

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

N.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New Orleans, LA, Employer**

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**Docket No. 08-1409
Issued: December 17, 2008**

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 15, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 10, 2008 nonmerit decision, denying his request for merit review of the Office's denial of his recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The Office's last merit decision on this matter was its August 24, 2005 decision. Because more than one year has elapsed between the Office's August 24, 2005 decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.¹

ISSUE

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

¹ The record also contains a September 11, 2007 Office decision regarding appellant's wage-earning capacity and a March 6, 2008 Office decision granting him a schedule award. Appellant did not appeal these decisions to the Board.

FACTUAL HISTORY

This is the second appeal in this case. The Board issued an April 20, 2007 decision that affirmed an August 9, 2004 Office decision finding that appellant did not meet his burden of proof to establish that he sustained a recurrence of total disability on or after April 9, 2004 due to his accepted employment injuries.² Although Dr. Bryant S. George, Sr., an attending Board-certified neurosurgeon, indicated that appellant's February 12, 2002 neck injury caused total disability on and after April 9, 2004, his opinion was of limited probative value because Dr. George did not provide adequate medical rationale in support of his conclusion on causal relationship. The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.

In a July 18, 2007 letter, appellant requested reconsideration before the Office. He alleged that he was entitled to compensation for lost work between March 2004 and February 2006 caused by his employment-related injuries and asserted that his claim was supported by a May 15, 2006 letter of Dr. Ronald Blum, a Board-certified orthopedic surgeon serving as an Office medical adviser. Appellant also indicated that his claim was supported by a July 18, 2007 report of Dr. Donald C. Faust, an attending Board-certified orthopedic surgeon.³

On May 15, 2005 Dr. Blum discussed appellant's accepted employment injuries, including his February 12, 2002 neck sprain/strain and the diagnostic testing findings in response to several questions posed by the Office. The Office requested that Dr. Blum address whether appellant's February 12, 2002 employment injury caused the cervical intervertebral disc disorder and cervical spondylosis with myelopathy diagnosed by Dr. Paul J. Waguespack, an attending Board-certified orthopedic surgeon. It also requested whether the proposed surgery, consisting of decompression and discectomy at C3-4, recommended by Dr. Waguespack was a reasonable option. Dr. Blum found that the neck surgery was a reasonable option which was necessitated by the accepted neck injury. He recommended that appellant's accepted conditions include employment-related aggravation of cervical degenerative disc disease.⁴

In a July 18, 2007 report, Dr. Faust discussed the chronology of appellant's medical problems. He indicated that appellant first reported neck problems in February 2002 and that in March 2002 he reported both right shoulder and neck symptoms. Dr. Faust stated that appellant

² Docket No. 06-1648 (issued April 20, 2007). The Office accepted that appellant sustained a right shoulder strain, right rotator cuff tendinitis, subacromial bursitis and right rotator cuff tear on December 17, 1999 due to casing mail and a neck sprain/strain on February 12, 2002 due to turning his head to the right while sweeping mail for dispatch. It also accepted that he sustained bilateral carpal tunnel syndrome due to the repetitive duties he performed prior to March 2002. Appellant worked in limited-duty positions for the employing establishment and claimed that he sustained a recurrence of total disability on April 9, 2004 due to his accepted employment injuries. At the time he stopped work, he was restricted from lifting more than 20 pounds, reaching above his shoulders and pushing and pulling.

³ Appellant also submitted a September 25, 2007 reconsideration request in which he repeated the arguments contained in his July 18, 2007 letter.

⁴ The Office upgraded appellant's accepted conditions to include cervical intervertebral disc disorder and cervical spondylosis with myelopathy and authorized the recommended neck surgery. Appellant underwent this surgery on July 10, 2006.

sustained an employment-related sprain and strain in 2002 and posited that this injury “precipitated the problems that have continued to this date.” He stated, “Since his difficulties with his neck, shoulder and carpal tunnel problems were finally accepted by the [employing establishment] in 2006, it would appear that his problems originated and began with the problems in March 2002.”

In a January 10, 2008 decision, the Office denied appellant’s request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act,⁵ the Office’s regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁶ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.⁷ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁸ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record⁹ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰

Proceedings under the Act are not adversary in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹¹ Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹²

⁵ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.” 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(b).

⁹ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁰ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹¹ *Russell F. Polhemus*, 32 ECAB 1066 (1981).

¹² *See Robert F. Hart*, 36 ECAB 186 (1984).

ANALYSIS

The Board finds that the Office abused its discretion in denying appellant's request for further review of the merits of his claim under section 8128(a). Appellant claimed that his employment-related conditions, including his neck condition sustained on February 12, 2002, caused him to sustain a recurrence of total disability beginning in the spring of 2004. He submitted new evidence that is relevant to this matter. The May 15, 2006 letter of Dr. Blum, a Board-certified orthopedic surgeon serving as an Office medical adviser, is relevant. The medical adviser opinion that appellant had a more serious employment-related neck condition than that accepted by the Office during the period that appellant claimed he sustained an employment-related recurrence of total disability.¹³ It is not apparent that the Office asked Dr. Blum or any other physician, to address whether appellant had any disability due to his employment-related conditions.¹⁴

The Board finds that appellant is entitled to further merit review of his claim with respect to the question of whether he sustained an employment-related recurrence of total disability beginning in the spring of 2004 or thereafter. After such development, as it deems necessary, the Office should issue an appropriate decision on this matter.

CONCLUSION

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

¹³ The Office accepted cervical intervertebral disc disorder and cervical spondylosis with myelopathy and authorized neck surgery as recommended by Dr. Blum and an attending physician.

¹⁴ See *supra* note 12 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' January 10, 2008 decision is reversed and the case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: December 17, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board