United States Department of Labor
Employees' Compensation Appeals Board

BOBBY D. BIGGS, Appellant	)	
and	)	**Docket No. 04-948**
	)	**Issued: July 29, 2004**
DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, NAVAL AIR STATION, Pensacola, FL, Employer	)	

Appearances:
Bobby D. Biggs, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 25, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decision dated February 26, 2003, which denied his request for merit review. Because more than one year has elapsed between the last merit decision dated January 3, 2003 and the filing of this appeal on February 25, 2004 the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

On November 1, 2002 appellant, then a 32-year-old meat cutter, alleged that on that day he injured his low back while trying to stop a palette of stacked meat from falling. He stopped work on that day. The employing establishment noted that appellant was subject to a reduction-

in-force action which would abolish his position on November 30, 2002 and that the medical evidence submitted in support of this claim was related to prior claims and did not establish a November 1, 2002 traumatic injury. In a duty status report dated November 1, 2002, Dr. Robert M. Sackheim, appellant's treating physician and Board-certified in anesthesiology, with a specialty in pain management, noted findings of lumbar trigger points and neck pain and checked a box "yes," indicating that his condition was based on a work-related injury that day as well as a 1993 injury.

In a request for authorization for examination or treatment report also dated November 1, 2002, Dr. Sackheim noted a 1993 low back injury, diagnosed numerous lumbar trigger points and checked a box "yes" indicating that appellant's increased back pain was caused or aggravated by a work-related injury that day. He placed appellant on total disability until December 1, 2002. On November 13, 2002 the employing establishment listed his seven prior back injuries dating from January 2, 1997 to May 3, 2002.

The record includes a September 27, 2002 notice from the employing establishment notifying appellant that his current position as a full-time meat cutter was identified for abolishment and that he was being offered a part-time position as a meat cutter effective December 1, 2002. The employing establishment advised appellant that, if he declined the job offer, he would be separated from the federal service effective midnight November 30, 2002.

On December 2, 2002 the Office notified appellant that it needed more information to determine his eligibility for benefits and advised him to submit a brief paragraph describing how his injury occurred. It also asked for a detailed narrative from his doctor with an explanation on how his current condition was the result of his federal employment. The Office also advised Dr. Sackheim to address whether any of appellant's prior back claims impacted on his current condition, whether it was an aggravation of a prior injury and, if so, whether it was permanent or temporary. The Office required Dr. Sackheim to address how the current condition was work related, particularly since the first work-related injury occurred in 1993.

On December 10, 2002 appellant then submitted a claim for compensation for wage loss beginning November 2, 2002. The employing establishment indicated that he received continuation of pay from November 2 to 30, 2002 and that he was separated from his employment effective December 1, 2002 after he refused a part-time job offer as a result of a reduction-in-force action.

In a medical report dated December 20, 2002, Dr. P.K. Garg, a Board-certified family practitioner, noted that appellant rated his low back pain as 9 out of a 10 maximum pain scale.

By decision dated January 3, 2003, the Office found that the November 1, 2002 incident occurred as alleged, but denied appellant's claim on the grounds that the medical evidence failed to support a medical condition related to the established November 1, 2002 incident.

On January 17, 2003 appellant requested reconsideration. In support of his request, he submitted a November 1, 2002 follow-up report from Dr. Sackheim, who related appellant's condition to his history of injuries starting in 1993 and the incident that day, noting further his

neck and shoulder pain. He diagnosed a chronic low back pain in exacerbation and chronic irritability and placed him on total disability for one week.

In a November 11, 2002 report, Dr. Sackheim requested authorization to provide trigger point injections for chronic low back pain. He also diagnosed left leg pain. On December 16, 2002 Dr. Sackheim requested authorization for magnetic resonance imaging (MRI) scans for chronic low back and left leg pain. He again related appellant's history of back injuries from 1993, noting that he had been out of work six times nine years and that he was currently in a no duty work status. On January 3, 2003 Dr. Sackheim diagnosed low back pain with left sciatica and prescribed additional medications. On January 8, 2003 he stated that appellant had had intermittent low back pain for several years and he now had acute exacerbations after stacking meat. Dr. Sackheim also noted that a 1995 lumbar MRI scan showed degenerated discs. However, he indicated that appellant's pain findings were subjective only in the lumbar and left buttock region, noting that he had not had a recent MRI scan. Dr. Sackheim checked a box "yes" indicating that by patient's history the condition was caused or aggravated by employment. He also requested authorization for epidural injections and a lumbar MRI scan; however, Dr. Sackheim stated that, if appellant were avoiding treatment, he would terminate the total disability status and medical treatment. Appellant was released to return to light duty on March 3, 2003.

On January 29, 2003 Dr. P.K. Garg stated that appellant had low back pain with radiculopathy and was disabled from December 20, 2002 with an unknown prognosis. In a follow-up report dated February 26, 2003, he stated that appellant's back pain had not improved and referred him for a functional capacity evaluation.

On February 26, 2003 the Office denied review of appellant's request for reconsideration on the grounds that he did not submit new and relevant evidence and that the evidence which was submitted was repetitious and did not support a review of the merits of his claim.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[1] the Office's regulation 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) cinstitute relevant and pertinent new evidence not previously considered by the Office.[2] 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.[3] The Board has found that the

[1] 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).

[2] 20 C.F.R. § 10.606(b)(2).

[3] 20 C.F.R. § 10.607(a).

imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[4]

ANALYSIS

In the present case, appellant presented no evidence that the Office erroneously applied or interpreted a point of law, nor did he advance a relevant legal argument not previously considered by the Office.

However, with respect to the third element, the submission evidence not previously considered by the Office, the record reveals that appellant submitted new evidence which requires review to determine whether it is relevant and pertinent to the issue in this claim.

Dr. Sackheim, appellant's treating physician and a specialist in pain management, submitted reports dated November 1 and 11, December 16, 2002 and January 3 and 8, 2003, which were not part of the record before the Office at the time of its January 3, 2003 decision. These reports are insufficient to require a merit review as they essentially repeat evidence previously of record, noting for example that appellant had neck and shoulder pain, an exacerbation of low back pain with left sciatica, chronic irritability and left leg pain. Dr. Sackheim also noted in his January 8, 2003 report, that his diagnosis of low back pain was based on appellant's subjective symptoms as there were no diagnostic tests to support objective findings. He also noted by checking a box "yes" that appellant's condition was work related, which he had also checked in two November 1, 2002 reports, which the Office had reviewed previously. Further, Dr. Garg's January 29, 2003 reports noting pain were also duplicative of prior reports. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case for further merit review.[5] Appellant, thus, has failed to show that the Office erred in interpreting the law and regulation governing his entitlement to compensation under the Act and has not advanced any relevant legal argument not previously considered by the Office. Likewise, he failed to submit relevant or pertinent new evidence not previously considered. Inasmuch as appellant failed to meet any of the three requirements for reopening his claim for merit review, the Office properly denied his reconsideration request on February 26, 2003.[6]

CONCLUSION

The Board finds that the Office properly denied appellant's request for merit review, pursuant to 5 U.S.C. § 8128(a), of its January 3, 2003 decision denying his claim for compensation.[7]

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[4] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[5] *See James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

[6] 20 C.F.R. § 10.606(b)(2).

[7] The Board notes that this case record contains evidence which was submitted subsequent to the Office's February 26, 2003 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 26, 2003 is affirmed.

Issued: July 29, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member