United States Department of Labor
Employees' Compensation Appeals Board

THOMAS T. BASS, Appellant	)	
and	)	**Docket No. 05-704**
	)	**Issued: March 15, 2006**
TENNESSEE VALLEY AUTHORITY, POWER CONSTRUCTION, CENTRAL AREA, Nashville, TN, Employer	)	

Appearances:
E. Covington Johnston, Jr., Esq., for the appellant
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument January 10, 2006

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 27, 2005 appellant filed a timely appeal of an October 27, 2004 decision by the Office of Workers' Compensation Programs denying further review of the merits of the claim. The Board's jurisdiction is limited to final decisions issued within one year of the filing of the appeal under 20 C.F.R. § 501.3(d)(2). As the last merit decision in this case is dated September 5, 2003, the Board does not have jurisdiction over the merits of the claim, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 12, 1973 appellant, then a 42-year-old driver, filed a traumatic injury claim contending that on October 4, 1973 he sustained a severe lumbar sacral strain when loading a

bulldozer on a lowboy float. The Office accepted appellant's claim for lumbar sprain and aggravation of osteoarthritis. Appellant was paid compensation and medical benefits.

By decision dated November 17, 2000, the Office terminated appellant's entitlement to compensation and medical benefits for the reason that the effects of the 1973 injury had resolved. In a decision dated July 13, 2001, an Office hearing representative affirmed the November 17, 2000 decision terminating appellant's benefits. However, because additional evidence was submitted at the hearing, a conflict in the medical evidence was found. The case was remanded for an impartial medical evaluation regarding whether appellant had any employment-related disability. On remand, appellant was seen by Dr. John McInnis, a Board-certified orthopedic surgeon, for an impartial medical evaluation on September 6, 2001. Dr. McInnis opined that the aggravation of appellant's osteoarthritis and lumbar degenerative disc disease had not resolved. He opined that appellant was not able to lift over 50 pounds.

In a decision dated September 26, 2001, the Office determined that the weight of the medical evidence was represented by Dr. McInnis as he was the impartial medical specialist. It reinstated appellant's entitlement to medical benefits for the injury of October 4, 1973 as his lumbar sprain and aggravation of osteoarthritis had not resolved. However, the decision did not reinstate compensation for wage loss as it found that these residuals did not prevent appellant from performing the job he had when injured. By decision dated May 24, 2002, an Office hearing representative affirmed the September 26, 2001 decision. On September 5, 2003 the Office denied appellant's request for reconsideration after reviewing the claim on its merits. The Office found that the medical evidence did not support that appellant had any remaining disability on or after November 14, 2000 that would prevent him from performing his date-of-injury position.

On August 30, 2004 appellant requested reconsideration and submitted an affidavit stating that he was not under any restrictions at the time of his October 4, 1973 injury. He submitted a March 23, 2004 report by Dr. Jon F. Von Almen, Jr., an internist, who indicated that appellant had been his patient since 1978. Appellant was hospitalized on October 4, 1973 with a diagnosis of aggravation of lumbar disease. Dr. Von Almen recorded a history that on the date of injury, appellant was lifting 200-pound skids which caused a severe injury to his back and that he has since been employed part time as a school bus driver which "in all probability requires no more than 20 pounds limit." Appellant also submitted a May 25, 2004 medical report from Dr. David W. Gaw, a Board-certified orthopedic surgeon, who noted that appellant had a history of low back strain with aggravation of degenerative lumbar disc disease. In response to the query as to whether appellant could perform the job today that he was performing in 1973, Dr. Gaw stated:

> "No. I think that it is rather obvious that at the age 73, he is significantly limited in his ability to bend, lift, push, pull or stay in awkward positions. There is no way he could do the type of work activities that he described doing at the time he injured [himself]."

Dr. Gaw noted that most of appellant's prior physicians placed him on lifting restrictions of 20 to 25 pounds, and that he would not question their judgment and opinions in hindsight.

By decision dated October 27, 2004, the Office denied appellant's request for reconsideration without merit review, finding that the evidence submitted was cumulative.

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 --
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> (1) end, decrease or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[1]

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 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 request for reconsideration dated August 30, 2004 neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second requirements of section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant's statement regarding his not having been on physical restrictions at the time of injury is repetitive of statements previously considered and accordingly is not sufficient to warrant merit review. The Board finds that the reports of Drs. Gaw and Von Almen are insufficient to warrant further merit review. Dr. Gaw merely reviewed prior medical reports in the record and stated that he would not question the opinions of the other physician's in hindsight. The report of Dr. Von Almen is cumulative in that it also repeats conclusions of reports already in the record and previously considered. In addition, neither physician addressed the underlying issue of whether appellant had any continuing

[1] 5 U.S.C. § 8128(a).

[2] *Richard Yadron*, 57 ECAB ___ (Docket No. 05-1738, issued November 8, 2005); *Eugene F. Butler*, 36 ECAB 393 (1984).

disability causally related to his 1973 accepted injury. Accordingly, appellant has failed to submit evidence sufficient to warrant a merit review of his claim.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 27, 2004 is affirmed.

Issued: March 15, 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