

<sup>1</sup> Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board lacks jurisdiction over the merits of this case.

## **FACTUAL HISTORY**

On February 7, 2003 appellant, then a 53-year-old welder, filed an occupational disease claim alleging that on September 20, 2002 he became aware of his condition and realized that he had developed damaged cartilage in his lumbar spinal region of the back from squeezing his body into very tight places, performing repetitive motions, holding various tools in all positions for hours at a time, and from performing his duties as a welder. On October 17, 2002 appellant claimed that he also filed a Form CA-1 claiming traumatic injury allegedly for the same conditions.<sup>2</sup>

By decision dated December 5, 2003, the Office rejected appellant's occupational disease claim finding that the medical evidence provided did not establish that the claimed medical condition resulted from the accepted employment factors. The Office also found, based on a November 5, 2003 report from Dr. Mary Bascom Migeon, an internist and appellant's treating physician, that the medical evidence submitted suggested that his condition was more likely due to both chronic and acute injury as a result of degenerative arthritis which was a wear and tear condition resulting from ongoing usage of the back. The Office found the medical evidence equivocal and insufficient to establish appellant's condition or any causal relationship with his employment.

On May 11, 2004 appellant requested reconsideration of the December 5, 2003 decision, and in support he submitted an injury code report referring to sprains/strains, a March 17, 2004 witness statement from appellant's foreman which stated that appellant was welding pipes in a main ballast tank on board a ship when he reported his back injury, a March 18, 2004 report from Dr. Migeon, safety office tracking data and medical dispensary records of his back problems. Dr. Migeon stated on March 18, 2004 that she had been treating appellant for several years for chronic low back pain as well as other medical issues. She noted that she had written a letter in November 2003 outlining that appellant's back pain was more than likely due to both chronic and acute injury in the low back, that he had degenerative arthritis, and that, although this pattern was not uncommon in men of advanced years, the degree appellant had was quite severe and more likely than not due to his work.

Appellant also submitted an October 5, 1994 radiology report from Dr. F. Michael Schroeder, a Board-certified radiologist, who examined appellant's lumbosacral spine radiographic series for recurrent sacral pain, noted that he demonstrated levoscoliosis and degenerative changes, most advanced at T10-11-12, but had no evidence of acute fracture, a pars defect, subluxation or destructive or blastic lesion. Dr. Schroeder diagnosed mild degenerative changes without evidence of an acute skeletal abnormality.

Medical dispensary notes dating from 1996 to 2003 were additionally submitted, discussed appellant's ongoing back problems and diagnosed paraspinal lumbar muscle strain.

By decision dated June 10, 2004, the Office declined to reopen appellant's case for further review on its merits finding that the issues raised had been addressed by the prior decision. The Office found that the medical evidence was merely rephrased, and was

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<sup>2</sup> This form is referred to in the present case record but is not included.

substantially similar to that previously submitted and considered, that specific work factors had still not yet been implicated, that no diagnosis had been given and no causal relationship with his employment had been discussed, and that the witness statement was irrelevant since the issue was medical at that time.

On November 23, 2004 appellant again requested reconsideration of the December 5, 2003 decision. In support appellant submitted a November 10, 2004 report from Dr. Lynn L. Staker, a Board-certified orthopedic surgeon. She diagnosed chronic lumbar strain and mild chronic degenerative disc and noted other physicians' opinions, namely Dr. Migeon, regarding causal relationship.

By decision dated December 10, 2004, the Office denied appellant's request for reopening appellant's case for a merit review, finding that Dr. Staker's new report essentially constituted cumulative evidence.<sup>3</sup> The Office also found that Dr. Staker's report did not address how a 1992 workplace incident or subsequent work-related back injuries or work activities caused or contributed to appellant's chronic back strain or degenerative disc disease.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>4</sup> the Office's regulations provide that 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) provide relevant and pertinent new evidence that was not previously considered by the Office.<sup>5</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his application for review within one year of the date of that decision.<sup>6</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for further review on the merits.<sup>7</sup>

Additionally, the submission of repetitive or cumulative medical evidence previously considered does not constitute a basis for reopening a claim.<sup>8</sup> Arguments from appellant or witness statements constitute lay opinions and therefore have no probative value on medical issues.<sup>9</sup>

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<sup>3</sup> Dr. Staker's report quoted Dr. Migeon's reports and generally followed the same thought and analysis. They were not substantially different from Dr. Migeon's reports.

<sup>4</sup> 5 U.S.C. § 8101 *et seq.* 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 his own motion or on application." 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.606(b)(2).

<sup>6</sup> 20 C.F.R. § 10.607(a).

<sup>7</sup> 20 C.F.R. § 10.608(b).

<sup>8</sup> *W.H. Van Kirk*, 28 ECAB 542 (1977).

<sup>9</sup> *See Sheila Arbour (Victor E. Arbour)*, 43 ECAB 779 (1992).

### ANALYSIS

In this case, the Board has jurisdiction over two nonmerit decisions dated June 10 and December 10, 2004. In support of appellant's May 11, 2004 reconsideration request of the Office's December 5, 2003 merit decision, he submitted repetitive reports from Dr. Migeon which had been previously submitted and considered by the Office prior to rendering its December 5, 2003 decision. As these reports were cumulative, they, therefore, did not constitute a basis for reopening his claim for further review on its merits. Also submitted were injury coding reports, which were not relevant as they did not address whether a particular condition was caused by a specific work factor. Therefore these coding sheets are insufficient to warrant reconsideration on the case merits. The submitted witness statement also did not constitute a basis for reopening appellant's claim for further review on its merits, as it described appellant's employment activities at the time of the alleged injury, which is not at issue as causal relationship, which is medical in nature, is at issue. The radiology report from Dr. Schroeder merely details appellant's thoracic and lumbar radiographic findings and did not address the cause of the condition found or relate it in any way to specific factors of his employment. Consequently, this report is not sufficient to warrant reopening appellant's case for further merit reconsideration. Finally, as the medical dispensary notes dating from 1996 to 2003 were in part provided by personnel who were not physicians, preexisted appellant's claimed awareness of the injury or condition, and did not address the causal relationship of any specific condition with any identifiable factors of his employment, they are insufficient to constitute a basis for reopening his claim for further review on its merits, as they are not relevant to the threshold issue.

The Board finds that on June 10, 2004 the Office, therefore, properly denied appellant's request to reopen his claim for further consideration on its merits.

By letter dated November 23, 2004, appellant again requested reconsideration of the December 5, 2003 decision and in support he submitted a new report from Dr. Lynn Le Roy Staker, an orthopedic surgeon, diagnosed chronic lumbar strain and mild chronic degenerative disc and offered other physicians' opinions but did not offer her own medical opinion on the issue of whether appellant's back condition resulted from factors of his federal employment. As Dr. Staker's report did not address causal relationship, it was not relevant to the threshold issue.

As appellant neither demonstrated that the Office erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by the Office nor relevant and pertinent new evidence not previously considered by the Office, the Board, therefore, finds that the Office properly denied appellant's request for further reconsideration of his case on its merits.

### CONCLUSION

The Board finds that, on June 10 and December 10, 2004, 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 December 10 and June 10, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 7, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member