

On appeal, appellant contends that, in light of the medical evidence, it was unreasonable for the Office not to reconsider and reverse the prior decision denying his claim.

FACTUAL HISTORY

On July 24, 2008 appellant, then a 47-year-old mail processor, filed a claim for an occupational disease. He noted a multi-year history of periodic migraine headaches. Appellant alleged that, while at work on June 23, 2008, he experienced a severe and ongoing sense of dizziness and loss of balance which he later learned was due to photosensitivity from exposure to bright lighting in his workplace. He went to the hospital and while there, he began to develop a migraine headache.

In an August 28, 2008 report, Dr. D. Gregory Gorman, a Board-certified neurologist, noted that appellant has been under his care since June 24, 2008. He advised that appellant had classical migraine with aura and transformed migraine with migraine equivalent of dizziness. Dr. Gorman noted triggers include bright artificial lights. He noted that, while attempting to work the prior Thursday, appellant's exposure to bright lights caused him problems and he left after one hour. Dr. Gorman stated, "In view of the above it seems medically necessary that his work be configured so that he is not in an environment of artificial bright light."

In a decision dated December 2, 2008, the Office denied appellant's claim for compensation, finding that the medical evidence did not establish that the claimed migraine condition was related to the established work-related exposure.

On September 3, 2009 appellant requested reconsideration. When he returned to work, he experienced migraine episodes that prevented him from working. Appellant noted that, when he was absent from work, he recovered, but when he returns to work, he again experiences headaches. He submitted results of a normal June 9, 2009 videonystagmography (VNG) report, a "fairly normal" computed tomography (CT) conducted on June 9, 2009 (noting a small polyp in the left maxillary sinus of questionable significance) and a July 7, 2009 magnetic resonance imaging scan of his head that was reported as normal.

In a December 12, 2008 report, Dr. Gorman noted that appellant had been off work since August and had no further migraines or dizziness. He advised that appellant had classic migraine with aura, transformed migraine. Dr. Gorman identified stackable triggers, including working the midnight shift with fluorescent lighting. He suggested that appellant could go back to work for two hours a day for two weeks, then four hours a day for two weeks, followed by six hours a day for a week. Assuming all went well, a return to full employment would be made.

In a May 20, 2009 report, Dr. Roger Zundei, an otolaryngologist, opined that appellant had some chronic vertigo of unclear etiology. It was most likely migrainous in nature. Dr. Zundei recommended keeping a food diary to see if there was any correlation of his vertigo symptoms with a particular food. In a June 9, 2009 report, he noted that appellant's CT and VNG tests were normal. Dr. Zundei opined that it was very likely that appellant's headaches and his vertigo episodes were secondary to migraine process.

In an August 26, 2009 report, Dr. Steven Singer, a Board-certified neurologist, stated that appellant was treated for a severe chronic headache disorder which had become particularly severe and disabling during the past year. Appellant had a major evaluation and treatment program, but continued to suffer severe and frequent headaches with other problems such as

vertigo and extreme light sensitivity. Dr. Singer noted that these problems are not uncommon with severe headache patients. He found that appellant was unable to work at the employing establishment in his usual environment because the indoor fluorescent lights had a marked triggering effect on his symptoms. Dr. Singer recommended altering appellant's work situation so that he could work in an environment which would not increase chronic pain issues.

In a September 2, 2009 report, Dr. Janine R. Cooley, a Board-certified family practitioner, noted that appellant was under her care. Appellant had been on leave from work since June 2008 because of an incident of headaches and vertigo triggered by lighting at work. He still experienced headaches and vertigo triggered by fluorescent lights requiring routine use of Valium. Dr. Cooley advised that appellant was unable to work at the employing establishment due to the lighting in the work environment.

In a September 17, 2009 decision, the Office denied appellant's request for reconsideration without reviewing the merits of the case.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹ the Office's regulations provide that the evidence or argument submitted by 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) constitute relevant and pertinent new evidence not previously considered by the Office.² To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.³ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁴

ANALYSIS

On appeal, appellant made various arguments regarding the merits of his claim. However, as noted, because more than 180 days elapsed between the most recent merit decision dated December 2, 2008 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim.⁵ The only issue before the Board is whether the Office properly denied appellant's request for reconsideration of the merits of his claim.

¹ 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.606(b)(2).

³ *Id.* at § 10.607(a).

⁴ *Id.* at § 10.608(b).

⁵ *Id.* at §§ 501.2(c) and 501.3(d)(2).

Appellant did not make any new argument 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. However, he submitted a new report by Dr. Gorman. This report, however, largely represented a restatement of Dr. Gorman's earlier findings and conclusions and is therefore repetitive of reports that were considered in the Office's prior merit decision. Evidence that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.⁶ The only additional information in Dr. Gorman's report was work restrictions and these are not relevant to the issue at hand, *i.e.*, whether appellant has provided medical evidence establishing a causal relationship between his headaches and dizziness and his federal employment.

Dr. Zundei did not relate appellant's symptoms to his federal employment. He suggested that appellant keep a food diary to determine if there was a correlation between his symptoms and certain food groups. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.⁷ Appellant's diagnostic tests were normal and did not provide any statements with regard to causal relationship. Accordingly, none of this evidence is sufficient to warrant further merit review of the case.

Drs. Cooley and Singer attributed the lighting at work as the cause for appellant's symptoms. Dr. Cooley noted that appellant had a history of migraines and he went to the emergency room on June 23, 2009 with headaches and vertigo triggered by the lighting at work requiring medication. She also noted that appellant has been unable to work at the employing establishment due to headaches and vertigo resulting from fluorescent lighting at the work. Dr. Singer advised that appellant was unable to work at the employing establishment in his usual environment because the indoor fluorescent lights had a marked triggering effect on his symptoms. The reports of Drs. Cooley and Singer are new medical reports relevant to the issue of causal relation. They are sufficient for a merit review of appellant's claim. The Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence must be relevant and pertinent and not previously considered by the Office.⁸

The Office abused its discretion by refusing to reopen appellant's claim for further review on the merits under 5 U.S.C. § 8128(a). The case will be remanded for further merit review. Following such development as necessary, the Office shall issue a merit decision on appellant's claim.

⁶ See *C.N.*, 60 ECAB ____ (Docket No. 08-1569).

⁷ See *David J. McDonald*, 50 ECAB 185 (1998).

⁸ See *Helen E. Tschantz*, 39 ECAB 1382 (1988).

CONCLUSION

The Board finds that the Office abused its discretion when it denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 17, 2009 is set aside and the case is remanded for further consideration consistent with this opinion.

Issued: August 16, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board