

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

F.C., Appellant)
)
and) **Docket No. 09-2024**
) **Issued: May 10, 2010**
U.S. POSTAL SERVICE, POST OFFICE,)
New York, NY, Employer)
)

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 4, 2009 appellant filed a timely appeal from a February 5, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. As no Office merit decision was issued within 180 days of the filing of this appeal, the Board does not have jurisdiction to review the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e).¹

ISSUE

The issue is whether the Office properly denied appellant's January 1, 2009 request for reconsideration under 5 U.S.C. § 8128.

¹ For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

On January 24, 2005 appellant, then a 27-year-old regular letter carrier, sustained a traumatic injury to his neck, shoulder and lower back while pushing his mail cart in the snow. He stopped work on January 26, 2005 and did not return. The Office accepted the claim for cervical lumbosacral sprains.

The Office referred appellant for a second opinion examination with Dr. Jacqueline Emmanuel, a Board-certified orthopedic surgeon. In an October 18, 2006 report, Dr. Emmanuel advised that appellant had no findings on examination consistent with the accepted conditions of sprain of the neck or sprain of the lumbosacral joint. She opined that the accepted conditions had resolved and no further medical treatment or physical therapy was indicated. Dr. Emmanuel found that appellant was capable of returning to his full duties as a letter carrier. Dr. Igor Cohen, an attending neurologist, and Dr. Paolo Perrone, an attending Board-certified internist, supported that appellant remained totally disabled and required physical therapy. The Office found a conflict in medical opinion and referred the case to Dr. Salvatore J. Sclafani, a Board-certified orthopedic surgeon, selected as the impartial medical examiner.² In an April 26, 2007 report, Dr. Sclafani noted that, while appellant had multiple subjective complaints, there were no objective findings to warrant disability or continued medical treatment. He advised that appellant had two years of therapy and, while symptomatic, there were no signs of any atrophy of the right upper extremity, which one would anticipate with any significant injury, disc herniation or cervical radiculopathy. Dr. Sclafani found that appellant reached maximum medical improvement and could return to work without restrictions. By decision dated February 28, 2008, the Office terminated appellant's compensation benefits effective March 16, 2008 based on the opinion of the impartial medical examiner.

On December 2, 2008 appellant requested an oral hearing. The Office subsequently received physical therapy treatment notes and a February 20, 2008 report from Dr. Cohen who noted that appellant presented with frequent radiating neck pain and a history of work-related injury and symptoms. Dr. Cohen advised that diagnostic testing was consistent with disc herniations at C4 through C7 with right C5 radiculopathy and cervical myofasciitis. He noted treatment recommendations and opined that appellant remained totally disabled due to his work-related injury.

By decision dated December 17, 2008, the Office denied appellant's hearing request as it was not submitted within 30 days of the February 28, 2008 decision.

In a January 1, 2009 letter, appellant requested reconsideration. He asked that the Office send an acknowledgment of his request and contact him if there was anything more he needed to do. No additional information was submitted.

By decision dated February 5, 2009, the Office denied appellant's request for reconsideration finding that he did not raise any substantive legal questions or include any new and relevant evidence. Appellant's request was insufficient to warrant further merit review.

² In a December 20, 2006 report, Dr. Cohen noted findings and diagnoses and opined that appellant continues to have total disability as a result of his work-related injuries.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a), 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.³ Section 10.608(b) of Office regulations provide 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.⁴ The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁵

ANALYSIS

Appellant's January 1, 2009 request for reconsideration did not allege or demonstrate 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. Appellant is not entitled to a review of the merits of his claim based on the first and second requirements under section 10.606(b)(2).

Appellant did not submit relevant and pertinent new evidence not previously considered by the Office. After the termination of his benefits, he submitted physical therapy notes and a February 20, 2008 report from Dr. Cohen. This evidence is not relevant to the underlying medical issue of whether appellant has a continuing medical condition or disability causally related to his 2005 work injury. Dr. Cohen noted that appellant remained symptomatic and opined that appellant remained totally disabled due to his work-related injury. This report is insufficient to require further merit review as it is duplicative and repetitive of Dr. Cohen's prior opinion which the Office previously considered.⁶

Furthermore, the physical therapy notes do not constitute relevant new evidence on the issue of appellant's disability related to his accepted injury and are duplicative of treatment records previously reviewed. Therefore, the evidence received by the Office after the termination of appellant's compensation benefits does not warrant reopening the case for a merit review.

On appeal, appellant contends that he never received any instructions from the Office prior to his reconsideration request being denied. However, it is his responsibility to submit any

³ 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

⁴ *Id.* at § 10.608(b); *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

⁵ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁶ 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. See *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

additional relevant evidence or legal argument concerning his claim. This is clearly stated in the appeal rights appellant received with the February 28, 2008 termination decision. Therefore, appellant was properly advised as to his appellate rights.

The Board finds that the Office properly determined that appellant was not entitled to further review of the merits of his claim pursuant to the requirements under section 10.606(b)(2). The Board properly denied his January 1, 2009 request for reconsideration.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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