

**United States Department of Labor
Employees' Compensation Appeals Board**

JAMES R. GARDNER, Appellant

and

**U.S. POSTAL SERVICE, EQUIPMENT
CENTER, Edgewater, NJ, Employer**

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**Docket No. 06-450
Issued: June 26, 2006**

Appearances:
Ronald S. Webster, 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 December 20, 2005 appellant filed a timely appeal of a December 7, 2005 decision of the Office of Workers' Compensation Programs, denying merit review of his claim. Since more than one year has elapsed between the last merit decision on March 13, 2002 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2) and 501.6(c) and (d).

ISSUE

The issue is whether the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

The case has been before the Board on prior appeals. In a February 23, 1996 decision, the Board affirmed a January 3, 1994 Office hearing representative's decision denying authorization for back surgery.¹ In an April 1, 2003 decision, the Board affirmed Office merit

¹ Docket No. 94-1223 (issued February 23, 1996).

decisions dated March 13, 2002 and July 30, 2001, denying modification of a February 26, 1999 decision terminating compensation for wage loss.² The Board found the weight of the evidence was represented by Dr. Michael Davoli, an orthopedic surgeon selected as an impartial medical specialist. By decision dated September 8, 2004, the Board affirmed a February 18, 2004 Office decision denying merit review of the claim. Appellant argued that the Office had erred in finding a conflict in the medical evidence and the Board found the existence of a conflict had previously been established in the April 1, 2003 Board decision. In addition, the Board found the submission of a March 31, 1998 report by the second opinion physician, Dr. Kenneth Levitsky, was not new evidence as the report was previously of record and had been considered by both the Office and the Board in merit decisions. The facts and the circumstances of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

In a letter dated September 27, 2004, appellant requested reconsideration. Appellant stated that the "DOL [Department of Labor] has never considered the argument that Dr. Levitsky and Dr. Gonzalez did not form a conflict..." He argued that both physicians felt appellant's symptoms were employment related and therefore no conflict existed. The March 31, 1998 report from Dr. Levitsky was again submitted.

By decision dated November 9, 2004, the Office denied appellant's request for reconsideration without merit review of the claim. Appellant filed an appeal with the Board. By decision dated June 9, 2005, the case was remanded to the Office as the Board had not received the case record. The Office was directed to issue an appropriate decision to protect appellant's appeal rights.

By decision dated December 7, 2005, the Office denied appellant's request for reconsideration without reviewing the merits of the claim.

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

² Docket No. 02-1659 (issued April 1, 2003).

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.³

ANALYSIS

Appellant alleged in his September 27, 2004 reconsideration request that he was raising a new legal argument: that there was no conflict under 5 U.S.C. § 8123(a). However, this argument had been raised in a prior reconsideration request. The April 1, 2003 Board decision held that the Office had properly found a conflict between Dr. Gonzalez and Dr. Levitsky. Dr. Gonzalez reported appellant was totally disabled, while Dr. Levitsky opined appellant could work full time with restrictions. Even if Dr. Levitsky found that the restrictions were employment related, a conflict existed regarding the extent of the disability. As the Board explained in the September 8, 2004 decision, the argument regarding the existence of a conflict is not sufficient to warrant reopening the claim for merit review. Appellant did not show that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office.

With respect to the submission of evidence, appellant resubmitted the March 31, 1998 report from Dr. Levitsky. As noted in the September 8, 2004 Board decision, this is not new evidence and is not sufficient to warrant reopening the claim for merit review. Since appellant did not meet any of the requirements of section 10.606(b)(2), the Office properly refused to reopen the claim for merit review.⁴

CONCLUSION

The Board finds that appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(2) and therefore the Office properly denied merit review of the claim.

³ *Eugene F. Butler*, 36 ECAB 393 (1984).

⁴ The requirements for obtaining a merit review were set forth in the Board's September 8, 2004 decision as well. The December 7, 2005 Office decision refers to 20 C.F.R. § 10.138, a prior regulation that provided a similar standard. The discussion of entitlement to a merit review, however, indicated that new evidence submitted would have to be of sufficient weight to require further development or modification of the merit decision. 20 C.F.R. § 10.606(b)(2)(iii) requires only that the evidence be new, relevant and pertinent. In addition, the brief reference to "clear evidence of error" in the decision is inappropriate as this was a timely reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 7, 2005 is affirmed.

Issued: June 26, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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