

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GEORGE D. MAJOR and DEPARTMENT OF THE ARMY,  
Fort Campbell, KY

*Docket No. 03-340; Submitted on the Record;  
Issued May 2, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case by decisions dated July 3 and August 14, 2002 for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On August 29, 2001 appellant, then a 61-year-old welder, filed a claim for occupational disease, alleging that he was aware of pain in his legs and shoulders and swollen hands on February 19, 1998 and that he first realized that his conditions were caused by his employment on October 4, 1999. Appellant stated that he could no longer carry or walk with heavy materials, climb a 140-foot tower, climb in and out of ditches, climb ladders or steps or work overhead. He stated that when he attempted to perform those functions, his muscles would swell, pain would start in his legs, knees would not bend and his shoulders would swell.

By letter dated September 18, 2001, the Office advised appellant regarding what evidence he needed to establish his claim.

In a report dated October 5, 2001, Dr. G. Michael Sabbah, appellant's treating physician and an internist, related that appellant sought treatment that day for a variety of medical conditions and sought the doctor's help in his application for disability retirement. He noted that appellant had been struck by lightning during his employment and that his medical conditions included lack of coordination when walking. In a handwritten annotation at the end of the report, Dr. Sabbah noted that "back and leg problems appear [to] be causing pain."

By decision dated October 25, 2001, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that he sustained an injury due to the claimed employment factor. The Office accepted that appellant actually experienced the claimed employment factor, but the evidence failed to establish a medical diagnosis due to this factor.

In a report dated December 14, 2001, Dr. Sabbah related appellant's history of being struck by lightning in 1992 which caused chronic and severe pain in his shoulders and back and

chronic bilateral leg swelling. He noted that he first treated appellant in 1999 and had reviewed prior reports on his condition. Dr. Sabbah also noted that appellant's condition had worsened over time, and that, based also on his obesity, osteoarthritis, hypertension, hearing deficit and hyperlipidemia, appellant was essentially totally disabled.

In a report dated June 14, 2002, Dr. Stuart J. Harris, appellant's treating physician and a specialist in family practice, stated that appellant sustained a lightning strike in 1992 causing multiple medical conditions. He noted that appellant is "55 percent disabled and is entitled to compensation since 1992."

By letter dated June 21, 2002, appellant requested reconsideration.

In support of his request, appellant submitted March 6, 2002 health record noting arthritis and chronic cough, an undated respiratory questionnaire, laboratory results, an undated report noting appellant's medical history, a May 13, 1992 accident report, personnel commendations, witness statements regarding the May 1992 lightning accident and a March 2002 x-ray report.

By a nonmerit decision dated July 3, 2002, the Office denied review of its October 25, 2001 decision as he had failed to submit new evidence related to whether he had sustained a work-related injury.

By letter dated July 17, 2002, appellant again requested reconsideration.

In a report dated July 16, 2002, Dr. Harris stated that appellant sustained injuries as a result of the May 12, 1992 lightning strike, "which have caused ongoing and ever increasing health problems. The most debilitating of these is the onset of severe osteoarthritis in both knees, wrists, fingers and lumbar spine. I have found decreased range of motion of 75 percent or more to the left hand, with deformity and swelling at the radial side and at the left metacarpophalangeal (MP) joint." Dr. Harris repeated his statement from his June 14, 2002 report that appellant was "55 percent disabled and is entitled to compensation from 1992."

By decision dated August 14, 2002, the Office denied a merit review of its October 25, 2001 decision on the basis that the evidence submitted was immaterial to the current claim.

The only decisions before the Board on appeal are dated July 3 and August 14, 2002, denying appellant's requests for reconsideration. Because more than one year has elapsed between the last merit decision dated October 25, 2001 and the filing of this appeal on November 18, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>1</sup>

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

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<sup>1</sup> 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

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 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.”<sup>2</sup>

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup>

Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.<sup>4</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>5</sup> Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>6</sup>

In support of his June 21, 2002 request for reconsideration, appellant submitted a December 14, 2001 report from Dr. Sabbah, who initially examined appellant in 1999, noted a familiarity with appellant's May 1992 lightning incident, and opined that his chronic and severe neck, shoulder and leg pain was present “since that time.” The Board has carefully reviewed this report and notes that it does not relate to the subject of the present claim, *i.e.*, appellant's claim that he was unable to perform his job as a result of leg and shoulder pain and muscle swelling which began on February 19, 1998. This report makes no clear mention of the employment factors implicated in the present claim, but rather relate to appellant's May 1992 lightning incident which is not the subject of the present claim. Appellant's additional evidence submitted in support of his June 21, 2002 request for reconsideration also fails to attribute appellant's condition to an employment factor on February 19, 1998. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>7</sup>

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.606(b)(2).

<sup>4</sup> 20 C.F.R. § 10.608(b).

<sup>5</sup> *David J. McDonald*, 50 ECAB 185 (1998).

<sup>6</sup> *Id.*

<sup>7</sup> *Ronald A. Eldridge*, 53 ECAB \_\_\_\_ (Docket No. 01-67, issued November 14, 2001).

With respect to appellant's July 17, 2002 request for reconsideration, appellant submitted a July 16, 2002 report from Dr. Harris, his treating physician, who also stated that appellant's ongoing medical conditions were a result of the May 1992 lightning strike. This report also relates appellant's conditions to an event to which appellant did not refer to in his August 29, 2001 CA-2 claim, and that was that he was first aware of leg and shoulder pain and swollen hands in February 1998 and that he was originally aware that his condition was attributable to his employment in October 1999.<sup>8</sup>

In the present case, appellant has not established that the Office abused its discretion in its August 14 or July 3, 2002 decisions by denying his requests for a review on the merits of its decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

The August 14 and July 3, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.<sup>9</sup>

Dated, Washington, DC  
May 2, 2003

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

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<sup>8</sup> *Id.*

<sup>9</sup> The Board notes that appellant submitted additional evidence in his appeal. However, the Board may not consider new evidence on appeal; see 20 C.F.R. § 501.2(c); *Pamela K. Guesford*, 53 ECAB \_\_\_\_ (Docket No. 02-915, issued August 12, 2002).