

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAN GOIN and DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

*Docket No. 02-2218; Submitted on the Record;
Issued March 19, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

On March 10, 1992 appellant, then a 38-year-old painter, filed a notice of traumatic injury alleging that on March 9, 1992 he injured his back while picking up a five-gallon paint can. The Office accepted his claim for cervical, lumbar and thoracic subluxations.¹ Appellant returned to limited-duty work. On October 21, 1992 he filed a notice of recurrence of disability. On April 26, 1993 the Office accepted that appellant sustained a recurrence of disability on or after October 13, 1992, causally related to the March 9, 1992 accepted employment injury.

On January 2, 1993 appellant filed a notice of occupational disease and claim for compensation contending that, beginning December 8, 1992, his lower back pain was caused by his position requiring overhead painting in submarines. By decision dated February 22, 1993, the Office accepted appellant's claim for lumbar subluxation. Appellant returned to limited-duty work.

On December 11, 2000 appellant filed a claim for recurrence of disability contending that his condition, on and after November 7, 2000, was due to the December 8, 1992 work injury. He stated that his general condition had been fine overall, except for occasional "flare-ups" since the initial injury. He noted on his recurrence of disability form that he was placing a lamp in a box when he began to experience pain in his lower back. He continued to experience pain throughout the weekend and on Monday morning, November 7, 2000, attempted to drive to work but had to return home.

¹ The decision accepting this claim is not found in the record; however, the Office refers to it in later decisions.

By letter dated November 30, 2000, appellant was advised to submit detailed factual and medical evidence to support his claim for recurrence of disability.

In support of his claim, appellant submitted medical reports from Dr. Kenneth R. Geiger, a Board-certified orthopedic surgeon and appellant's treating physician.² Appellant noted on his notice of recurrence of disability form that he had been seeing Dr. Geiger approximately twice a year since the original injury.

In a progress report dated November 27, 2000, Dr. Geiger stated that appellant's hip pain had essentially resolved but that he had increased pain in the left side of his lower back. He stated: "Unfortunately the patient's low back pain is worsening. He has had a magnetic resonance imaging (MRI) scan back in 1993 that did demonstrate a 4 to 5 mm [millimeter] left-sided disc protrusion at the L4-5 level. Given his symptoms now it is possible that this has progressed." He diagnosed lumbar spondylosis, history of L2 vertebral hemangioma, right hip trochanteric bursitis and left hip pain.

In a progress report dated December 28, 2000, Dr. Geiger stated:

"There appears to be a question regarding whether this is a new or recurrent problem. I carefully reviewed the history with the patient today and this appears to be a recurrence of the symptoms that he has had since his original injury in 1992. He was evaluated for low back problems here in the office in early 1993 and an MRI scan of his lumbosacral spine was obtained at that time. He was complaining of left-sided low back and leg pain at that time and those are identical to the symptoms that he is having now. There has been no separate injury...."

By decision dated February 1, 2001, the Office denied appellant's claim for recurrence of disability, as the record did not contain rationalized medical opinion evidence finding that the claimed recurrence on and after November 7, 2000 was due to the December 8, 1992 work injury. The Office indicated that, if appellant's current condition was due to activities other than those cited in the original claim or involved other medical conditions, he should file a new claim. The Office noted that the degenerative back conditions diagnosed by Dr. Geiger since 1993, which continued to be stated in current reports, may not be considered a recurrence of the original work injury, which was accepted for lumbar subluxation.

Appellant disagreed with the Office's decision and requested a review of the written record. By decision dated August 2, 2001, the Office hearing representative affirmed the February 1, 2001 decision.

By letter dated May 5, 2002, appellant requested reconsideration. In support of his request, he submitted progress reports from Dr. Geiger from January, February, March, September and October 1993, February, May, June and December 1994, May and October 1995, March and September 1996, February and July 1997, January, June and December 1998, June

² Appellant submitted medical evidence dated prior to the recurrence; however, the Board will only discuss the medical evidence dated after the recurrence, or November 7, 2000.

and November 1999 and January, June, October, November and December 2000. He also submitted a radiology report finding no foreign bodies and an MRI scan dated January 18, 1993 showing disc herniation at levels L4-5, L5-S1 spondylitic changes and disc protrusion and degenerative changes at levels L3-4 through L5-S1.

By decision dated August 19, 2002, the Office denied appellant's request for reconsideration as appellant did not submit relevant new evidence or present legal arguments previously not considered by the Office.

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.³ Because more than one year has elapsed between the issuance of the Office's most recent merit decision on August 2, 2001 and September 3, 2002, the date appeal filed his appeal with the Board, the Board lacks jurisdiction to review the August 2, 2001 decision and any preceding decisions. Therefore, the only decision before the Board is the Office's August 19, 2002 nonmerit decision denying appellant's application for review of its February 1, 2001 decision.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for further reconsideration of the merits.

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not give a claimant the right upon request or impose a requirement upon the Office to review a final decision of the Office awarding or denying compensation. Section 8128(a) of the Act, which pertains to review, vests the Office with the discretionary authority to determine whether it will review a claim following issuance of a final Office decision. The Office, through regulations, has placed limitations on the exercise of that discretion.

To require the Office to reopen a case for merit review, section 10.606 provides that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and setting forth arguments or submitting evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁵ When a claimant fails to meet at least one of the above standards, the Office will deny the application for review without reviewing the merits of the claim.⁶

In support of his May 5, 2002 request for reconsideration, appellant submitted medical evidence already found in the record. The reports dated March 10, 1993, September 16, 1996 and July 25, 1997, were previously not of record; however, these reports are cumulative as they stated that the same diagnoses from earlier reports and did not provide an opinion on causal

³ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁴ 20 C.F.R. § 10.606(a). *See generally* 5 U.S.C. § 8128.

⁵ *Id.*

⁶ 20 C.F.R. § 10.608(a).

relationship between appellant's degenerative condition and the original work injury. Appellant's claim for recurrence of disability was denied because of insufficient rationalized medical evidence to establish a causal relationship between his current degenerative condition and the original work injury. In these reports, Dr. Geiger diagnosed lumbar spondylosis and L2 vertebral body hemangioma and mentioned appellant's continuing lower back symptoms, but did not provide an opinion on causal relationship. In fact, Dr. Geiger did not mention the December 8, 1992 accepted work injury. The reports only restate information already found in the record and do not offer new information on the issue of causal relationship. Appellant did not meet his burden of proof because he did not submit rationalized medical opinion evidence establishing a causal relationship between his degenerative back condition and the accepted employment injury.

It is also a well-settled principle that the submission of evidence or legal argument, which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁷ Even though the progress reports were technically new to the record, they provided no new information and did not address the underlying issue in appellant's case. As such, they have little probative value. Appellant also did not raise any legal arguments in his request for reconsideration to warrant a merit review.

As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent evidence not previously considered by the Office, the Office properly denied his request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated August 19, 2002 is hereby affirmed.

Dated, Washington, DC
March 19, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁷ *Alton L. Vann*, 48 ECAB 259 (1996).