United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
	)	**Docket No. 09-1506**
and	)	**Issued: January 28, 2010**
DEPARTMENT OF THE NAVY, KINGS BAY SUBMARINE BASE, Kings Bay, GA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On May 11, 2009 appellant, through his attorney, filed a timely appeal from an April 13, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. As more than one year has elapsed between the filing of this appeal and the last merit decision, the Board lacks jurisdiction to review the merits of this case 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 further review of the merits of his case under 5 U.S.C. § 8128.

FACTUAL HISTORY

On October 12, 2004 appellant, then a 46-year-old pipefitter, filed an occupational disease claim alleging that he sustained spondylolisthesis at L5-S1 due to factors of his federal

employment. The Office accepted his claim for a permanent aggravation of spondylolisthesis at L5-S1.[1] Appellant underwent lumbar fusion surgery in April 2005.

On April 20, 2006 appellant requested a schedule award. By decision dated May 30, 2007, the Office granted him a schedule award for a four percent permanent impairment of the left leg.

On January 31, 2008 appellant requested reconsideration. He submitted a January 14, 2008 report from Dr. Gary Kaufman, an attending Board-certified neurosurgeon and physiatrist, who opined that appellant had a 28 percent impairment of the whole person under Table 15.3 on page 384 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*), which categorizes impairments of the lumbar spine. In a decision dated April 23, 2008, the Office denied modification of its May 30, 2007 decision.

Appellant submitted progress reports dated January 28, 2008 through March 11, 2009 from Dr. Kaufman. In a report dated May 12, 2008, Dr. Kaufman noted that appellant "certainly fulfills the criteria for category 5" under the A.M.A., *Guides* and indicated that he had previously found a 28 percent impairment. He advised appellant to "contest his impairment rating…." On March 11, 2009 Dr. Kaufman recommended that he obtain an impairment evaluation from Dr. Gold.[2]

By letter dated April 1, 2009, appellant, through his attorney, requested reconsideration of the April 23, 2008 decision. Counsel indicated that the request was "based on the medical report of Dr. Gold" which he would submit to the Office when he received the report.[3]

By decision dated April 13, 2009, the Office denied appellant's request for further review of the merits of his claim under section 8128. It noted that he had not submitted a report from Dr. Gold. The Office found that the medical evidence received subsequent to its April 23, 2008 decision was not relevant in determining the extent of appellant's impairment rating.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[4] the Office's regulations provide that 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.[5] To be entitled to a merit

[1] By decision dated January 3, 2005, the Office denied appellant's claim after finding that the medical evidence was insufficient to establish that he sustained a medical condition due to the identified work factors. On March 30, 2006 it vacated its January 3, 2005 decision and accepted his claim for an aggravation of L5-S1 spondylisthesis.

[2] Dr. Gold's full name is not known.

[3] On April 7, 2009 appellant's attorney inquired whether the Office would pay Dr. Gold in advance for his report.

[4] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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] 20 C.F.R. § 10.606(b)(2).

review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[6] 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.[7]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[8] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[9] While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[10]

ANALYSIS

In a decision dated May 30, 2007, the Office granted appellant a schedule award for a four percent permanent impairment of the left lower extremity. On January 31, 2008 he requested reconsideration and submitted a report dated January 14, 2008 from Dr. Kaufman, who found that appellant had 28 percent whole person impairment according to Table 15.3 on page 384 of the A.M.A., *Guides*, which lists criteria for rating impairments of the lumbar spine. By decision dated April 23, 2008, the Office denied modification of its May 30, 2007 decision.

On April 1, 2009 appellant requested reconsideration of the April 23, 2008 decision based on an anticipated report from Dr. Gold. He did not, however, submit an impairment evaluation from Dr. Gold. In a report dated May 12, 2008, Dr. Kaufman noted that he had previously found that appellant had a 28 percent permanent impairment and asserted that he met the criteria for a Category 5 impairment under the A.M.A., *Guides.* The Office, however, previously considered Dr. Kaufman's impairment evaluation in its April 23, 2008 decision. Evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[11] Further, Dr. Kaufman's finding that appellant had a Category 5 impairment under an unspecified section of the A.M.A., *Guides* is too general to be relevant to determining the extent of appellant's permanent impairment; thus it is insufficient to warrant reopening the case for further review of the merits.

The remaining progress reports dated January 28, 2008 through March 11, 2009 from Dr. Kaufman do not address the extent of appellant's permanent impairment and thus are not

[6] *Id.* at § 10.607(a).

[7] *Id.* at § 10.608(b).

[8] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[9] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[10] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

[11] *F.R.*, 58 ECAB 607 (2007); *Richard Yadron*, 57 ECAB 207 (2005).

pertinent to the issue at hand. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.[12]

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's request for further review of the merits of his case under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 13, 2009 is affirmed.

Issued: January 28, 2010
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

[12] *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).