

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY JONES and DEPARTMENT OF THE NAVY,
LONG BEACH NAVAL SHIPYARD, Long Beach, CA

*Docket No. 02-559; Submitted on the Record;
Issued August 26, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion under section 8128 of the Federal Employees' Compensation Act by denying appellant's request for a merit review.

The Office accepted that in July 1990, appellant, then a 40-year-old pipe fitter, sustained "disc derangement lumbar spine" at L5-S1 "with right-sided radiculopathy." At the time of the injury, he had been employed at the employing establishment for four months and was still in his probationary period. Appellant stopped work on August 8, 1990. His case was placed on the periodic rolls through July 13, 1993.¹

Following vocational rehabilitation, appellant returned to light-duty work on August 8, 1993 as a modified pipe fitter.² The position was a temporary appointment with a maximum term of employment of one year.³

¹ The Office initially denied appellant's claim by a March 27, 1991 decision on the grounds that fact of injury was not established. He requested reconsideration on July 22, 1991, denied by decision dated October 30, 1991. Appellant again requested reconsideration by December 24, 1991 letter. The Office accepted his claim as of June 13, 1992. Appellant has two claims of record: 91701-13-937040 for the July 1990 injury; and 91701-13-11042254 for an August 3, 1993 injury and September 1, 1993 recurrence. The claims were doubled as of April 29, 1996.

² The employing establishment filed a notice of termination of disability (Form CA-3) on July 14, 1993, the date that appellant was instructed to report for duty. However, he did not resume work until August 8, 1993 as he had to attend to personal matters involving treatment for a nonoccupational heart murmur and to make child care arrangements for his four-year-old nephew whom he had adopted.

³ The modified pipefitter position required appellant to test, install, repair and remove various piping systems and regulatory gauges, with no twisting, kneeling, climbing and lifting limited to one hour per day, sitting, standing, reaching and grasping to two hours per day and walking to four hours per day. Appellant was allowed to lift up to 40 pounds for one hour per day. These restrictions conform to those prescribed by Dr. Brent Pratley, an attending orthopedic surgeon, on May 24, 1993.

The record indicates that appellant was absent from work on August 9, 23 and 27, September 2, 3, 14, 15, 21 and 23 and October 6, 14 and 15, 1993. He stopped work on October 22, 1993 and did not return. Appellant was terminated from the employing establishment effective November 7, 1993 due to excessive absenteeism and failure to follow a supervisor's instruction on October 18, 1993.

On October 25, 1993 appellant filed a claim for recurrence of disability commencing September 1, 1993. He attributed the recurrence of disability to being forced to work outside of his medical restrictions, in particular, being required to mop floors.⁴

By decision dated May 18, 1994, the Office denied appellant's claim for a recurrence of disability commencing September 1, 1993. The Office found that "[n]one of the medical evidence provided substantiate[d] that [appellant] was unable to perform the duties provided. Each of the reports reviewed subsequent to his return to work state that he was to continue modified duty." The Office further found that the modified pipefitter position fairly and reasonably represented appellant's wage-earning capacity as the duties were within his medical restrictions and he performed those duties for more than 60 days. The Office also found that appellant was terminated for excessive absenteeism and not because he was in any way disabled from performing the modified pipefitter position.

Appellant disagreed with this decision and in a January 1, 1995 letter requested reconsideration. He alleged that he was terminated from the employing establishment in retaliation for filing an Equal Employment Opportunity (EEO) claim and was discriminated against in the rehiring process and assignment of duties due to his age, race and disability. Appellant submitted additional evidence. In an October 21, 1993 slip report, Dr. Edward Keiderling, an attending orthopedic surgeon, diagnosed a "chronic back injury" and found appellant totally disabled for work through November 28, 1993. Appellant also submitted a March 2, 1994 report from Dr. R. Serna, an attending family practitioner, noting decreased lumbar flexion and lateral lumbar deviation. He noted that June 1991 x-rays showed degenerative joint disease with osteoarthritis at L5-S1 and mild spinal stenosis. Dr. Serna diagnosed lumbosacral osteoarthritis with radiculopathy. He opined that appellant's condition was a "chronic problem brought on by lifting injury at work in July 1990."

By decision dated March 8, 1995, the Office denied modification of its May 18, 1994 decision on the grounds that the evidence submitted was insufficient to warrant modification. The Office noted that the evidence was also insufficient to establish recurrence or that the pipefitter position did not fairly and reasonably represent his wage-earning capacity, as he performed the position for the required 60 days, from August 8 to October 22, 1993. The Office found that appellant was terminated from the employing establishment due to excessive absenteeism and not in retaliation for filing an EEO claim.

In a November 27, 1995 report, Dr. Mazin Sabri, an attending orthopedic surgeon found a limited range of lumbar motion and noted appellant's subjective symptoms of lumbar pain,

⁴ In a March 25, 1994 report, Dr. J.C. Murdoch, an attending endocrinologist, diagnosed nonoccupational Grave's disease.

particularly with lifting. He opined that appellant could not perform the duties of a pipefitter as he was precluded from heavy lifting.

Appellant disagreed with this decision and in a February 2, 1996 letter requested reconsideration through his attorney representative. He submitted a statement alleging that he was made to work outside his medical restrictions from August 8 to October 22, 1993. Appellant also submitted additional medical evidence and a transcript related to an EEO claim against the employing establishment, alleging retaliatory termination and discrimination on the basis of race, age and disability.⁵

An October 10, 1995 EEO investigative transcript confirmed that appellant was required to perform janitorial duties, including mopping, as part of the duties of a modified pipefitter from August 8 to November 7, 1993.

In a December 31, 1995 report, Dr. Brent Pratley, an attending orthopedic surgeon, noted treating appellant beginning in May 1991 for chronic lumbar strain and lumbar disc disease. He noted findings on examination of degenerative disc disease at L5-S1 as demonstrated by a May 3, 1991 magnetic resonance imaging (MRI) scan, chronic lumbar sprain/strain with right-sided radiculopathy and partial lumbar ankylosis. Dr. Pratley attributed these findings to appellant performing heavy lifting at work up until July 1990.

An April 9, 1996 EEO investigation report found that the employing establishment had not discriminated against appellant on the basis of age, race or disability.

By decision dated April 29, 1996, the Office denied modification on the grounds of insufficient medical evidence. The Office found that as appellant alleged that mopping floors and janitorial duties from August 30 to September 1, 1993 caused a new injury, appellant's "claimed recurrence on and after August 30, 1993 should be treated as a new injury and not a recurrence...." The Office directed further development on this issue and doubled the file from the July 1990 injury claim with appellant's claim for an August 1993 injury.

In a May 8, 1996 statement, the employing establishment generally refuted appellant's allegations of harassment, retaliation and discrimination, explaining that he was terminated from the employing establishment effective November 7, 1993 due to excessive absenteeism and failure to follow a supervisor's instructions on October 18, 1993.

By decision dated August 22, 1996, the Office denied appellant's claim for an August 30, 1993 injury or September 1, 1993 lumbar injury as fact of injury was not established.⁶ The

⁵ On February 12, 1996 appellant filed an occupational disease claim alleging that he sustained a lumbar condition on September 1, 1993 due to performing janitorial work outside of his medical restrictions. The record indicates that the Office did not develop the February 12, 1996 claim as a separate claim, as it merely reiterates appellant's previous claims.

⁶ On November 13, 1996 appellant filed an appeal with the Board, docketed on December 4, 1996 as 97-583. Pursuant to his August 1997 request to dismiss the appeal so that he could pursue reconsideration, the Board issued an order dismissing the appeal on September 2, 1997.

Office found that appellant submitted insufficient rationalized medical evidence to establish that he sustained either a recurrence of disability or a new injury.

Appellant requested an oral hearing on the August 22, 1996 decision by a September 23, 1996 letter, postmarked September 25, 1996. The Office denied appellant's request by a September 2, 1997 decision, finding that his request for an oral hearing was untimely. The Office conducted a limited review of appellant's request and further denied it on the basis that the issues could be addressed equally well pursuant to a valid request for reconsideration.

Appellant disagreed with this decision and in a July 28, 1997 letter requested reconsideration, asserting that he performed janitorial duties outside of his job description, in particular mopping, which aggravated his previous injury. He asserted that there was a change both in the nature of his job duties and in his accepted condition such that he was disabled for work on and after October 22, 1993. Appellant enclosed an August 15, 1997 report from Dr. Pratley, stating that appellant's job duties from August to October 1993 aggravated his subjective lumbar symptoms and the chronic lumbosacral strain.

By decision dated January 14, 1999, the Office denied modification on the grounds of insufficient evidence. The Office found that appellant had not established wrongful termination, harassment or that he was made to work outside of his medical restrictions from August 8 through November 7, 1993. The Office noted that the EEO investigation revealed no discrimination or other wrongdoing by the employing establishment and that the supervisory statements obtained indicated that appellant's version of events was incomplete or untruthful. The Office specifically found that there was no evidence that appellant was made to work outside of his medical restrictions.

Appellant disagreed with this decision and in a January 11, 2000 letter requested reconsideration of both claims. He asserted that the employing establishment's statements and the EEO investigation did not dispute his version of events and that the Office erred by failing to accept as factual his allegations of overwork, verbal abuse, retaliation and harassment. Appellant also asserted that Dr. Keiderling's October 21, 1993 report was sufficient to establish that he sustained an objective worsening of the accepted lumbar condition due to performing the modified pipefitter position from August 8 to October 22, 1993.

By decision dated June 19, 2000, the Office denied modification on the grounds of insufficient evidence. The Office found that appellant's allegations of harassment, retaliation, discrimination and being made to work outside his medical restrictions were all unproven. The Office further found that his allegations were in large part directly rebutted by statements from employing establishment supervisors. The Office noted that Dr. Keiderling's October 21, 1993 report only stated that appellant's experienced subjective lumbar symptoms while performing the modified pipefitter position. The Office therefore, found that as Dr. Keiderling did not provide objective findings or medical rationale explaining how and why the modified job duties would cause an objective worsening of appellant's condition, his report was insufficient to meet appellant's burden of proof in establishing a recurrence of disability.

Appellant again requested reconsideration of both claims by letter received by the Office on June 18, 2001. He alleged that the modified pipefitter position was not suitable work, that he

was made to work outside of his job restrictions from August to October 1993 causing a worsening of his lumbar condition and that he was terminated on November 8, 1993 in retaliation for filing an EEO claim. Appellant also asserted that he obeyed all employing establishment regulations regarding use of leave and notification of absence and thus, the employing establishment's allegation that he was terminated due to excessive absenteeism was false. He also alleged that the Office erred by not accepting his account of events as truthful.

By decision dated October 2, 2001, the Office denied reconsideration on the grounds that appellant "presented only repetitious arguments, insufficient ... to warrant [a] merit review." The Office found that appellant had submitted no new medical evidence and merely reiterated his allegations that the light-duty pipefitter position was not suitable work and that the employing establishment fired him on November 8, 1993 because he filed an EEO complaint. The Office noted that the EEO investigation found no wrongdoing by the employing establishment.

The Board finds that the Office properly denied appellant's June 18, 2001 request for a merit review.

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. As appellant filed his appeal with the Board on January 25, 2002, the Board has jurisdiction only over the October 2, 2001 denial of a merit review and not over the prior decisions regarding his claims for recurrence of disability, an August 1993 injury or loss of wage-earning capacity.⁷

The Board finds that the Office in its October 2, 2001 decision properly denied appellant's request for reconsideration on its merits under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration did not meet the requirements set forth under section 8128.⁸

Under section 8128(a) of the Act,⁹ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,¹⁰ which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office]; or

⁷ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁸ See 20 C.F.R. § 10.606(b)(2)(i-iii).

⁹ 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.606(b) (1999).

“(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office].”¹¹

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.¹²

The critical issues in the case at the time the Office issued its June 14, 2000 decision were whether appellant sustained a recurrence of disability from September 1, 1993 onward and whether the modified pipefitter position properly represented his wage-earning capacity. Appellant’s June 18, 2001 letter does not provide new, relevant, pertinent evidence on these issues. Appellant merely reiterated his previous allegations regarding overwork, harassment, discrimination and retaliatory termination by the employing establishment. The June 18, 2001 letter is therefore, of no probative value in establishing either issue. The Office’s October 2, 2001 decision finding that appellant’s June 18, 2001 request for reconsideration was repetitious and, therefore, insufficient to warrant a merit review was correct.

The October 2, 2001 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, DC
August 26, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ 20 C.F.R. § 10.606(b).

¹² 20 C.F.R. § 10.608(b).