

when he slipped on a step while performing a preoperative sanitation inspection on the hog kill floor. The claim was accepted for low back strain. On February 26, 1981 the Office issued a decision reducing appellant's compensation benefits based on his ability to work as a computer programmer.¹ By decision dated August 24, 1982 and finalized August 30, 1982, the hearing representative affirmed the Office's decision.

On November 10, 1999 appellant filed a claim alleging that he sustained a recurrence of the October 14, 1971 injury on March 1, 1986. By decision dated March 5, 2002, the Office denied appellant's claim for a recurrence commencing on March 1, 1986 as it found that he had failed to establish that he was disabled by the work-related condition from performing the job as a computer programmer. The Office based its decision on the report of the impartial medical examiner, Dr. Stanley E. Donahoo, a Board-certified orthopedic surgeon, who concluded that appellant had no employment-related disability as of March 1, 1986 as his condition had stabilized "by the time of his disability rating as a computer programmer." On March 4, 2003 appellant requested reconsideration. After reviewing the case on the merits, the Office denied reconsideration by decision dated June 4, 2003.

By letter dated June 4, 2004, appellant again requested reconsideration. Appellant, through his attorney, asked his Board-certified family practitioner, Dr. Brian G. Jones, to comment on the report of Dr. Donahoo and the Office's decision. Dr. Jones noted that he did not agree with Dr. Donahoo's report. Specifically, he noted:

"I believe that [appellant] suffers from chronic low back pain secondary to pain generated from the L4, 5 degenerative disc that I believe is deteriorating more rapidly as a result of the fusion at L5, S1. Dr. Donahoo opines that this degeneration of a disc adjacent to a fused disc is not likely to happen, but he admits that his information comes from literature based mostly on the cervical, not lumbar spine. Appellant's pain location of low back radiating to the buttocks is consistent with the L4-5 disc degeneration."

Dr. Jones opined that, due to appellant's chronic pain, appellant could be employed in any capacity. Appellant also submitted additional reports by Dr. Jones dated May 13 through November 24, 2003. These reports address appellant's worsening pain at the time of these reports. Appellant also submitted a report from a computerized tomography (CT) scan of appellant's spine dated June 4, 2004 wherein Dr. Darian W. Morray, a Board-certified radiologist, concluded that, when compared to the 2001 and 2003 studies, the degree of disc height loss and spondylitic alteration at L4-5 progressed between the two examinations, but that the diffuse annular bulging at L4-5 and the concomitant L4-5 neural foraminal narrowing did not appreciably change. Finally, appellant submitted physical therapy notes, from Dr. Jones relative to treatment of appellant's back pain.

By decision dated June 17, 2004, the Office denied appellant's request for reconsideration with reviewing the case on the merits.

¹ The Office found that had appellant complied with vocational rehabilitation efforts, he would have reasonably been expected to obtain employment as a computer programmer.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.²

ANALYSIS

In support of his June 4, 2004 request for reconsideration, appellant submitted medical reports by Dr. Jones indicating that appellant was experiencing increased pain in his back. He also submitted answers to questions by Dr. Jones wherein he indicated that appellant's pain deteriorated more rapidly as a result of the L5-S1 fusion. Finally, appellant submitted physical therapist reports from Dr. Jones relative to treatment for back pain and a report on a CT scan of appellant's spine.

The Board notes that these reports are not relevant to the main issue of this case and therefore do not require reopening of appellant's case for merit review.³ The issue in this case is whether the Office properly determined that appellant established a recurrence of disability commencing on March 1, 1986 due to his inability to work as a computer programmer. The new reports are not relevant to the issue in that no physician rendered an opinion on appellant's medical condition as of March 1, 1986, whether such condition was causally related to the accepted October 14, 1971 employment injury or indicated whether appellant could perform the computer programmer position at that time.

As appellant has not shown that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered or submitted relevant and pertinent new evidence, the Office, in its June 17, 2004 decision properly refused to reopen appellant's claim for a review of the merits.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration of his claim pursuant to 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.606(b)(2)(i-iii).

³ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 17, 2004 is affirmed.

Issued: November 16, 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