

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DARRELL STOVALL and DEPARTMENT OF THE AIR FORCE,
HANSCOM AIR FORCE BASE, MA

*Docket No. 02-1618; Oral Argument Held September 24, 2003;
Issued November 10, 2003*

Appearances: *Darrell Stovall, pro se; Miriam D. Ozur, Esq.,*
for the Director, Office of Workers' Compensation Programs.

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 further review of the merits of his claim under 5 U.S.C. § 8128(a).

This case is before the Board for the second time. In the first appeal, the Board set aside a July 2, 1999 Office decision which found appellant's request for reconsideration untimely and failed to show clear evidence of error.¹ The Board found appellant's reconsideration request was timely filed and remanded the case to the Office to determine whether appellant's request and the accompanying evidence was sufficient to warrant reopening of the record for review on the merits. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

Following the Board's decision, the Office reviewed the medical evidence submitted by appellant. The surgical report of a discogram dated December 16, 1998 performed by Dr. Shankman, who found a degenerated disc at L5-S1. Appellant also submitted a hospital report dated December 16, 1998 in which Dr. Shankman performed a physical examination, considered appellant's history of injury and diagnosed a herniated disc and a possible degenerative disc in the lumbar spine. Further, appellant submitted copies of previously submitted evidence consisting of the March 5, 1997 magnetic resonance imaging (MRI) scan showing concentric bulging of degenerated disc material into the anterior epidural space and intervertebral foramina, an undated letter from Dr. Ronald E. Femia, a Board-certified radiologist, with a specialty in internal medicine, in which he stated, in part, that the March 5, 1997 MRI scan showed disc material extending beyond the margins of the vertebrae in a concentric fashion at the L4-5 and L5-S1 levels and a letter dated January 28, 1998 from

¹ *Darrell Stovall*, Docket No. 99-2562 (issued March 14, 2001).

Dr. Lawrence M. Burgreen, a Board-certified radiologist, stating, in part, that bulging discs as in appellant's case "can produce symptoms which clinically cannot be differentiated from symptoms of herniated disc." Appellant also submitted a work restriction form dated July 28, 1998.

By decision dated May 1, 2001, the Office found that the additional evidence was insufficient to warrant further merit review as the evidence submitted was not new or relevant and no substantive legal question was raised.

The only Office decision before the Board on this appeal is the Office's May 1, 2001 decision, finding that appellant's application for review was insufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent merit decision on February 23, 1998 and the filing of appellant's appeal on February 1, 2002, the Board lacks jurisdiction to review the merits of appellant's claim.²

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

20 C.F.R. § 10.606, titled "How does a claimant request reconsideration?" states:

"(a) An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by [the Office] in the final decision.

"(b) The application for reconsideration, including all supporting documents, must--

- (1) Be submitted in writing;
- (2) Set forth arguments and contain evidence that either:
 - (i) Shows that [the Office] erroneously applied or interpreted a specific point of law;
 - (ii) Advances a relevant legal argument not previously considered by [the Office]; or

² 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed.

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

Title 20 Code of Federal Regulations section 10.608, titled “How does [the Office] decide whether to grant or deny the request for reconsideration?” states in pertinent part:

“(a) 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). If reconsideration is granted, the case is reopened and the case is reviewed on its merits.

“(b) Where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2), or where the request is untimely and fails to present any clear evidence of error, [the Office] will deny the application for reconsideration without reopening the case for a review on the merits.”

Under the regulations, the Office exercised its discretion to review decisions under 5 U.S.C. § 8128(a) on motion of the claimant.³ In section 10.606(b)(2), it has defined the standards under which it will grant a review on the merits and in section 10.608 made those the only circumstances under which a merit review will be granted on motion of the claimant. Having exercised its discretion by issuance of regulations, the only consideration left for the Office is to determine whether an application for reconsideration meets the standards of the regulations. If it does, a review on the merits will be done; if it does not, a review on the merits will not be undertaken.

In the present case, appellant’s applications for review of the Office’s February 23, 1998 decision did not satisfy the standards of 20 C.F.R. § 10.606(b). In support of his reconsideration request, appellant submitted the reports of Drs. Burgreen, Femia and Shankman and a July 28, 1998 work restriction form. The reports of Drs. Burgreen and Femia were previously considered by the Office and therefore do not constitute new evidence. The reports of Dr. Shankman are also insufficient to support reopening the claim. In his reports, Dr. Shankman provided a diagnosis of a herniated disc and degenerative disc at L5-S1, but did not provide any opinion as to whether this condition was causally related to appellant’s August 28, 1995 employment injury. The Office accepted appellant’s claim for cervical and lumbar strain and sciatica arising from the August 28, 1995 employment injury and Dr. Shankman provided no opinion explaining how appellant’s current disability was due to the accepted condition. For these reasons, these reports are not relevant and are, therefore, insufficient to require that the Office reopen the case for review of the merits of appellant’s claim.⁴

In this case, appellant’s January 19, 1999 request for reconsideration did not meet any of the above requirements for reopening a claim for merit review. The evidence submitted was not

³ The Office did not limit its discretion to review decisions on its own motion, as seen in 20 C.F.R. § 10.610.

⁴ 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. *Eugene F. Butler*, 36 ECAB 393 (1984).

relevant to the present issue,⁵ nor did appellant submit a relevant legal argument or show that the Office erroneously applied or interpreted a specific point of law. Accordingly, the Board finds that the Office properly denied appellant's request for reconsideration without merit review.

The decision of the Office of Workers' Compensation Programs dated May 1, 2001 is hereby affirmed.

Dated, Washington, DC
November 10, 2003

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ Appellant submitted a work restriction form dated July 28, 1998 which detailed his work restrictions. The work restriction form is irrelevant as it does not relate to the issue at hand, whether appellant had any continuing disability on and after March 28, 1997 causally related to his accepted August 28, 1995 employment injury.