARTMENT OF DEFENSE,
DEFENSE GENERAL SUPPLY CENTER, Richmond, VA

Docket No. 02-361; Submitted on the Record;
Issued September 20, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs refusal to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On November 22, 1981 appellant, then a 41-year-old laborer, sustained an employment-related peroneal nerve contusion of the right leg when it was caught in a conveyor belt. He stopped work that day and returned to limited duty on January 27, 1982. On June 4, 1982 appellant filed a Form CA-7, claim for compensation, for the period January 7 to 27, 1982. On March 13, 1999 he filed a Form CA-2a, claim for recurrence of disability, alleging that on May 3, 1987 appellant sustained a recurrence of disability and was out of work for two weeks. He was then working at Radiant System in Carolina, Puerto Rico. Appellant stated that pain in his leg, foot and lower back had continued due to the November 22, 1981, employment injury and that it finally became so severe that he stopped work.

By letter dated May 11, 2000, the Office informed appellant of the type evidence needed to support his claim. On June 9, 2000 appellant filed a second recurrence claim, stating that the recurrence of disability occurred on January 2, 1982. In an attached statement, he indicated that upon his return to work in 1982, he was assigned to office duties but alleged that sitting at a desk produced sharp needle-like pains in his neck, back and legs which continued to the present. Appellant further stated that his back "began to slip more frequently" when he bent to the floor, which also produced migraine headaches and that the condition caused him to suffer emotionally. Appellant concluded that he was unable to work. The Office sent appellant a second development letter on June 28, 2000. In both letters, the Office informed him that he needed to submit medical reports including a narrative statement from his physician with a supporting explanation regarding the causal relationship between appellant's current condition and the 1981 employment injury.

In a decision dated June 28, 2000, the Office denied that appellant sustained a recurrence of disability on May 3, 1987 on the grounds that he failed to submit evidence to establish that the claimed recurrence of disability was causally related to the November 22, 1981, employment injury.

On August 8, 2000 appellant submitted medical evidence, which pertained to his initial injury and was previously of record. He also submitted a note from the Department of Veterans Affairs concerning a rating decision. By decision dated September 7, 2000, the Office denied that appellant sustained a recurrence of disability on January 2, 1982, finding that the medical evidence submitted was insufficient to establish entitlement.[1]

Appellant continued to submit medical evidence and on June 26, 2001 requested reconsideration. By decision dated September 10, 2001, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitious, irrelevant or immaterial and was thus insufficient to warrant merit review. The instant appeal follows.

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration.

The only decision before the Board in this appeal is the decision of the Office dated September 10, 2001, denying appellant's application for review. Since more than one year had elapsed between the date of the Office's most recent merit decision dated September 7, 2000 and the filing of appellant's appeal on November 29, 2001 the Board lacks jurisdiction to review the merits of his claim.[2]

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[3] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[4] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[5]

[1] The record, however, indicates that appellant was paid wage-loss compensation for the period January 7 to 26, 1982 when he returned to work.

[2] 20 C.F.R. § 501.3(d)(2).

[3] 20 C.F.R. § 10.608(a) (1999).

[4] 20 C.F.R. § 10.608(b)(1) and (2) (1999).

[5] 20 C.F.R. § 10.608(b) (1999).

In support of his request for reconsideration, appellant submitted a number of medical reports that were previously of record and were, therefore, repetitious. He further submitted physical therapy notes[6] and medical reports that were irrelevant to the employment injury.[7] Appellant also submitted a report dated August 20, 1982, in which Dr. R.M. McGlade, an employing establishment physician, reported that he continued to have pain on flexion and extension of the right knee and an August 17, 1990 report, in which Dr. Luis E. Faura-Clavell, a physiatrist, noted that appellant's complaints of pain and numbness in the right leg. Finally, appellant submitted reports of a hospitalization from November 10 to 14, 2000, which contained a discharge diagnosis of cellulitis of the right lower extremity.

The Board has long held that the submission of evidence or legal argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[8] Likewise, evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[9] In the instant case, while appellant submitted new evidence with his petition for reconsideration, the Board finds that this evidence is not material to the underlying issue, *i.e.*, whether appellant met his burden of proof to establish that he sustained a recurrence of disability on May 3, 1987 causally related to his November 22, 1981 employment injury.

[6] The reports of a physical therapist do not medical evidence as a physical therapist is not a physician under the Federal Employees' Compensation Act. 5 U.S.C. § 8101(2); *Thomas R. Horsfall*, 48 ECAB 180 (1996).

[7] The evidence included a lumbosacral spine x-ray dated July 24, 1990 and a report dated March 6, 2001, in which Dr. Felix M. Galvan-Bird, a general practitioner, diagnosed disc herniation at the L3-4 level, disc bulging at L3-4 and L4-5 and degenerative disc disease at L4-5 and L5-S1. There is no evidence of record to indicate that appellant's back condition is causally related to the November 22, 1981, employment injury.

[8] *Saundra B. Williams*, 46 ECAB 546 (1995).

[9] *David J. McDonald*, 50 ECAB 185 (1998).

The January 28, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 20, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member