

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAUL A. FLORES and DEPARTMENT OF THE AIR FORCE,
KELLY AIR FORCE BASE, TX

*Docket No. 03-1752; Submitted on the Record;
Issued January 6, 2004*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

On July 28, 1989 appellant, then a 36-year-old electronic mechanic, filed a traumatic injury claim alleging that on July 27, 1989 he hurt his lower back when he attempted to lift the guts of a "181" box. Appellant stopped work on July 28, 1989.

The Office accepted appellant's claim for a lumbar strain and a herniated nucleus pulposus at L5-S1, and authorized surgery which was performed on January 25, 1990. On April 11, 1991 appellant returned to light-duty work as a clerk for two hours per day. By decision dated July 11, 1991, the Office found that appellant's actual earnings as a clerk fairly and reasonably represented his wage-earning capacity pursuant to 5 U.S.C. § 8106.

On March 15, 2002 appellant filed a claim alleging that he sustained a recurrence of disability on April 26, 2001 accompanied by a May 7, 2001 surgical report by Dr. Fernando T. Avila, a Board-certified anesthesiologist, regarding his back surgery and Dr. Avila's responses to questions.

By decision dated June 14, 2002, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability in or after April 2001 causally related to his July 27, 1989 employment injury. In a May 22, 2003 letter, appellant, through his representative, requested reconsideration.

By decision dated June 3, 2003, the Office denied appellant's request for a merit review of his claim on the grounds that it neither included new and relevant evidence nor advanced a point of law not previously considered, and thus, it was insufficient to warrant review of its prior decision.

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.¹ As appellant filed his request for an appeal on July 2, 2003 the only decision before the Board is the June 3, 2003 decision denying his request for a merit review.

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

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,² the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

In support of his request for reconsideration, appellant submitted several reports and letters of Dr. Avila. In a December 22, 2000 report, Dr. Avila diagnosed lumbosacral radiculopathy/post laminectomy syndrome, increased pain and a recurrence of appellant's original injury. Dr. Avila's May 7, 2001 surgical report indicated that appellant underwent surgery on April 26, 2001 to insert dual dorsal column stimulator trial leads. In a January 28, 2002 letter, Dr. Avila stated that appellant's ability to return to his light-duty clerk position for two hours a day following surgery on April 26, 2001 was uncertain in response to questions posed by the Office. He further stated that the surgery was not successful and that appellant had been scheduled for a functional capacity examination on February 1, 2002. Dr. Avila diagnosed lumbosacral radiculopathy post laminectomy syndrome and weakness of the left knee. He indicated that appellant sustained a recurrence of his original injury and a failed dorsal column stimulator trial. Dr. Avila's December 22, 2000 and May 7, 2001 reports and his January 28, 2002 letter were previously of record and considered by the Office. 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.⁵

Dr. Avila's reports dated January 22, February 21 and 28, March 21 and April 18 2001, and October 23, November 20 and December 18, 2002 revealed a diagnosis of lumbosacral radiculopathy/post laminectomy syndrome, increased pain and a recurrence of appellant's

¹ 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(1)-(2).

⁴ *Id.* at § 10.607(a).

⁵ See *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

original injury. His April 17, May 20, June 19, July 17, August 26 and September 25, 2002 reports reiterated the above-noted diagnoses, and noted the additional diagnoses of failed dorsal column stimulator trial, gingivitis secondary to chronic opiate usage and spastic myofascial low back pain. The Board finds that Dr. Avila's reports are repetitive in nature of his other reports previously considered by the Office in its June 14, 2002 decision⁶ and found deficient.

Dr. Avila's January 14, 2002 letter advised the Office that appellant was being treated for chronic pain syndrome that was related to his post laminectomy syndrome which was secondary to a 1989 work-related injury and requested that the Office provide appropriate dental care to appellant because his gingivitis and resultant tooth decay were caused by long-term use of opiate analgesic medications used to treat his pain is repetitive in nature.

Although Dr. Avila's April 17, May 20, June 19, July 17, August 26 and September 25, 2002 reports and January 14, 2002 letter revealing that appellant had gingivitis due to chronic opiate usage constitutes new evidence, it is irrelevant as it did not address the issue in this case of whether appellant sustained a recurrence of disability on or after April 26, 2001 causally related to his July 27, 1989 employment injury.

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 new evidence not previously considered by the Office, the Office properly denied his request for reconsideration.

The June 3, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 6, 2004

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁶ *Id.*