

pay from January 14 to February 26, 2003, after which the Office began payment of compensation for temporary total disability.

In an April 10, 2003 report, appellant's attending physician, Dr. Thomas A. Scilaris, a Board-certified orthopedic surgeon, diagnosed cervical radiculopathy, lumbar derangement and right shoulder impingement. He stated that he remained totally disabled and recommended continuation of physical therapy to his shoulder, neck and back. In a June 5, 2003 report, Dr. Scilaris stated that a magnetic resonance imaging (MRI) scan of appellant's shoulder revealed impingement and acromioclavicular joint arthropathy and tendinitis. He stated that appellant was totally disabled and recommended continued physical therapy to the neck and low back and surgery to the right shoulder.

On October 3, 2003 the Office referred appellant, his medical records and a statement of accepted facts to Dr. Donald Forman, a Board-certified orthopedic surgeon, for a second opinion evaluation of his condition and his ability to work. In an October 27, 2003 report, Dr. Forman stated that appellant had complaints of pain in the cervical spine, lumbosacral spine and left leg, but that he found no objective physical findings to substantiate his complaints. He concluded that appellant had made a satisfactory and full recovery from his injury, that he was capable of returning to his usual occupation as a tractor trailer driver for eight hours per day and that there was no need for further physical therapy or other form of treatment, including right shoulder surgery as he had satisfactory motion and motor power of the right upper extremity.

In an October 21, 2003 memorandum, a postal inspector stated that on May 13, 14 and 22 and June 20, 2003 appellant was videotaped driving his vehicle without difficulty for extended periods, vigorously cleaning his vehicle and forcefully pushing the 4,000-pound stalled vehicle repetitively from the curb into the street. The Office sent the videotape to Dr. Scilaris with a request for a supplemental opinion. In a November 14, 2003 report, he stated that his opinion was not affected by the videotape.

On February 13, 2004 the Office referred appellant, the case record, the videotape and a statement of accepted facts to Dr. Leon Sultan, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion between Dr. Scilaris and Dr. Forman. In a March 29, 2004 report, Dr. Sultan stated that his examination of appellant's cervical and thoracolumbar spine was unremarkable in that he was orthopedically stable and neurologically intact and that his examination of his right shoulder did not confirm the need for any surgery, as it was entirely within normal limits without any clinical signs of motion restriction or impingement. Dr. Sultan concluded that appellant had fully recovered from the effects of the January 7, 2003 injury and stated: "Based on today's examination of the spine and upper extremities and my observance of this gentleman in the course of videotape surveillance in May and June 2003, I cannot confirm that he is orthopedically disabled and unable to perform the duties of the position of a tractor trailer driver."

On April 14, 2004 the Office issued a notice of proposed termination of compensation on the basis that appellant had no continuing disability related to his January 7, 2003 employment injury. The Office noted that a videotape from May and June 2003 depicted him driving a vehicle for extended periods, vigorously cleaning a vehicle and forcefully pushing a stalled 4000-pound vehicle repetitively from the curb into the street. In an April 19, 2004 response,

appellant stated that he disagreed with the proposed action, as Dr. Forman and Dr. Sultan did not conduct a thorough examination or perform any tests and based their opinions on the videotape.

By decision dated May 24, 2004, the Office terminated appellant's compensation effective that date on the basis that the weight of the medical evidence, represented by the report of Dr. Sultan, established that he had no continuing disability due to his January 7, 2003 employment injury.

On May 28, 2004 appellant requested a hearing. He submitted additional evidence. In a February 27, 2004 report, Dr. Christopher Kyriakides, an osteopath, who is associated in practice with Dr. Scilaris, stated that, as a consequence of lower extremity weakness from his January 7, 2003 injury, appellant fell and fractured his ankle. In a May 6, 2004 report, Dr. Kyriakides stated:

“[Appellant] also relates to me that he has been videotaped pushing his car as well as shopping in a supermarket and I asked him regarding this and he states that he needed to go to a medical appointment and his car needed to be pushed several feet and was able to push the car although [he] states that he did this through his pain during the process. He states that he does not push a car on a regular basis, nor does he participate in many exertional activities. However, [appellant] also states that he needs to shop for himself, as he does not have a spouse that cooks for him and, therefore, needs to invariably go to the market to pick up food.”

In a June 29, 2004 report, Dr. Kyriakides stated that he was aware that appellant “was at one time able to push his car and shop in a supermarket,” but that he remained totally disabled.

In a September 17, 2004 letter, appellant's attorney, who he authorized to represent him on July 1, 2004, withdrew the request for a hearing and stated that appellant would request reconsideration within the statutory period allowed by law upon the collection of new and relevant evidence. The attorney also requested a copy of the case record, including any and all videotapes. On November 2, 2004 the Office provided appellant with a copy of the case record, not including the videotape.

In an April 19, 2005 letter, appellant's attorney requested reconsideration, contending that a careful review of the videotape revealed that the individual recorded engaging in the activities described in the postal inspector's memorandum was not appellant but his brother, who resembles him. Appellant's attorney contended that the videotape could not be used by the Office because it was not part of the Office's case record, that the Office had not undertaken any action to confirm the veracity of the videotaped occurrences and that Dr. Sultan's opinion was based on his review of the false videotape. Appellant submitted a September 13, 2004 report from Dr. Kyriakides that reproduced all the reports previously submitted and from Dr. Scilaris. Dr. Kyriakides then concluded: “In summary, it is my opinion, based on his history and physical examinations that there is reasonable degree of medical certainty that appellant's physical injuries were causally related to the work-related motor vehicle accident of January 7, 2003.” The record contains a May 28, 2005 decision of an arbitrator denying his grievance of the termination of his employment by the employing establishment. This decision noted that appellant's brother testified at a December 16, 2004 hearing and did closely resemble appellant,

but that the allegation that the videotape depicted his brother could not be raised initially at the arbitration hearing.

By decision dated October 24, 2005, the Office found that appellant's request for reconsideration was insufficient to warrant review of its prior decisions.¹ The Office found that the September 13, 2004 report from Dr. Kyriakides merely restated his previous opinions without providing detailed medical reasoning, that no evidence was submitted to support the allegation that the videotape was of appellant's brother and that the May 6, 2004 report from Dr. Kyriakides confirmed that it was appellant who was videotaped.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“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 awarded; or
- (2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office or by submitting relevant and pertinent new 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. 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.²

ANALYSIS

Appellant's attorney's April 19, 2005 request for reconsideration was accompanied by one piece of new evidence, the September 13, 2004 report from Dr. Kyriakides. This report, however, is essentially duplicative of reports already in the case record, only adding a conclusion on causal relation that had long been espoused by Dr. Scilaris and Dr. Kyriakides. This report is insufficient to warrant review of the merits of appellant's case.

The April 19, 2005 request for reconsideration also advanced the argument that the person videotaped by a postal inspector in May and June 2003 was not appellant, but was his brother. However, this contention is not a legal argument but rather a factual dispute. This factual

¹ With this decision the Office sent appellant a copy of the videotape.

² *Eugene F. Butler*, 36 ECAB 393 (1984).

allegation, standing alone, does not correct or establish that the history obtained by Dr. Kyriakides on May 6, 2004 was in error as to appellant's identity on the videotape. Appellant has not advanced a legal argument not previously considered by the Office and thus, the Office properly declined to reopen his case for further merit review.

CONCLUSION

As appellant did not meet any of the three requirements of 20 C.F.R. § 10.606(b)(2), the Office properly refused to reopen his case for further review of the merits of his claim.

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 14, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board