United States Department of Labor
Employees' Compensation Appeals Board

ROBERT J. COX, Appellant	)	
and	)	**Docket No. 06-386**
	)	**Issued: June 27, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Aurora, CO, Employer	)	

Appearances:
John S. Evangelisti, Esq., for the appellant
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 April 14, 2006 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated November 18, 2005 which denied merit review. Because more than one year has elapsed between the last merit decision of the Office dated July 16, 2004 and the filing of this appeal on April 14, 2006, 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). On appeal appellant contends that the Office erred in not conducting merit review and that his claim was held to an improper standard of proof.

FACTUAL HISTORY

This case has been before the Board previously. In a June 25, 2003 decision, the Board found that appellant did not sustain an injury on April 3, 2000 causally related to his federal employment. The Board found that, as the evidence was insufficient to show that appellant struck an intervening object when he fell that day, the incident was an idiopathic fall and was not

compensable.[1] The law and the facts of the previous Board decision are incorporated herein by reference.

Subsequent to the Board's June 25, 2003 decision, on December 16, 2003 appellant, through his attorney, requested reconsideration. He submitted additional evidence including evidence previously of record which included photographs of appellant and emergency room records. The attorney also submitted an April 19, 2004 report in which Dr. Lynn Parry, a Board-certified surgeon, noted her review of the medical record. She opined that appellant's quadriplegia was caused by either a hyperflexion or hyperextension injury which was unlikely to have occurred if he fell straight to the ground. Dr. Parry concluded that appellant struck an object when he fell at work.

In a July 2, 2004 report, the employing establishment reported that a thorough investigation of the area where appellant was found unconscious, face down, on April 3, 2000 had been conducted. The employing establishment noted that the area was clean and undisturbed and no blood found.

By decision dated July 16, 2004, the Office denied modification of the prior decisions, noting that the emergency room records did not document a second laceration and that the photographs merely documented a laceration photographed by appellant's sister in May 2000. The Office further noted that Dr. Parry merely reviewed the medical record and her opinion that appellant struck an intervening object was conjecture on her part. On August 10 and 26, 2004 appellant filed appeals with the Board.[2] In letters dated September 2, 2004, appellant, through his attorney, simultaneously requested that the appeals be withdrawn and requested reconsideration before the Office. He submitted new evidence to the Office consisting of a December 11, 2000 magnetic resonance imaging (MRI) scan of the right shoulder, and a May 25, 2001 report in which Dr. Mark P. Cilo, an attending Board-certified neurologist, opined that appellant's quadriplegia was a consequence of his April 3, 2000 fall. The attorney noted that the medical record supported that appellant sustained two lacerations that day. Dr. Cilo opined that it was more likely that appellant hit his head on an object when falling rather than simply hitting it on the floor. In a January 13, 2004 report, Dr. Cilo reiterated that appellant had two lacerations, the forehead laceration described in hospital notes, and the gash to the back of his head described by his sister. By letter dated September 29, 2005, appellant renewed his reconsideration request.

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] Docket No. 03-360 (issued June 25, 2003).

[2] The former was docketed as 04-2016 and the latter 04-2105.

[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 18, 2005 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 July 16, 2004, and the filing of his appeal with the Board on April 14, 2006, the Board lacks jurisdiction to review the merits of his claim.[8]

With his reconsideration request,[9] appellant presented no new argument and submitted additional evidence. He did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Consequently, 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).[10]

With respect to the third requirement under section 10.606(b)(2), while appellant submitted additional evidence, the right shoulder MRI scan is irrelevant as it does not contain any opinion regarding the cause of the diagnosed condition. The underlying merit issue in this case is whether appellant sustained an employment injury on April 3, 2000. Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[11] Regarding the May 25, 2001 and January 13, 2004 reports from Dr. Cilo, both the Office and the Board had previously reviewed a July 15, 2002 report in which Dr. Cilo opined that appellant

[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] Appellant had initially requested reconsideration on September 4, 2004. At that time, however, the Board had jurisdiction over this case as appellant had filed appeals with the Board on August 10 and 26, 2004. The Office and the Board may not have simultaneous jurisdiction over the same issue in the same case. Following the docketing of an appeal with the Board, the Office does not retain jurisdiction to render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction. *Linda D. Guerrero*, 54 ECAB 556 (2003).

[10] 20 C.F.R. § 10.606(b)(2).

[11] *Stella M. Bohlig*, 53 ECAB 341 (2002).

had a scalp laceration on the top of his head when admitted to the hospital on April 4, 2000. His May 25, 2001 report predated the July 15, 2002 report that was previously reviewed. In the January 13, 2004 report, Dr. Cilo merely stated that appellant had both a forehead laceration as reported in hospital records upon his hospital admission on April 4, 2000 and a scalp laceration as reported by his sister in May. Evidence that repeats of duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[12] As Dr. Cilo's opinion has been previously addressed by both the Office and the Board, these reports are insufficient to warrant merit review. Appellant therefore did not submit relevant and pertinent new evidence not previously considered by the Office, and the Office properly denied his reconsideration request.

Appellant contends that he was held to an improper standard of proof. A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his federal employment.[13] In its June 25, 2003 decision, the Board held that appellant sustained an idiopathic fall. An injury resulting from an idiopathic fall may be compensable if some job circumstance or working condition intervenes in contributing to the incident or injury, for example, the employee falls onto, into or from an instrumentality of the employment or where, instead of falling directly to the floor on which he has been standing, the employee strikes a part of his body against a wall, a piece of equipment, furniture or machinery or some like object. The employee has the burden of establishing that he or she struck an object connected with the employment during the course of the idiopathic fall.[14] The Board found that appellant did not meet this burden of proof. Appellant did not establish that his claim was held to an improper standard of proof.

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).

[12] *James A. Castagno*, 53 ECAB 782 (2002).

[13] *Marlon Vera*, 54 ECAB 834 (2003).

[14] *Margaret Cravello*, 54 ECAB 498 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 18, 2005 be affirmed.

Issued: June 27, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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