

FACTUAL HISTORY

This case has previously been on appeal before the Board.¹ Appellant, a former mail clerk, has an accepted claim for exacerbation of partial rotator cuff tear of the right shoulder, which arose on or about October 4, 1979. Appellant received appropriate wage-loss compensation and a schedule award for four percent impairment of the right upper extremity. The employing establishment terminated appellant's employment on May 11, 1990.²

In March 1996, appellant sought authorization for medical treatment and the Office advised that he would have to file a claim for recurrence of disability. On May 13, 1996 appellant filed a notice of recurrence of disability alleging that he sustained a recurrence of disability in November 1989. He later filed claims for compensation (Form CA-7) for wage loss beginning March 1, 1990. In a letter dated January 30, 1997, the Office advised appellant that his claim had been expanded to include C6-7 radiculopathy as an accepted condition.³ By decision dated March 6, 1997, the Office denied appellant's claim for recurrence of disability. The Office subsequently denied modification in a decision dated March 30, 1998. Appellant again requested reconsideration on June 2, 1998, which the Office denied on August 25, 1998. By decision dated March 22, 2001, the Board found that the Office improperly denied the June 2, 1998 request for reconsideration. The Board set aside the Office's August 25, 1998 decision and remanded the case for review of the claim on the merits. Following the Board's March 22, 2001 decision, the Office reviewed the merits of the November 1989 claimed recurrence on three separate occasions and, in each instance, denied modification. The Office issued its most recent merit decision on June 11, 2003. Thereafter, the Office received the results of a May 3, 2003 cervical EMG, which was interpreted to be "within normal limits." The Office also received the May 21, 2003 treatment notes from Dr. Jacob Green, a Board-certified neurologist, who diagnosed cervical pain secondary to arthritis.

On June 2, 2004 appellant requested reconsideration. His request was accompanied by a February 6, 1990 letter from the employing establishment advising appellant of its intention to remove him from employment. Appellant also submitted Department of Veterans Affairs (VA) medical records for August 23, 2001, January 25 and February 26, 2002. Additionally, appellant provided a copy of an October 31, 2001 VA award of disability pension benefits for degenerative disc disease of the cervical spine, status post decompression of the right shoulder and onychomycosis of the toenails and hands. By decision dated June 22, 2004, the Office denied appellant's request for reconsideration.

¹ Docket No. 99-507 (issued March 22, 2001). The Board's March 22, 2001 decision is incorporated herein by reference.

² The reason for his termination was a "failure to maintain a regular work schedule -- [absence without leave]." Appellant had reportedly been absent from duty since October 23, 1989.

³ This action appears to have been based on the January 23, 1997 treatment records of Dr. Margaret J. Ripley, a Board-certified orthopedic surgeon, who reported that a recent electromyography (EMG) and nerve conduction study revealed C6-7 radiculopathy. She had last seen appellant in May 1990 when she provided an impairment rating for schedule award purposes.

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.⁴ 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.⁵ 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.⁶

ANALYSIS

Appellant's June 2, 2004 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).⁷

Appellant also failed to satisfy the third requirement under section 10.606(b)(2); that the information submitted constitute relevant and pertinent new evidence not previously considered by the Office. With the exception of the recent EMG results and Dr. Green's May 21, 2003 treatment notes, the majority of the evidence appellant submitted with his request for reconsideration was previously considered by the Office. Specifically, the February 6, 1990 letter from the employing establishment regarding the impending termination for cause was part of the record when the Office initially denied the claim on March 6, 1997. Additionally, the VA medical records dated August 23, 2001, January 25 and February 26, 2002, as well as the October 31, 2001 disability pension award were considered by the Office in its June 21, 2002 denial of modification. This evidence is insufficient to reopen the claim for further merit review.⁸

Regarding the May 3, 2003 cervical EMG results and Dr. Green's May 21, 2003 treatment notes, this evidence is also insufficient to warrant reopening the record for merit review. The EMG results were found to be within normal limits, and thus, do not establish

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(2) (1999).

⁶ 20 C.F.R. § 10.608(b) (1999).

⁷ 20 C.F.R. §§ 10.606(b)(2)(i) and (ii) (1999).

⁸ 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. *Sandra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

disability. While Dr. Green diagnosed cervical pain secondary to arthritis, he did not specifically relate this condition to appellant's October 4, 1979 employment injury or his claimed recurrence of disability in November 1989. Because Dr. Green's May 21, 2003 treatment notes do not address the relevant issue on reconsideration, this evidence is insufficient to require merit review of the claim. Accordingly, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).⁹ 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 Office properly denied the June 2, 2004 request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a review of the merits of his claim.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁹ 20 C.F.R. § 10.606(b)(2)(iii) (1999).