

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

---

**RICARDO FRESCAS, Appellant**

**and**

**U.S. POSTAL SERVICE, MISSION ANNEX  
STATION, San Elizario, TX, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 03-296  
Issued: February 25, 2004**

*Appearances:*  
*Ricardo Frescas, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
COLLEEN DUFFY KIKO, Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On November 5, 2002 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decision dated April 15, 2002 which denied his request for reconsideration. Because more than one year has elapsed between the last merit decision dated May 11, 2001 and the filing of this appeal on November 5, 2002, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

**ISSUE**

The issue is whether 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).

**FACTUAL HISTORY**

On September 13, 1993 appellant, a 46-year-old postal clerk, filed a traumatic injury claim alleging that he strained his back while picking up bundled mail to place in a hamper. The Office accepted the claim for a lumbosacral strain and authorized medical treatment. Appellant

returned to work and the case was administratively closed in 1996 as there was no continuing medical treatment or residuals due to the accepted employment injury.

On April 23, 1999 appellant filed a claim (Form CA-2a) alleging that he sustained a recurrence of disability beginning August 12, 1998.

In a March 1, 1999 report, Dr. Alvaro A. Hernandez, an attending Board-certified orthopedic surgeon, diagnosed lumbar syndrome and noted that appellant had injured his back in 1993.

By letter dated May 3, 1999, the Office requested that appellant submit additional factual and medical evidence in support of his claim for recurrence of disability.

Dr. Hernandez diagnosed chronic lumbosacral sprain, degenerative spondylosis with traumatic aggravation and degenerative lumbar disc disease in a February 11, 1999 report. Appellant related that since the 1993 employment injury he has had back pain, but that it had become worse over the prior four to five months.

Subsequently, the Office received reports dated March 10 and April 8, 1999 from Dr. Hernandez. In the April 8, 1999 report, Dr. Hernandez noted that appellant continued to have pain and physical examination revealed tenderness in the lumbosacral region. A magnetic resonance imaging (MRI) scan revealed degenerative disc disease at L4-5, L5-S1, a moderate narrowing of the L4-5 disc; a first degree spondylolisthesis at L5-S1; degenerative facet changes at L4-5 and L5-S1; and some lateral recess stenosis. Dr. Hernandez, in the March 10, 1999 report, noted that appellant continued to have pain in the lower back which radiated into his right leg.

By decision dated June 24, 1999, the Office denied appellant's claim for a recurrence of disability.

Appellant requested a hearing before an Office hearing representative in a July 21, 1999 letter and a hearing was held on November 30, 1999.

Subsequent to his hearing request appellant submitted reports by Dr. Hernandez dated June 24 and August 9, 1999. Dr. Hernandez noted, in the June 24, 1999 report, that appellant continued to have pain in his lower back and intermittent pain radiating into the right groin and right posterior hip. In the August 9, 1999 report, he attributed appellant's current condition to his 1993 employment injury. In support of this conclusion, Dr. Hernandez noted that appellant's history "is consistent with a back injury in 1993 when he was unloading a truck" which caused an "acute onset of a sharp pain in the back" and "as a result, has continued with this problem."

In a December 29, 1999 letter, appellant's representative submitted post-hearing reports from Dr. Hernandez, Dr. Moises E. Margolis, a diagnostic radiologist, and Dr. Thomas J. Scully, an attending Board-certified orthopedic surgeon.

In a September 1, 1999 report, Dr. Hernandez noted that appellant had increasing pain in the lower back and opined that appellant had an "aggravation of his back condition from his work activities. He has difficulty with lifting."

In an October 20, 1999 computerized tomography (CT) scan, Dr. Margolis reported antero-listheis with protrusion of the intervertebral disc and marked narrowing consistent with spinal stenosis.

In an October 20, 1999 report, Dr. Scully noted appellant's employment injury history and diagnosed radicular pain probably secondary to facet arthropathy. Dr. Scully, in a December 7, 1999 report, stated that the CT scan "shows remarkable arthropathy of the right L4/5 facet joint and of both L5/S1 facet joints with resultant spinal stenosis at the L5/S1 level." He opined that, as appellant had no back pain prior to the injury and based upon the pain subsequent to the injury and the objective evidence, that "it can be concluded that the injury in 1993 either caused his current condition or aggravated (sic) a preexisting condition."

In a December 20, 1999 report, Dr. Hernandez noted the results of a CT scan performed by Dr. Scully. The CT scan showed arthropathy of both L4-5 facet joints and the right L4-5 facet joint with resultant spinal stenosis at the L4-5 level. He stated "Dr. Scully wrote that he feels that the 1993 injury either caused his current condition or aggravated a preexisting condition."

By decision dated February 14, 2000, the Office hearing representative affirmed the June 24, 1999 denial of appellant's recurrence claim.

Appellant's representative requested reconsideration by letter dated February 9, 2001.<sup>1</sup> In support of his request, appellant submitted a March 12, 1998 pathology report by Dr. Jorge E. Bilbao, a Board-certified anatomic and clinical pathologist, on a hernia lipoma, treatment notes from Dr. Francisco L. Vilorio, an attending physician, for the period February 17 through May 5, 1998 and an April 13, 2000 letter by Dr. Hernandez.

By merit decision dated May 11, 2001, the Office denied appellant's request for modification.

In a letter dated May 6, 2002, appellant requested reconsideration. He contended that he injured his back when he sustained a hernia on March 12, 1998. In support of his request, appellant submitted treatment notes from Dr. Vilorio, a pathology report from Dr. Bilbao and a February 11, 1999 report from Dr. Hernandez.

In a nonmerit decision dated August 15, 2002, the Office denied appellant's request for reconsideration.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> vests the Office with discretionary authority to determine whether it will review an award for or against

---

<sup>1</sup> The representative noted Dr. Vilorio performed surgery on March 12, 1998 on another claim and referenced claim number 16-0311094.

<sup>2</sup> 5 U.S.C. § 8128(a) ("the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

compensation.<sup>3</sup> Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup>

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).<sup>5</sup> 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.<sup>6</sup>

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 of the merits.<sup>7</sup>

### ANALYSIS

Appellant's May 6, 2002 reconsideration request 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).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, the Board notes that the evidence submitted by appellant on reconsideration was previously of record. The treatment notes from Dr. Vilorio, pathology report from Dr. Bilboa and February 11, 1999 report from Dr. Hernandez were previously submitted and reviewed by the Office. As this evidence does not constitute relevant and pertinent new evidence, it is insufficient to warrant further merit review of the claim.<sup>8</sup>

---

<sup>3</sup> *Raj B. Thackurdeen*, 54 ECAB \_\_\_\_ (Docket No. 02-2392, issued February 13, 2003); *Veletta C. Coleman*, 48 ECAB 367, 368 (1997).

<sup>4</sup> 20 C.F.R. § 10.608(a).

<sup>5</sup> 20 C.F.R. § 10.606(b)(1)-(2); see *Sharyn D. Bannick*, 54 ECAB \_\_\_\_ (Docket No. 03-567, issued April 18, 2003).

<sup>6</sup> 20 C.F.R. § 10.608(b).

<sup>7</sup> *Id.*

<sup>8</sup> Evidence that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening the claim. *Darletha Coleman*, 55 ECAB \_\_\_\_ (Docket No. 03-868, issued November 10, 2003); *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

**CONCLUSION**

Because appellant has failed to satisfy the requirements of section 10.606(b)(2), he is not entitled to a merit review. Accordingly, the Board finds that the Office properly denied appellant request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 15, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed

Issued: February 25, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member