United States Department of Labor
Employees' Compensation Appeals Board

JAMES R. GARDNER, Appellant	)	
and	)	**Docket No. 04-1106**
	)	**Issued: September 8, 2004**
U.S. POSTAL SERVICE, EQUIPMENT CENTER, Edgewater, NJ, Employer	)	

Appearances:
Ronald S. Webster, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 22, 2004 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated February 18, 2004, which denied his request for reconsideration. Because more than one year has elapsed between the last merit decision dated March 13, 2002 and the filling date of this appeal on March 22, 2004, 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) and 501.6(c) and (d).

ISSUE

The issue is whether the Office abused its discretion by denying appellant's request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This is appellant's third appeal before the Board. In a February 23, 1996 decision, the Board affirmed a January 3, 1994 Office hearing representative's decision denying authorization

for back surgery.[1] In an April 1, 2003 decision, the Board affirmed the Office decisions dated March 13, 2002 and July 30, 2001 which affirmed the February 26, 1999 termination of appellant's wage-loss compensation.[2] The facts and circumstances of the case are set fourth in the Board's prior decisions and are hereby incorporated by reference.

By letter dated May 21, 2003, appellant's attorney requested reconsideration and argued that there had been no conflict in the medical opinion evidence that required obtaining an impartial medical examiner's opinion.

Appellant also submitted a March 31, 1998 report from Dr. Kenneth A. Levitsky, a Board-certified orthopedic surgeon.

By decision dated February 18, 2004, the Office denied appellant's request for reconsideration, finding that the argument presented carried no weight as the facts demonstrated a conflict in medical opinion evidence between Dr. Mario Gonzalez, appellant's attending physician and an orthopedic surgeon, and Dr. Levitsky, a Board-certified orthopedic surgeon and Office second opinion referral, requiring referral to Dr. Michael Davoli, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. Dr. Levitsky's March 31, 1998 report was repetitious as it had been previously submitted to the record and considered by both the Office and the Board. The argument and evidence was insufficient to warrant reopening appellant's case for further merit review.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[3] does not give a claimant the right upon request or impose a requirement upon the Office to review a final decision of the Office awarding or denying compensation.[4] Section 8128(a) of the Act, which pertains to review, vests the Office with the discretionary authority to determine whether it will review a claim following issuance of a final Office decision. Section 8128(a) of the Act states:

> "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 previously awarded; or
> (2) award compensation previously refused or discontinued."[5]

[1] Docket No. 94-1223 (issued February 23, 1996).

[2] Docket No. 02-1659 (issued April 1, 2003).

[3] 5 U.S.C. § 8101 *et seq*; *see* 5 U.S.C. § 8128(a).

[4] *Compare* 5 U.S.C. § 8124(b)(1), which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

[5] 5 U.S.C. § 8128(a).

Although it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128,[6] the Office, through regulations, has placed limitations on the exercise of that discretion, with respect to a claimant's request for reconsideration. By these regulations the Office has stated that it will reopen a claimant's case and review the case on the merits under 5 U.S.C. § 8128(a), upon request by the claimant, whenever the claimant's application for review meets the specific requirements set forth in 20 C.F.R § 10.606(b).

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a relevant legal argument not previously considered by the Office; or by constituting relevant and pertinent evidence not previously considered by the Office. 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.[7] Evidence or argument that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[8]

ANALYSIS

In this case, appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b) to require the Office to open his claim for further review on its merits. He did not allege that the Office erroneously applied or interpreted a point of law. Appellant also did not advance a legal argument not previously considered. The Board previously determined that a conflict in medical opinion evidence existed between Dr. Gonzalez and Dr. Levitsky prior to the referral of appellant to Dr. Davoli for an impartial medical opinion. As this matter was previously adjudicated by the Board, absent new medical evidence the subject matter reviewed in the April 1, 2003 decision is *res judicata*.[9] Appellant did not submit new relevant or pertinent medical evidence not previously considered by the Office. Dr. Levitsky's March 31, 1998 report had been previously submitted to the record and considered by both the Office, in the February 26, 1999 decision, and the Board in the April 1, 2003 decision. This evidence is repetitious and insufficient to warrant reopening appellant's case for further merit review.

CONCLUSION

As appellant did not meet the requirements to warrant reconsideration of his case on its merits under 20 C.F.R. § 10.606(b), under section 10.608(b) the Office properly denied his application for further review without reopening the case or reviewing the merits of the claim.

[6] *See Charles E. White*, 24 ECAB 85, 86 (1972).

[7] 20 C.F.R. § 10.608(b).

[8] *Helen E. Paglinawan*, 51 ECAB 591 (2000).

[9] *See Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998); *Hugo A. Mentink*, 9 ECAB 628 (1953).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 18, 2004 be affirmed.

Issued: September 8, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member