United States Department of Labor
Employees' Compensation Appeals Board

CLYDE D. JAMES, Appellant	)	
and	)	**Docket No. 05-1169**
	)	**Issued: December 14, 2005**
DEPARTMENT OF THE NAVY, NAVAL AIR STATION ALAMEDA, Alameda, CA, Employer	)	

Appearances:
Clyde D. James, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On May 3, 2005 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated May 2, 2004 which denied merit review. Because more than one year has elapsed between the last merit decision of the Office dated May 8, 2003 and the filing of this appeal on May 3, 2005, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has been before the Board previously. In an April 3, 1998 decision, the Board reversed a September 14, 1994 Office decision which found that the selected position of security

guard fairly and reasonably represented appellant's wage-earning capacity.[1] The law and the facts of the previous Board decision are incorporated herein by reference.[2]

Appellant thereafter worked intermittently as a longshoreman operating a motorized vehicle and also received supplemental wage-loss compensation. On November 29, 2001 he filed a recurrence claim, stating that he had never recovered from his original injury and his condition had worsened such that he had chronic arthritis, muscle, bone and joint pain, elevated blood pressure, stress, diabetes and impotence. He noted that he had to use a cane for walking.

By decision dated February 28, 2002, the Office denied that appellant sustained a recurrence of disability. He timely requested a hearing that was held on October 31, 2002 where he testified that he had not worked since March 2002. In a December 26, 2002 decision, an Office hearing representative found that appellant failed to meet his burden of proof to establish that he had an employment-related emotional condition, diabetes or high blood pressure condition but remanded the case for further development regarding appellant's back condition.

The Office referred appellant to Dr. Aubrey A. Swartz, Board-certified in orthopedic surgery, for a second opinion evaluation. Based on Dr. Swartz' examination, by decision dated May 8, 2003, the Office found that appellant failed to establish a recurrence of disability based on a low back condition. On February 26, 2004 appellant requested reconsideration, arguing that the Office had the burden to terminate compensation benefits as a lumbar strain had been accepted as employment related. He also submitted form reports from his attending orthopedic surgeon, Dr. David Wren, Jr., dated May 19, September 11 and December 31, 2003 and January 22, 2004. Each of these reports contained the same typed diagnoses of shoulder bursitis-tendinitis, shoulder adhesive capsulitis and lumbar disc disease, and included handwritten notes describing symptoms of a pain and reduced motion of the right shoulder and lower back.

In a May 2, 2004 decision, the Office denied appellant's reconsideration request, finding that the arguments presented was irrelevant regarding whether appellant established a recurrence of his back condition and finding that Dr. Wren's reports were similar to those previously reviewed.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[3] vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[4] Section 10.608(a) of the Code of

[1] *Clyde James*, 49 ECAB 440 (1998) The record further indicates that on February 6, 1984 appellant was granted a schedule award for a 27 percent permanent loss of use of the right arm.

[2] The accepted conditions were right acromioclavicular shoulder separation with nerve injury and surgery and lumbar strain.

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8128(a).

Federal Regulations provides that 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).[5] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (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.[6] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[7]

ANALYSIS

The only decision before the Board in this appeal is the decision of the Office dated November 9, 2004 denying appellant's application for review. Because more than one year had elapsed between the date of the Office's most recent merit decision dated May 8, 2003, and the filing of his appeal with the Board on May 3, 2005, the Board lacks jurisdiction to review the merits of his claim.[8]

Appellant argued on reconsideration that the burden of proof rested with the Office regarding his accepted low back strain. While the Office accepted that appellant sustained a low back strain in 1979, his disability since that time has been based on an accepted right shoulder condition. Appellant filed a recurrence claim for his back condition in 2001. In the merit decision dated May 8, 2003, the Office reviewed the medical evidence of record and credited the second opinion examiner, Dr. Swartz, regarding appellant's current back condition, noting that Dr. Swartz reviewed the medical evidence of record, a statement of accepted facts, and performed a physical examination. He diagnosed degenerative disc disease of the lumbar spine and concluded that it was not related to appellant's employment injury. The Office, therefore, found that appellant failed to establish a recurrence of disability and the decision of the Office dated November 9, 2004 will be affirmed.

The Board finds that there is no evidence that the Office erroneously applied or interpreted a specific point of law in rendering its November 9, 2004 decision. The accepted back condition was for a lumbar strain. While appellant now suffers from lumbar degenerative disc disease, this has not been accepted as employment related. Appellant's contentions on reconsideration therefore do not constitute a relevant new argument, and he was 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]

[5] 20 C.F.R. § 10.608(a).

[6] 20 C.F.R. § 10.608(b)(1) and (2).

[7] 20 C.F.R. § 10.608(b).

[8] 20 C.F.R. § 501.3(d)(2).

[9] 20 C.F.R. § 10.606(b)(2).

With respect to the third above-noted requirement under section 10.606(b)(2), while appellant resubmitted several form medical reports from Dr. Wren, these reports are essentially duplicates of reports previously reviewed by the Office. The Board has long held that 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.[10] Appellant therefore did not submit relevant and pertinent new evidence not previously considered by the Office, and the Office properly denied his reconsideration request.

CONCLUSION

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

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 2, 2004 be affirmed.

Issued: December 14, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

[10] *James A. Castagno*, 53 ECAB 782 (2002); *Eugene F. Butler*, 36 ECAB 393 (1984).