

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND L. MOREHEAD and DEPARTMENT OF THE ARMY,
MADIGAN ARMY MEDICAL CENTER, Tacoma, WA

*Docket No. 03-917; Submitted on the Record;
Issued June 25, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On May 11, 1994 appellant, then a 44-year-old medical clerk, filed a traumatic injury claim (Form CA-1), alleging that on April 26, 1994 he injured his lower back while moving a patient.¹ The Office accepted the claim for a lumbar strain. Appellant initially returned to part-time work on October 24, 1994 and subsequently was released for full duty with restrictions on January 12, 1995.

On April 14, 1995 appellant filed a traumatic injury claim alleging that he injured the left side of his body, his hip and right wrist when he fell.² The Office initially denied appellant's claim by decision dated August 15, 1996. In a July 18, 1997 decision, the Office hearing representative accepted appellant's claim as a consequential injury of his accepted April 26, 1994 employment injury and instructed the two claims to be consolidated. Appellant's claim was subsequently accepted for "an aggravation of his preexisting spondylolisthesis which was permanently aggravated by the injury of April 26, 1994" and right wrist sprain and right wrist tear of the triangular fibrocartilage which required arthroscopic debridement.

On August 24, 1999 the Office referred appellant to Dr. Alfred I. Blue, a Board-certified orthopedic surgeon, to resolve a conflict in the medical opinion evidence between Dr. Robert C. Winegar, a second opinion Board-certified orthopedic surgeon, and Dr. Wilbur G. Sandblute, an attending Board-certified orthopedic surgeon with a subspecialty in hand surgery, on the issue of whether appellant's right wrist surgery on August 6, 1997 was causally related to his accepted employment injury.

¹ This was assigned claim number A14-293435.

² This was assigned claim number A14-304396.

To determine whether appellant continued to have any residuals from his injury, the Office referred appellant to Dr. Harry S. Reese, a Board-certified orthopedic surgeon, for a second opinion evaluation. In his March 19, 2001 report, Dr. Reese opined that appellant had recovered from his accepted employment injury and that there was no objective evidence to support any continuing disability due to his accepted employment injury.

Based on the reports of Dr. Blue, Dr. Reese and Dr. Winegar, the Office issued a notice of proposed termination of benefits on August 6, 2001.

In a letter dated August 9, 2001, appellant disagreed with the proposal to terminate his benefits and requested a hearing by telephone.

By decision dated September 13, 2001, the Office finalized the termination effective September 23, 2001 on the basis that appellant had recovered from his accepted employment injuries.

Appellant requested reconsideration in a letter dated August 15, 2002 and submitted evidence in support of his claim. In an August 28, 2001 report, Dr. Virgil V. Becker, Jr., an attending Board-certified orthopedic surgeon, diagnosed lumbar strain with preexisting and underlying spondylolisthesis. Dr. Becker noted that he disagreed with Dr. Reese on the issue of whether appellant was capable of performing his duties as a medical clerk.

By decision dated December 20, 2002, the Office denied appellant's application for review finding that the evidence submitted was irrelevant, immaterial and insufficient to warrant review of the prior decision.

The Board finds that the Office properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

The only decision before the Board on this appeal is the Office's decision of December 20, 2002. Since more than one year elapsed from the date of issuance of the Office's September 14, 2001 merit decision to the date of the filing of appellant's appeal, February 26, 2003, the Board lacks jurisdiction to review this decision.³

Section 8128(a) of the Federal Employees' Compensation Act⁴ vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵ Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.⁶

³ See 20 C.F.R. § 501.3(d)(2).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8128(a) ("the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application"); see also 20 C.F.R. §§ 10.610, 10.605, respectively.

⁶ *Veletta C. Coleman*, 48 ECAB 367, 368 (1997).

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).⁷ The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.⁸

Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.⁹

With his request for reconsideration, appellant submitted reports from Drs. Becker and Reese and a March 26, 2001 magnetic resonance imaging (MRI) scan test. The March 26, 2001 MRI scan test and reports were of record and were considered by the Office in its prior decisions. As this evidence is duplicative of that already of record, it does not constitute a basis for reopening the claim.

Appellant submitted a medical report dated August 28, 2001 from Dr. Becker which diagnosed lumbar strain with preexisting and underlying spondylolisthesis and his disagreement with Dr. Reese. The Board notes that Dr. Becker had previously submitted a report dated July 12, 2001 that was reviewed by the Office in the September 13, 2001 merit decision. In the July 12, 2001 report, Dr. Becker diagnosed spondylolisthesis in the lumbar spine and that he did not expect appellant to be able to return to work. The August 28, 2001 report does not provide any new and relevant evidence with respect to the underlying medical issues in the case. Dr. Becker stated his disagreement with Dr. Reese regarding appellant's ability to perform the duties of a medical clerk, without providing any medical discussion that had not previously been presented in his July 12, 2001 report. The Board finds that appellant failed to submit relevant and pertinent evidence not previously considered, nor did he meet any of the requirements of section 10.606(b)(2). Therefore, appellant has failed to meet the subsection (iii) requirement of relevant and pertinent new evidence.¹⁰

Appellant has failed to show that the Office erred in interpreting the law and regulations governing his entitlement to compensation under the Act, nor has he advanced any relevant legal argument not previously considered by the Office. As appellant failed to meet any of the three requirements for reopening his claim for merit review, the Office properly denied his reconsideration request.

⁷ 20 C.F.R. § 10.608(a).

⁸ 20 C.F.R. § 10.606(b)(1)-(2).

⁹ 20 C.F.R. § 10.608(b).

¹⁰ See *Eugene L. Turchin*, 48 ECAB 391, 397 (1997) (finding that appellant's failure to submit new and relevant evidence on reconsideration justified the Office's refusal to reopen his case for merit review).

The December 20, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 25, 2003

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member