

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

RUSSELL JIMENEZ, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Grand Rapids, MI, Employer**

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**Docket No. 03-2250
Issued: January 22, 2004**

Appearances:
Russell Jimenez, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On September 16, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated August 29, 2003 which denied a merit review. Because more than one year has elapsed between the last merit decision dated August 16, 2002 and the filing of this appeal on September 16, 2003, the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue on appeal is whether the Office properly denied merit review of appellant's claim on August 29, 2003.

FACTUAL HISTORY

On July 29, 1998 appellant, then a 27-year-old mail handler, filed a notice of occupational disease and claim for continuation of pay/compensation (Form CA-2), alleging that he sustained low back pain and numbness going down the right leg. Appellant stopped work on

June 11, 1998 and returned to light duty on October 25, 1998.¹ The Office accepted his claim for disc herniation at L5-S1.²

On June 6, 2001 appellant filed a recurrence of disability claim. The employing establishment indicated that he had stopped work on May 3, 2001. The Office accepted the claim for recurrence on August 27, 2001.³ On February 1, 2002 appellant filed a recurrence of disability claim. He listed October 2, 2001 as the date that he stopped work following the recurrence. The employing establishment challenged the claim and indicated that he had not worked since January 19, 2002.⁴

The Office requested that appellant submit additional factual and medical evidence by letter dated March 8, 2002. In an April 5, 2002 response, he indicated that his problems and symptoms were the same as his original injury and that he had sharp pain and burning in his back and legs including a numbing sensation that ran down his legs. Appellant stated that he was unable to perform his normal job duties and it was difficult to maintain a normal schedule. He described his position and indicated that he was having back problems prior to the car accident in September. Appellant underwent a bilateral lower L4 hemisemilaminectomy, total L5 laminectomy, left facetectomy, foraminotomy and excision of herniated disc at L5 bilaterally on April 11, 2002.

By letter dated June 11, 2002, the Office referred appellant, along with the medical record, a statement of accepted facts and a set of questions to Dr. Charles F. Xeller, a Board-certified orthopedic surgeon. In a report dated June 25, 2002, he provided an opinion that appellant was status post recent back fusion surgery. In his supplemental report dated August 13, 2002, Dr. Xeller opined that appellant's fusion surgery was appropriate; however, it was not due to any work-related condition.

On August 16, 2002 the Office denied appellant's claim for recurrence of total disability for intermittent periods beginning October 2, 2001, that he was totally disabled on January 19, 2002 or that the surgery on April 11, 2002 was necessitated by the original work factors accepted in the claim.

¹ It appears that appellant was released to light duty on October 16, 1998. He accepted a limited-duty job offer on November 5, 1998. The limited-duty position required appellant to remove trays from the saw tooth rack and place them in steel, remove all plastic bands from the trays when not in service and work empty equipment. Apparently appellant returned to full duty on December 9, 1998. He was off work from August 12 to May 2, 2000, unrelated to the work injury.

² The record indicates that appellant has a prior claim for date of injury March 14, 1998. No. 090438703.

³ The Office authorized appellant's June 8, 2001 surgery, a right L5 hemisemilaminectomy, excision of the herniated disc at L5-S1 and decompression of the S1 nerve root.

⁴ Further, a statement submitted by Erin Sutton, a supervisor, indicated that appellant's injury to his back was reagravated due to a car accident that occurred during the time period of his absence. The employing establishment also submitted additional information to support that appellant was in a car accident.

By letter dated August 15, 2003, appellant, through his representative, requested reconsideration of the August 16, 2002 decision. Subsequent to the August 16, 2002 decision, the Office received duplicates of medical evidence previously of record and medical evidence.

In a July 19, 2002 report, Dr. Reynaldo Castillo, a Board-certified neurosurgeon, indicated that appellant had completed his physical therapy. He noted that appellant's lumbar fusion decompression had been done more than three months previously, that he was ready to remove his brace, that the wound was well healed and that appellant had no weakness. Dr. Castillo recommended a functional capacity assessment to determine what appellant could do and discharged him from care.

In a magnetic resonance imaging (MRI) scan of the lumbar spine dated March 24, 2002, Dr. Edward J. Bok, a Board-certified radiologist, noted findings of changes of a prior right L5-S1 laminectomy with mild volume loss of the right L5-S1 intervertebral foramen with granulation of tissue enhancing around the right S1 nerve root, but no sign of focal prolapse of disc material upon the nerve root. He also noted a distinctive effacement of the perineural fat in the right L5-S1 foramen, which was only a few millimeters in height, as a result of the combined degenerative changes, which was noted to be present and similar on the MRI scan performed one year earlier on March 22, 2001 with very little interval change. Dr. Bok noted no signs of additional or re-prolapsed soft disc fragment at this level or at the other levels, with no signs of infectious discitis or instability.

In chart notes dated November 16, 2001, January 24, 29 and March 1, 2002, Dr. Christopher Zielinski, an osteopath,⁵ indicated that appellant had chronic lumbar strain with L5-S1 radiculopathy, urinary incontinence, hematochezia, probable anal fissure and a history of herniated disc of the lumbar spine. In the January 29, 2002 chart notes, he assessed chronic back pain and provided a work restriction of no lifting over 20 pounds until appellant saw his neurologist on February 1, 2002. Dr. Zeilinski advised that he had provided a work restriction for January 27 to 28, 2000 for exacerbation of appellant's back pain. In his March 1, 2002 chart notes, Dr. Zeilinski assessed chronic lumbar pain and follow-up regarding his pending surgical procedure.

The Office also received chart notes from Dr. Frank Belsito, an osteopath,⁶ dated April 1 and July 29, 2002. He indicated that an electrocardiogram (EKG) was performed and showed a normal sinus rhythm. Dr. Belsito cleared appellant for surgery. In his July 29, 2002 report, Dr. Belsito indicated that appellant was status post lumbar fusion and had been doing well until the previous weekend when he developed pain along the left sacral area and down into the buttocks. Dr. Belsito recommended Bextra and follow up with Dr. Castillo.

By decision dated August 29, 2003, the Office denied appellant's request for merit review.

⁵ He is not listed as Board-certified.

⁶ He is not listed as Board-certified.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act⁷ vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁸

“The Secretary of Labor may review an award for or against compensation at any time or on his own motion or on application. The Secretary, in accordance with the facts found on review, may --

- (1) end decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).⁹

The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.¹⁰

Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.¹¹

ANALYSIS

In the instant case, the Office denied appellant's reconsideration request on August 29, 2003 after reviewing the evidence submitted in support of the request. The Office determined that the medical evidence submitted was insufficient to warrant merit review.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.608(a) (1999).

¹⁰ 20 C.F.R. § 10.606(b)(1)-(2).

¹¹ 20 C.F.R. § 10.608(b).

The Board initially notes that, with his request for reconsideration, appellant submitted evidence previously of record. 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.¹²

Appellant also submitted reports from Drs. Castillo, Belsito and Zielinski, which covered his complaints and treatment but did not specifically discuss his condition in relation to his accepted employment injury or address whether he had stopped work or the reasons for his stopping.¹³ Although Dr. Zielinski made findings and opined that appellant should have work restrictions, he offered no opinion regarding appellant's recurrence or inability to work in relation to the accepted employment injury. Therefore, appellant has failed to submit medical evidence relevant to the issue in the instant case of whether his recurrence or surgery was related to the accepted employment injury.¹⁴ Appellant, thus has failed to show that the Office erred in interpreting the law and regulations governing his entitlement to compensation under the Act, and has not advanced any relevant legal argument not previously considered by the Office. Likewise, he failed to submit relevant or pertinent new evidence not previously considered. Inasmuch as appellant failed to meet any of the three requirements for reopening his claim for merit review, the Office properly denied his reconsideration request on August 29, 2003.¹⁵

CONCLUSION

The Board finds that the Office properly denied merit review of appellant's claim on August 29, 2003.

¹² *David J. McDonald*, 50 ECAB 185 (1998); *John Polito*, 50 ECAB 347 (Docket No. 96-2430, issued April 19, 1999); *Khambandith Vorapanya*, 50 ECAB 347 (1999).

¹³ The Board has held that a medical opinion not fortified by medical rationale is of little probative value. *Annie L. Billingsley*, 50 ECAB 210 (1998); *Michael E. Smith*, 50 ECAB 313 (1999).

¹⁴ See *Kevin M. Fatzer*, 51 ECAB 407, 412 (2000) (finding that a medical report containing a vague and unrationalized opinion on appellant's disability was insufficient to require reopening of appellant's case because it failed to address his physical condition at the relevant time).

¹⁵ 20 C.F.R. § 10.606(b)(2).

ORDER

The decision of the Office of Workers' Compensation Programs dated August 29, 2003 is hereby affirmed.

Issued: January 22, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member