

MICHAEL J. CUMMINGS, Appellant

and

**DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Anchorage, AK, Employer**

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On December 22, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated November 3, 2003, which denied his request for reconsideration. Pursuant to its regulations, the Board has jurisdiction over this nonmerit decision.¹ Because more than one year has elapsed between the Office's most recent merit decision on the underlying issue dated October 23, 2002 and the filing of this appeal on December 22, 2003, the Board lacks jurisdiction to review the merits of appellant's claim.²

¹ See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

² There is an October 16, 2003 merit decision denying compensation for the dates of October 25, December 12 and 15, 2002 and March 9 through 22, 2003 from which appellant has not appealed but has requested a hearing.

ISSUE

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

FACTUAL HISTORY

On June 3, 2002 appellant, then a 39-year-old air traffic control specialist, filed a traumatic injury claim alleging that on June 2, 2002 the back of his chair broke causing him to fall in the course of his federal employment. Appellant stopped work and returned to his regular duties on June 17, 2002. He continued to miss intermittent time off for scheduled appointments. The Office accepted appellant's claim for a neck sprain.

Appellant submitted numerous chart notes dating from June 6 to July 25, 2002 from Dr. Timothy Coalwell, a Board-certified family practitioner, who diagnosed a contusion of the neck and prescribed Ketoprofen and Lorcet, medications that could not be used prior to working. He also advised a physical therapy program. In a July 2, 2002 chart note, Dr. Coalwell indicated that appellant could do his regular job and continue with physical therapy. In a July 25, 2002 report, Dr. Coalwell indicated that, although appellant was doing well, he would have days "when he hurts pretty bad." He recommended that appellant continue with his physical therapy. In an August 17, 2002 attending physician's report, Dr. Coalwell diagnosed a herniated nucleus pulposus (HNP) at C4-5, 6, 7 and indicated that appellant's condition was caused or aggravated by his employment activity.

Appellant also included copies of documentation concerning his physical therapy visits which included the dates of July 25 and 29 and August 9 and 25, 2002. Additionally, appellant provided a June 18, 2002 magnetic resonance imaging (MRI) scan of the cervical spine, read by Dr. Erik Maurer, a Board-certified diagnostic radiologist, which revealed broad based central disc protrusions at C4-5, C5-6 and C6-7 associated with mild central canal stenosis.

Appellant filed CA-7 forms for wage-loss compensation for intermittent dates from July 28 to August 10, 2002. They included one hour each for the dates of July 29 and August 9, 2002 for physical therapy.

By letter dated August 20, 2002, the Office advised appellant that compensation was not payable for the first three days of disability following the expiration of continuation of pay (COP) unless the period of disability after COP entitlement exceeded 14 days.

By letter dated September 17, 2002, the Office advised appellant that additional medical evidence was needed for the dates of July 27 and 29 and August 1, 6, 9, 12 and 18, 2002, dates for which he was claiming compensation.³

By decision dated October 23, 2002, the Office denied appellant's claim for intermittent compensation for the period from July 27 to August 18, 2002. The Office advised appellant that

³ The Office advised appellant that medical evidence they currently had on file showed that appellant received physical therapy on August 9, 2002; however, there was no evidence for the other dates.

his claim was denied as he had not provided the requested evidence of medical reports to show that appellant could not work due to his cervical strain.

On October 20, 2003 appellant's representative requested reconsideration of the Office's October 23, 2002 decision and included additional evidence with his request. The additional evidence included duplicates of reports which were previously submitted and several additional reports including federal aviation rules and documents.

Also submitted was an October 2, 2002 disability certificate, in which Dr. Coalwell indicated that appellant was unable to work a number of days between July 27 and September 17, 2002.⁴

In a July 25, 2002 duty status report, Dr. Coalwell indicated that appellant could return to regular duty; however, he opined that appellant was still symptomatic and undergoing physical therapy as he may get spasms occasionally that would cause him to miss work.

In a June 2, 2003 report, Dr. Robert W. Rigg, a Board-certified ophthalmologist, indicated that when air traffic controllers were prescribed medications, under no circumstances would they be allowed to work.

In a September 10, 2003 report, Dr. Coalwell indicated that, from July 27 to August 18, 2002, appellant was either attending physical therapy or he was symptomatic requiring him to take medication, which precluded him from performing his duties.

In a September 25, 2003 report, Dr. Larry Levine, Board-certified in physical medicine and rehabilitation, opined that appellant did have a ratable impairment and would possibly need cervical spine surgery, including possible fusion procedure. The physician did not address the cause of any disability between July 27 and August 18, 2002.

By decision dated November 3, 2003, the Office denied appellant's reconsideration request without reviewing the case on the merits. The Office found that the evidence was insufficient to warrant merit review.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,⁵ the Office may reopen a case for review on the merits 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

⁴ In an undated note, received by the Office on November 12, 2002, Dr. Coalwell indicated that appellant was unable to work on a number of days from July 27 to September 17, 2002, due to being symptomatic and being prescribed medication. Appellant also provided a note from his physical therapist confirming that he received treatment on July 29, August 9 and 18, 2002.

⁵ 5 U.S.C. § 8128(a).

review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

- “(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 [the Office].”⁶

Section 10.608(b) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in section 10.606(b), will be denied by the Office without review of the merits of the claim.

ANALYSIS

In support of his October 27, 2003 request for reconsideration, appellant submitted several reports from Dr. Coalwell dating from July 25, 2002 to September 10, 2003. He also submitted reports from Dr. Levine dated September 25, 2003 and Dr. Rigg dated June 2, 2003. Additionally, appellant provided several forms and physical therapy reports verifying receipt of treatment on July 29, August 9 and 18, 2002.

In the present case, appellant’s claim for intermittent compensation from July 27 to August 24, 2002 was denied on the basis that appellant did not provide the requested medical evidence to show that he was disabled from July 27 to August 24, 2002. The medical evidence provided by appellant either postdated the dates in question or failed to support the time frame from July 27 to August 24, 2002 for which appellant alleged that he was temporarily disabled. Furthermore, none of these reports provided relevant and pertinent new evidence to show that appellant was disabled on the dates from July 27 to August 24, 2002, due to his accepted condition of cervical strain.

In his reconsideration request dated October 27, 2003, appellant also provided additional medical evidence, which the Office did not previously consider, such evidence, although new, is insufficient to require reopening of appellant’s case for further review of the merits of his claim pursuant to section 8128 as it is either irrelevant or duplicative of evidence already within the case record.⁷

Appellant also submitted copies of federal aviation rules and documents. These documents are not relevant to the underlying issue of whether appellant was disabled for the period from July 27 to August 24, 2002. The Board has held that newspaper clippings, medical

⁶ 20 C.F.R. § 10.606(b).

⁷ *Edward W. Malaniak*, 51 ECAB 279 (2000); *Donald E. Ewals*, 51 ECAB 428 (2000); *Denis M. Dupor*, 51 ECAB 482 (2000); *Helen E. Paglinawan*, 51 ECAB 591 (2000).

texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and a claimant's federal employment as such materials are of general application and are not determinative of whether the specific condition claimed is related to particular employment factors or incidents.⁸

Consequently, appellant was not entitled to a merit review because the information provided in this report was not new, relevant or pertinent. He did not advance a relevant legal argument that had not been previously considered by the Office. Additionally, appellant did not argue that the Office erroneously applied or interpreted a specific point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the above-noted requirements under section 10.606(b)(2). Accordingly, the Board finds that the Office properly denied appellant's October 20, 2003 request for reconsideration.

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 November 3, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 7, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

⁸ *Gloria J. McPherson*, 51 ECAB 441 (2000).