

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

W.C., Appellant

and

**DEPARTMENT OF THE ARMY,
Huntington, WV, Employer**

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**Docket No. 07-1955
Issued: January 25, 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 July 17, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated June 18, 2007 denying reconsideration. Because more than one year has elapsed between the most recent merit decision of record, the Board's July 17, 2006 decision, and the filing of this appeal on July 17, 2007, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

This case is on appeal to the Board for the fifth time. The Office accepted that appellant, then 29 years old, sustained a lumbosacral strain resulting from a February 23, 1967 work injury. Appellant underwent a laminectomy in 1960 and had a spinal fusion in 1967. It also accepted a low back strain superimposed on preexisting degenerative disc disease when appellant was

kicked in the back by a coworker on February 10, 1988. In a July 29, 1998 decision, the Board affirmed the Office's termination of compensation benefits effective November 12, 1994. It found that the April 5, 1994 report of Dr. Carl Roncaglione, a Board-certified orthopedic surgeon and an impartial medical examiner, established that appellant did not have residuals of his accepted injury.¹ On September 20, 2001 appellant claimed a recurrence of disability beginning February 10, 1988 that he attributed to his February 10, 1988 work injury and the failure of his 1967 back surgery. In an April 18, 2005 order, the Board set aside the Office's September 4, 2003 nonmerit decision denying appellant's reconsideration request and remanded the case so that the case files could be doubled.² In a July 17, 2006 decision, the Board affirmed the Office's October 12, 2005 decision which denied modification of a December 31, 2002 decision finding that appellant did not establish a recurrence of disability.³ In a May 1, 2007 decision, the Board affirmed an October 26, 2006 Office decision that denied appellant's request for a review of the merits of his claim.⁴ The facts and the circumstances of the case as set out in the Board's prior decisions are incorporated herein by reference.

In a June 1, 2007 letter, appellant requested reconsideration. He submitted a magnetic resonance imaging (MRI) scan dated January 22, 2003. It noted degenerative disc disease most prominent at L4-L5 and neuroforaminal stenosis bilaterally at L5-S1. Appellant also submitted copies of a September 13, 2000 medical report from Dr. Wesley Johnson, a Board-certified orthopedic surgeon, and a July 23, 2001 medical report from Dr. Robert W. Lowe, a Board-certified orthopedic surgeon, both previously of record.

By decision dated June 18, 2007, the Office denied appellant's request for reconsideration finding that the evidence submitted neither raised legal questions nor included new and relevant evidence sufficient to warrant a review of the prior decision.⁵

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,⁶ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or

¹ Docket No. 96-1682 (issued July 29, 1998); *petition for recon. denied*, (issued November 16, 1998).

² Docket No. 04-764 (issued April 18, 2005).

³ Docket No. 06-195 (issued July 17, 2006).

⁴ Docket No. 07-296 (issued May 1, 2007).

⁵ Appellant filed an appeal to the Board and requested an oral argument which was scheduled for February 14, 2008. In a December 8, 2007 letter, appellant advised the Board that he no longer desired oral argument. Accordingly, the Board will proceed with a decision on the record.

⁶ 5 U.S.C. § 8128(a).

(3) constituting relevant and pertinent new evidence not previously considered by the Office.⁷ Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS

Appellant's June 1, 2007 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. He did not advance a relevant 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 above-noted requirements under section 10.606(b)(2).⁹

With respect to the third requirement, constituting relevant and pertinent new evidence not previously considered by the Office, appellant submitted no relevant evidence. The January 22, 2003 MRI scan, while new, is not relevant to the issue in this case. The underlying issue in this case is whether the medical evidence establishes whether appellant sustained a recurrence of disability on February 10, 1988 causally related to his employment injuries. The MRI scan is not relevant because it does not address causal relationship between appellant's employment and any diagnosed medical conditions. The diagnostic study, without addressing causal relationship, is not relevant to the issue in this case. The Board has held that the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.¹⁰ Appellant also submitted copies of medical evidence from Dr. Johnson and Dr. Lowe, which were previously of record and considered by the Office. Evidence or argument which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.¹¹ The duplicative nature of this evidence does not require reopening the record for further merit review. Consequently, appellant is not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(2).¹²

Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he constitute relevant and pertinent evidence not previously considered by the Office.¹³

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ 20 C.F.R. § 10.608(b).

⁹ 20 C.F.R. § 10.608(b)(2)(i) and (ii).

¹⁰ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹¹ *Denis M. Dupor*, 51 ECAB 482 (2000).

¹² 20 C.F.R. § 10.606(b)(2)(iii).

¹³ 20 C.F.R. § 10.606(b).

Accordingly, the Board finds that the Office properly determined that appellant was not entitled to a merit review.¹⁴

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 June 18, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 25, 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

¹⁴ See *James E. Norris*, 52 ECAB 93 (2000).