United States Department of Labor
Employees' Compensation Appeals Board

JONATHAN COPPEDGE, Appellant	)	
and	)	**Docket No. 04-907**
	)	**Issued: August 16, 2004**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, San Francisco, CA, Employer	)	

Appearances:
Hank Royal, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On February 23, 2004 appellant filed a timely appeal of a May 14, 2003 nonmerit decision of the Office of Workers' Compensation Programs denying his February 28, 2003 request for reconsideration. Because more than one year has elapsed between the last merit decision dated December 18, 2002 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2). The only decision properly before the Board is the Office's May 14, 2003 decision denying appellant's request for reconsideration.[1]

ISSUE

The issue is whether the Office properly denied appellant's request for a review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] The record on appeal includes evidence that was received after the issuance of the Office's decision dated May 14, 2003. The Board's review is limited to the evidence in the case record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On December 12, 1997 appellant, then a 50-year-old motor vehicle operator, sustained a traumatic injury to his back while in the performance of duty. The Office accepted appellant's claim for low back sprain.[2] Appellant stopped working the day of his injury and he received appropriate wage-loss compensation.[3] The Office placed appellant on the periodic compensation rolls effective August 16, 1998.

Appellant began participating in an Office sponsored vocational rehabilitation program on November 21, 2000. The rehabilitation counselor designed a plan directed at securing possible employment as a security guard, cashier or dispatcher. In determining appellant's physical limitations, the Office relied on the September 18 and December 19, 2000 findings of Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon and impartial medical specialist. On February 23, 2001 the Office approved the rehabilitation plan. Appellant received 90 days of job placement assistance. However, he was unable to secure employment during that timeframe.

By decision dated July 19, 2001, the Office found that the constructed position of cashier, with weekly earnings of $330.00, represented appellant's wage-earning capacity.[4] The Office reduced appellant's wage-loss compensation to reflect his ability to earn wages as a cashier.

Appellant requested an oral hearing, which was held January 28, 2002. He submitted a January 11, 2002 report from his treating physician, Dr. David Wren, Jr., an orthopedic surgeon, who diagnosed chronic lumbar disc disorder with lumbar radiculitis involving both legs.[5] He advised that appellant was unable to return to any form of employment pending further evaluation. In follow-up reports dated February 15 and March 25, 2002, Dr. Wren found appellant totally disabled due to his back condition. In a decision dated April 17, 2002, the Office hearing representative affirmed the July 19, 2001 decision.

On December 10, 2002 appellant requested reconsideration. He submitted a June 19, 2002 magnetic resonance imaging scan of the lumbar spine and three additional reports from Dr. Wren dated July 22, September 5 and November 7, 2002, that stated that appellant remained totally disabled. The Office reviewed the claim on the merits and in a decision dated December 18, 2002, the Office denied modification of the prior decisions.

On February 28, 2003 appellant again requested reconsideration. He submitted a December 2, 2002 decision from the Social Security Administration (SSA), which found him disabled as of December 12, 1997. Appellant also submitted a document describing various

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[2] Appellant sustained two prior employment-related back injuries on May 15, 1990 (A13-0923844) and June 6, 1995 (A13-1077749), which the Office had previously accepted for low back strain and lumbar strain.

[3] Appellant was a temporary employee and his appointment with the employing establishment expired December 22, 1997.

[4] The Office issued a notice of proposed reduction of compensation on June 14, 2001.

[5] On October 25, 2001 the Office granted appellant's request to change treating physicians from Dr. Michael K. Park to Dr. Wren.

revisions to the Department of Labor's *Dictionary of Occupational Titles* (DOT). Appellant submitted a February 19, 2003 statement from Sylvia R. Johnson indicating that, in an unrelated matter, appellant's rehabilitation counselor, Michael Haag, had reportedly not verified the availability of various positions gleaned from newspaper advertisements and Internet job sites. The Office also received 11 pages of excerpts from a 62-page unsigned and undated decision of a U.S. Magistrate, who referenced the participation of Dr. Swartz as an impartial medical examiner in an unrelated civil matter involving a private insurance carrier. Appellant submitted a September 8, 1999 article from *The Wall Street Journal* concerning the civil suit involving the insurance carrier and Dr. Swartz. Appellant resubmitted Dr. Wren's July 22, 2002 report and an April 28, 2003 report. By decision dated May 14, 2003, the Office denied appellant's February 28, 2003 request for reconsideration.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act, the Office has the discretion to reopen a case for review on the merits.[6] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must 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 (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[7] Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[8]

ANALYSIS

Appellant's February 28, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[9]

With respect to the third requirement, that the information submitted constitute relevant and pertinent new evidence not previously considered by the Office, appellant submitted, among other things, two reports from Dr. Wren dated July 22, 2002 and April 28, 2003. The July 22, 2002 report was previously of record and considered by the Office in its December 18, 2002 decision and the April 28, 2003 report is merely repetitious of Dr. Wren's several earlier reports. Consequently, neither the July 22, 2002 report nor the April 28, 2003 report constitutes a basis

[6] 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.606(b)(2) (1999).

[8] 20 C.F.R. § 10.608(b) (1999).

[9] 20 C.F.R. § 10.608(b)(2)(i) and (ii) (1999).

sufficient to reopen the claim for merit review.[10] Appellant also submitted a December 2, 2002 SSA disability determination. The Office is not bound by such a finding as the Act and the SSA have different standards of medical proof on the question of disability. Therefore, the SSA decision is not a sufficient basis to reopen the claim.[11]

The excerpts from the court decision and *The Wall Street Journal* article were submitted in support of appellant's allegation that Dr. Swartz was biased. Appellant previously alleged bias on the part of Dr. Swartz and has argued that the Office should disregard his opinion concerning appellant's physical limitations. The documents submitted on reconsideration regarding the involvement of Dr. Swartz in an unrelated civil matter do not establish bias on the part of the doctor relevant to this claim. The information appellant provided is of a general nature and is not pertinent to appellant's claim under the Act nor does it advance a relevant legal argument.

Appellant also cited excerpts from the DOT in support of his argument that the cashier position is classified as light work. The rehabilitation specialist properly identified the selected position of cashier as light work. Inasmuch as the proper classification of the selected position is not at issue, the excerpts from the DOT are not relevant on reconsideration. Lastly, Ms. Johnson's February 13, 2003 statement is similarly not relevant to the instant claim. She repeated what a third party told her about appellant's rehabilitation counselor's actions in an unrelated matter. Whether Mr. Haag failed to verify the availability of other positions in a separate matter does not bear upon his actions in this claim. Accordingly, this information is insufficient to warrant reopening the claim for merit review. As appellant did not submit any relevant and pertinent new evidence, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[12]

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied appellant's February 28, 2003 request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's February 28, 2003 request for reconsideration.

[10] Evidence that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening the claim. *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

[11] *See generally Freddie Mosley*, 54 ECAB ___ (Docket No. 02-1915, issued December 19, 2002) (entitlement to benefits under another act does not establish entitlement to benefits under the Act).

[12] 20 C.F.R. § 10.608(b)(2)(iii) (1999).

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 16, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member