

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

B.L., Appellant

and

**U.S. POSTAL SERVICE, ALBANY
PERFORMANCE CLUSTER, Albany, NY,
Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 07-2354
Issued: March 26, 2008**

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
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 July 24, 2007 appellant filed a timely appeal from a July 24, 2006 nonmerit decision of the Office of Workers' Compensation Programs which denied his request for reconsideration. Because more than one year elapsed between the most recent merit decision of the Office, dated April 29, 2005, and the filing of this appeal the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

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

FACTUAL HISTORY

On February 3, 2004 appellant, then a 39-year-old mail handler, filed a traumatic injury claim alleging that he hurt his back that day when the equipment he was holding was struck by equipment being pushed by another employee. He first sought medical treatment on

February 12, 2004 and started working part time on February 13, 2004.¹ Appellant retired on disability November 15, 2005.

By decision dated August 5, 2004, the Office found that appellant experienced the claimed incident in the manner alleged, but denied the claim as the medical evidence was insufficient to establish a causal relationship between a diagnosed medical condition and the February 3, 2004 work incident.

In a January 17, 2005 letter, appellant requested reconsideration of the Office's August 5, 2004 decision. He submitted the December 22, 2004 medical report of Dr. Kevin L. Hastings, an osteopath; an April 12, 2005 magnetic resonance imaging (MRI) scan; and evidence predating the current claim and relating to File No. 020711825.

By decision dated April 29, 2005, the Office denied modification of its August 5, 2004 decision. It found that the medical evidence was insufficient to establish a causal relationship between a diagnosed medical condition and the February 3, 2004 work incident.

In an April 16, 2006 letter, appellant requested reconsideration of the Office's April 29, 2005 decision. He alleged that there were two errors in the Office's decision. Appellant asserted that, contrary to the Office's statement, he did not go off eight hours of work per day until February 13, 2004. He asserted that his back spasms were initially caused by a March 24, 1996 injury under File No. 020711825. Appellant stated that his symptoms remained through February 3, 2004 and never abated. He requested that the Office consider a letter written by Richard Nappi, an Officer in Charge, who confirmed that appellant was unable to continue working after his February 3, 2004 injury. Appellant submitted copies of clock rings for the period February 2 to 20, 2004 and a duplicative copy of the April 12, 2005 MRI scan previously of record. A statement from Mr. Nappi was not of record.

By decision dated July 24, 2006, the Office denied appellant's request for reconsideration without conducting a merit review. It found that the evidence submitted in support of appellant's request was irrelevant to the medical issue in the case.

On appeal, appellant contended that the Board should consider the current claim in relation to his prior claim under File No. 020711825, alleging his work restrictions under that claim were violated on February 3, 2004. Appellant asserts that he reported the February 3, 2004 incident to his treating physician. Evidence pertaining to File No. 020711825 was submitted.²

LEGAL PRECEDENT

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on

¹ The Office assigned the claim File No. 022049528. On February 22, 2004 appellant also filed a recurrence claim under File No. 020711825 alleging that his February 3, 2004 injury was a recurrence of his March 24, 1996 injury.

² The Board, however, lacks jurisdiction to consider this evidence for the first time on appeal as it was not before the Office at the time of its July 24, 2006 decision. See 20 C.F.R. § 501.2(c).

application by a claimant.³ Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.⁴ Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁵ The Board has held that the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.⁶ It is well established that evidence which repeats or duplicates that already of record does not constitute a basis for reopening a case for merit review.⁷

ANALYSIS

The only decision before the Board in this appeal is the July 24, 2006 decision of the Office denying appellant's application for review of its April 29, 2005 decision. The underlying issue in this claim was whether appellant submitted sufficient medical evidence to establish that he sustained an injury causally related to the accepted February 3, 2004 incident. Thus, to be relevant, the arguments and evidence submitted in support of the April 16, 2006 request for reconsideration must address this issue.

The Board finds that appellant neither raised new and relevant legal arguments nor asserted that the Office misapplied or misinterpreted a point of fact or law. In his April 16, 2006 letter, appellant advised that he took off work prior to February 13, 2004 and submitted copies of clock rings for the period February 2 to 20, 2004. However, the letter and clock rings are not relevant to the basis on which the Office denied the claim. As noted, the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.⁸

While appellant asserts that his back injury of February 3, 2004 is a recurrence of his prior claim under File No. 020711825, the Board notes that the Office properly adjudicated the current claim as a new injury. A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁹ As the Office accepted that the February 3, 2004

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.608(b).

⁶ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

⁷ *See Arlesa Gibbs*, 53 ECAB 204 (2001).

⁸ *Joseph A. Brown, Jr.*, *supra* note 6.

⁹ 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

incident occurred as alleged, this incident represents an intervening injury or new exposure to the work environment. Therefore, appellant's argument does not show that the Office erroneously applied or interpreted a specific point of law nor does it advance a relevant legal argument not previously considered. Accordingly, the Board finds that appellant did not meet the first two criteria warranting a merit review.

Appellant has not submitted any new and relevant evidence warranting reopening of the claim for a merit review. Since the underlying issue in the case is medical in nature, the factual evidence submitted by appellant is not relevant. The only medical evidence appellant submitted was the April 12, 2005 MRI scan report, which was previously of record and which does not address the cause of appellant's claimed condition. As noted, evidence which repeats or duplicates that already of record does not constitute a basis for reopening a case for merit review.¹⁰ Thus, appellant did not meet the third criteria for warranting a merit review.

The Board finds that appellant did not meet any of the above-listed three criteria warranting a merit review. The Office properly denied his request for reconsideration without conducting further merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 24, 2006 is affirmed.

Issued: March 26, 2008
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

¹⁰ See *Arlesa Gibbs*, *supra* note 7.