United States Department of Labor
Employees' Compensation Appeals Board

D'WAYNE AVILA, Appellant	)	
and	)	**Docket No. 06-366**
	)	**Issued: June 21, 2006**
DEPARTMENT OF THE NAVY, NORTH ISLAND NAVAL AIR STATION, San Diego, CA, Employer	)	

Appearances:
D'Wayne Avila, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 25, 2005 appellant filed a timely appeal from the August 22, 2005 nonmerit decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has no jurisdiction to review the merits of appellant's case.

ISSUE

The issue is whether the Office properly denied appellant's July 20, 2005 request for reconsideration.

FACTUAL HISTORY

On March 13, 1980 appellant, then a 32-year-old aircraft electrician, sustained an injury in the performance of duty after working in a cockpit in an awkward position for an extended period of time. He stopped work on March 17, 1980. On March 18 and 25, 1980 he saw Dr. Kenneth J. McGrath, a general practitioner, who noted a history of back strain and on examination reported spasm of back muscles. He diagnosed chronic back strain, recommended a

muscle relaxant, heat and rest and released appellant to resume regular duty beginning on or about April 1, 1980. The Office accepted this claim for chronic back strain.[1]

On April 15, 1980 appellant filed a claim alleging that he injured his back at 3:00 p.m. on April 8, 1980: "Before the start of work I was showing my car to another person, I noticed a[n] oil spot beneath it. I bent over and my back snapped." Appellant stopped work on April 8, 1980. He indicated that this was a recurrence of the previous injury. Appellant returned to regular duty on April 21, 1980.

A witness corroborated what happened on April 8, 1980:

> "At approximately 3:00 p.m., [appellant] was showing his car to me. It was parked outside of Building 94, adjacent to our work area. We were standing in the doorway inside of the building when we noticed an oil spot beneath the rear of the engine. The car had an exposed VW engine. [Appellant] walked outside and bent over to look and determine where it was leaking. When he bent over I heard a faint pop. When he asked for help, I went outside and helped him to the foreman's desk.
>
> "[Appellant] was not working on the (his) car at the time of injury. I was standing about ten (10) feet from him when the injury occurred."

A supervisor indicated that appellant clocked in at 2:28 p.m. on April 8, 1980 or 47 minutes before his regular work shift began at 3:15 p.m. The supervisor stated that when the alleged injury occurred appellant had not begun work or reported to his work site.

On May 8, 1980 Dr. Donald W. Hobbs, an orthopedic surgeon, diagnosed: (1) strain right paravertebral muscle, lower thoracic area, industrially-related incident of March 13, 1980 and aggravated by incident of April 8, 1980; and (2) compression fracture at T12, healed, old and nonindustrial. Dr. Hobbs anticipated a complete recovery without residual disability:

> "However, the patient freely admits that since he sustained the hereinabove-mentioned compression fracture at T12, he has been unable to sit for more than an eight[-]hour period without suffering recurrent low grade pain. His 'injury' actually represents repeated stress -- working in small or confined areas. Since he apparently has a low injury threshold, repetitions (in the future) can probably be expected."

Appellant returned to regular duty on April 21, 1980. He stopped work again on July 1, 1980 and filed a claim of recurrence.

In a decision dated September 24, 1982, the Office denied appellant's claim on the grounds that his April 8, 1980 injury occurred prior to the beginning of business and not within the scope of his duties.

[1] OWCP File No. A13-612414.

In a decision dated March 11, 1983, the Office reviewed the merits of appellant's case and affirmed its September 24, 1982 decision insofar as the new injury of April 8, 1980 did not occur in the performance of duty. However, the Office found that further development was warranted on whether appellant's problems on April 8, 1980 had anything to do with the accepted injury of March 13, 1980.

On July 27, 1983 an Office medical consultant, Dr. Kevin Hanley, a Board-certified orthopedic surgeon, reviewed appellant's file. He stated:

> "The way that I interpret this situation is this. I believe that this gentleman sustained a fairly significant injury to the back at a time when service in the Marines almost 17 years prior to this point in time. He sustained structural damage to the back, which is still evidence on radiographs. One would expect, therefore, that his back would be somewhat more susceptible to sprain and strain type of injuries. This appears to be the case in this gentleman. I believe that the injury he reported on March 13, 1980 was not really an injury. The patient merely was in an awkward position for a period of time and then noted the onset of symptoms in the back. This clearly, therefore, was a temporary aggravation of a preexisting condition. I believe that temporary aggravation may well have persisted for up to two weeks. I believe that the injury reported on April 8, 1980 is more so related to his preexisting back condition, that is his previous compression fracture rather than the temporary aggravation sustained on March 13, 1980. Therefore, I believe the April [8, 1980] incident again represents a temporary aggravation of a preexisting condition. Again these temporary aggravations can be expected to resolve within two weeks. I believe once again the July 1980 episode again is a temporary aggravation of his preexisting condition. Therefore, I do not think that one can support a relationship between any of the aggravating episodes but all must be related back to his original condition, that is old compression fracture of the thoracic spine. One specific question that is asked is whether the injury of April 8, 1980 would have caused such disability if [appellant] had not had the March 13, 1980 injury. I believe the answer to that is yes. I do not believe that the amount of disability he suffered in April 1980 had any relationship to his injury of March 1980. Again as stated above, it relates more so to his chronic back condition, which is that of a chronic compression fracture."

In a decision dated February 21, 1984, the Office found that Dr. Hanley's well-reasoned report represented the weight of the medical evidence and established that the injury of April 8, 1980 did not represent an aggravation of the accepted, industrially-related injury of March 13, 1980. The Office also found that appellant's disability from July 1 to August 17, 1980, was not related to factors of federal employment.

Following an oral hearing before an Office hearing representative on September 19, 1984, the Office received an October 19, 1984 report from Dr. McGrath, who stated:

> "I have just spent the better part of an hour reviewing various medical reports and memoranda regarding [appellant] and a work[-]related injury he sustained in March 1980.
>
> "As far as I can determine, this man sustained a back injury on March 8, [sic] 1980, while working. He was under the care of a physician for this, but was back to work on April 8, 1980, when just prior to going into work his back again 'went out.' He continued seeing the orthopedic surgeon for this problem and they were paid for his care. For some reason the claim for the injury on April 8, 1984 [sic] was subsequently denied (an 'Analytic Orthopedic Surgeon' reviewed the charts and drawing from some deep understanding of the case, decided there was no connection between the two). I think this judgment can be questioned for several reasons, (1) the doctor had never seen the patient; [and] (2) he has a built in bias because of who is paying the bill for his judgment call. The other documents make the case that this man's back was a disaster area before he went to work for the Navy because of an injury sustained in the Marine Corps and various automobile mishaps. This is likely, but they hire him on and they took him as he was. He has given thousands of hours of service and he has worked many days in pain.
>
> "In conclusion, I think that any analysis of this man's chart will disclose a person with a weak back structure, who does n[o]t respond to therapy as quickly as the general population. I think that physicians and lay people alike tend to dislike this kind of person because they do n[o]t 'fit the program' and reflect our own inadequacy in diagnosis and therapy. For this reason we should be ever more objective when dealing with this kind of problem and if there is a reasonable probability that his injury was indeed work connected he should have the benefit of any doubt."

In a decision dated January 10, 1985, an Office hearing representative affirmed the February 21, 1984 decision rejecting appellant's claim for benefits. The hearing representative noted that experiencing pain on April 8, 1980 in the area of the March 1980 injury did not automatically make that pain a recurrence of the earlier injury. The hearing representative added that every physician who examined appellant recognized a long and complicated history of prior back injuries and that the numerous claims he had filed all appeared to be aggravations of this condition.

On October 13, 2004 appellant wrote to his congressman asking for his help in obtaining a reconsideration of the April 8, 1980 injury claim. He stated this "was and is a recurrence of the March 13, 1980 injury." Appellant argued that the Office should have accepted his claim of recurrence after receiving Dr. Hobbs' May 8, 1980 diagnosis. He complained about the controversion of his claim and about how he was denied a recurrence claim form. To support his request, appellant submitted copies of a Form CA-3, a Form CA-16, his April 15, 1980 Form CA-1, Dr. Hobbs' April 18 and May 8, 1980 reports, several memoranda and timecards.

On November 1, 2004 the congressman forwarded appellant's arguments and supporting documents to the Office. On July 18, 2005 the Office asked appellant to submit a written request, as well as additional evidence to support a recurrence of his March 18, 1980 injury. On July 20, 2005 appellant again wrote to his congressman and requested reconsideration of his April 8, 1980 injury. He stated:

> "As new evidence I request that this time the reconsideration be based on the rules of FECA [the Federal Employees' Compensation Act] and not on the improper controversions of the employer. The reconsideration should be based on the file as the events happened. The reconsideration should also be based on the eye witness's statement in 1980."

Appellant alleged that in 1980, the Office based its decisions solely on the statements of the employer and ignored the rules of the Act.

In a decision dated August 22, 2005, the Office denied appellant's request for reconsideration. The Office found that appellant had submitted no new medical evidence to support his allegation that the April 8, 1980 injury was a recurrence of his March 13, 1980 injury. The Office also found that appellant's arguments were irrelevant, immaterial and mistaken. The Office concluded that his request for reconsideration did not warrant a merit review of the hearing representative's January 10, 1985 decision.

LEGAL PRECEDENT

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."[2]

An award for or against the payment of compensation may be reviewed by the Office under 5 U.S.C. § 8128(a) at any time, on its own motion or on application of the claimant. No formal application for review is required, but a written request for review, stating reasons why the decision should be changed and accompanied by evidence not previously submitted to the Office, is necessary to invoke action.[3]

To require the Office to reopen a case for reconsideration, a claimant must submit relevant evidence not previously of record or advance legal contentions not previously considered. Where such evidence or contentions have not been presented, it is a matter of

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.136. Effective June 1, 1987, federal regulations were amended to provide that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision. *Id*. at § 10.138(b)(2) (1987).

discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128.[4]

ANALYSIS

The Office last adjudicated the merits of appellant's April 8, 1980 injury on January 10, 1985, when an Office hearing representative affirmed the denial of his claim for compensation. Two decades later, appellant requested reconsideration. But he did not support his request with relevant evidence not previously of record nor did he advance legal contentions not previously considered.

The relevance of the evidence submitted must be judged by the merit decisions issued in this case. The Office initially denied compensation on the grounds that the April 8, 1980 injury occurred prior to the beginning of business and not within the scope of appellant's duties. The Office developed the issue of recurrence and found that the weight of the medical evidence, as represented by the well-reasoned report of Dr. Hanley, the Board-certified orthopedic surgeon, established that the April 8, 1980 injury was not related to the employment injury of March 13, 1980. The Office hearing representative affirmed this decision on January 10, 1985.

The Office's January 10, 1985 merit decision, therefore, turned on a medical issue, namely, whether appellant sustained a recurrence on April 8, 1980 causally related to his March 13, 1980 employment injury. But when appellant requested reconsideration, he submitted no new medical opinion evidence addressing the issue of causal relationship. Indeed, most of the evidence he submitted was irrelevant to this issue. His Form CA-1, a Form CA-3 and Form CA-16, memoranda from supervisors or other employees and timecards have no bearing on whether a causal relationship existed between the March 13, 1980 employment injury and the injury that occurred on April 8, 1980. Causal relationship is a medical issue[5] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[6]

The only evidence appellant submitted that was relevant to the issue of causal relationship were the April 18 and May 8, 1980 reports of Dr. Hobbs, who gave an impression of (1) strain at right paravertebral muscle at lower thoracic spine (industrial injury of March 13, 1980, with aggravation April 8, 1980); and (2) compression fracture at T12 (healed, old and nonindustrial). But these reports were not new. The Office received the May 8, 1980 report on July 15, 1980 and received the April 18, 1980 report no later than October 4, 1983. It is well established that evidence which repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.[7]

Appellant also supported his request for reconsideration with arguments that were previously made. He complained about the controversion of his claim and the manner in which

[4] *E.g., Eladio Joel Abrera*, 28 ECAB 401 (1977).

[5] *Mary J. Briggs*, 37 ECAB 578 (1986).

[6] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[7] *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

both the employing establishment and the Office handled his claim. He also argued the sufficiency of Dr. Hobbs' May 8, 1980 diagnosis. But he made these arguments before, most notably at the September 19, 1984 oral hearing before the Office hearing representative. Although the hearing representative explained that the Office based its decision on the medical evidence and not on statements from the supervisors, appellant repeatedly took issue with these statements. He questioned how the employing establishment and the Office treated his claim. In his request for reconsideration, 20 years later, appellant echoed these same concerns. His contentions have been previously considered. Further, they have no bearing on the medical issue adjudicated by the Office in its January 10, 1985 merit decision. Evidence that does not address the particular issue involved constitutes no basis for reopening a case.[8]

Because appellant failed to submit relevant evidence not previously of record and failed to advance legal contentions not previously considered, the Office properly determined that his July 20, 2005 request for reconsideration did not warrant a reopening of his case for a review on the merits. The Board will, therefore, affirm the Office's August 22, 2005 decision denying his request.[9]

CONCLUSION

The Board finds that the Office properly denied appellant's July 20, 2005 request for reconsideration. His request did not meet the standard for obtaining a merit review of his case.

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 21, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[8] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[9] The Board finds no merit in the arguments appellant raises on appeal. He once again devotes a great deal of attention to details that are inconsequential to the January 10, 1985 denial of his claim, such as incorrect characterizations of his job title, typographical errors and word choice.