

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LEONARD LAROSA and DEPARTMENT OF THE NAVY,  
NAVAL WEAPONS CENTER, China Lake, CA

*Docket No. 00-697; Submitted on the Record;  
Issued September 27, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

The Office accepted that on December 1, 1966 appellant, then a 35-year-old mechanical technician sustained multiple contusions, cervical strain and right cervicobrachial syndrome due to a whiplash injury while in the performance of duty. Appellant retired from work on medical disability on or around February 1977 and filed a notice of recurrence of disability on April 18, 1977 alleging further disability, related to the original injury.<sup>1</sup>

On March 9, 1978 appellant filed a traumatic injury claim alleging that on January 28, 1977 he injured his lower back and right and left lower extremities when leaning back in his chair, which had begun to tip over.

On July 26, 1978 the Office issued a decision denying entitlement to continuation of pay, finding that the claim was not filed within 30 days of the alleged injury. Appellant filed several appeals on the issue of continuation of pay; however, the denial was affirmed.

On November 6, 1996 appellant filed a notice of recurrence of disability alleging that his disability on January 1, 1977 was related to the accepted employment injury.

On February 11, 1997 the Office denied appellant's recurrence of disability claim finding that the evidence did not establish that appellant sustained a recurrence of disability on January 1, 1977 causally related to the accepted work injury. Also in the February 11, 1997 decision, the Office considered the merits of appellant's 1978 claim and denied the claim finding

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<sup>1</sup> It appears from the record that although the Office attempted to develop appellant's claim for recurrence, the Office did not issue a decision on the claim.

that appellant had not established that he sustained a work-related injury on January 28, 1977 as alleged. Appellant thereafter requested an oral hearing of the February 11, 1997 decisions.

Following a hearing held November 19, 1997, an Office hearing representative affirmed the prior decisions on January 29, 1998. The Office hearing representative found that the evidence was insufficient to support that appellant sustained an employment injury on January 28, 1977 or that he sustained a recurrence of disability on January 1, 1977 causally related to the original December 1, 1966 work injury. On September 16, 1998 appellant requested reconsideration of the hearing representative decision and submitted 53 documents in support of his request. On November 20, 1998 appellant submitted 261 documents in further support of his claim.

By decision dated December 1, 1998, the Office denied appellant's request for review of the merits of the case after finding that the evidence submitted in support of the request for review was repetitive of previously submitted evidence and also insufficient to warrant a merit review of the prior decision.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>2</sup> As appellant filed his appeal with the Board on November 15, 1999, the Board lacks jurisdiction to review the Office's most recent merit decision dated January 29, 1998. Consequently, the only decision properly before the Board is the Office's December 1, 1998 decision denying appellant's request for reconsideration.

The Board finds that the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may:

“(1) end, decrease or increase the compensation awarded; or

“(2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or ( 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. Section 10.608(b) provides that where the request fails to meet at least

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<sup>2</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

one of the standards described in section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>3</sup>

In the present case, appellant filed a request for reconsideration, which was received by the Office on September 18, 1998. Much of the evidence, which accompanied the reconsideration request, had either been previously submitted to the record prior to the February 11, 1997 and January 29, 1998 denial decisions or was irrelevant to the issues at hand. The underlying issues in this case are whether appellant sustained an employment injury on January 28, 1977 as alleged or whether he sustained a recurrence of disability on January 1, 1977 causally related to the original December 1, 1966 work injury.

The 53 documents appellant initially submitted with his request consisted mainly of administrative documents regarding notices and reports of injury, request for medical treatment and related travel, billing and leave statements and request for file documents. The submission did contain various medical reports, which mainly relate to the original work injury of 1966 and are irrelevant to the above-stated issues. Appellant also submitted handwritten medical notes dated February 7, 1977 from a physician named Dr. Taylor which are mostly illegible but appear to discuss complaints of low back and right buttocks pain and x-ray reports of the lumbar spine. She also submitted a May 23, 1977 x-ray report which indicated that appellant had degenerative changes of the cervical spine. Appellant further submitted a report from Dr. Robert R. Lawrence, a Board-certified orthopedic surgeon dated November 9, 1977 who reported that appellant last worked in February 1977 and was no longer able to work because of extreme pain in the lower back and right lower extremity. Dr. Lawrence related that the pain first began in 1966 when he injured his neck and shoulder at work. He noted that appellant sustained a subsequent work injury to his shoulders in 1973 and that on February 7, 1977 he injured his back again; however, appellant did not know how that injury occurred. Appellant further submitted a March 10, 1981 report from Dr. Donald Henderson, attending physician who diagnosed cervical five fracture, neck and back pain, cervical degenerative joint disease and history of radiculopathy involving his low back. He further stated that, "the conditions were determined to be related to an old fracture -- 1966 accident."

In the subsequent submission, appellant provided the previously submitted documents, additional documentation of an administrative nature and other documents, which also either discussed his 1966 accepted work injury or generally discussed his continued complaints of either right neck, and shoulder pain or lower back pain. Although the medical evidence submitted on reconsideration supports that appellant has had continued complaints of back pain since 1966, the evidence does not explain how appellant's alleged recurrent condition on January 1, 1977 was causally related to the December 1966 injury. Furthermore the evidence does not contain any factual or medical documentation of the alleged January 28, 1977 work injury. The February 7, 1977 note from Dr. Taylor was mostly illegible and although it does discuss an evaluation of appellant's back condition, it does not appear to relate the condition to an injury on January 28, 1977 or to his previous 1966 work-related injury.

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<sup>3</sup> 20 C.F.R. § 10.608(b) (1999).

In its December 1, 1998 decision, the Office correctly noted that appellant did not submit relevant and pertinent new evidence not previously considered by the Office, nor did he 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 review of the merits of the claim based upon any of the above-noted requirements under 10.606(b)(2). Accordingly, the Board finds that the Office properly denied appellant's September 18, 1998 request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated December 1, 1998 is hereby affirmed.

Dated, Washington, DC  
September 27, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Member