United States Department of Labor
Employees' Compensation Appeals Board

NORMAN WALKER, Appellant	)	
and	)	**Docket No. 04-40**
	)	**Issued: January 28, 2004**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Texarkana, TX, Employer	)	

Appearances:
Norman Walker, 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 25, 2003 appellant filed a timely appeal from the decision of the Office of Workers' Compensation Programs dated April 4, 2003, in which the Office denied appellant's request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over this case.

ISSUE

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

FACTUAL HISTORY

On July 25, 2000 appellant, then a 57-year-old material handler, filed a traumatic injury claim alleging that on that date he injured his lower back while moving material in the performance of duty. On November 28, 2000 the Office accepted appellant's claim for lumbosacral sprain.

On October 25, 2001 appellant filed a claim for a schedule award and submitted medical evidence in support of his claim, including a September 25, 2001 report from Dr. Barry M. Green, a Board-certified orthopedic surgeon. In his report, Dr. Green stated that appellant complained of dull lumbar aches with radiation into both legs, shooting pain and a pins and needles feeling in both hands and both feet, but had no sensory or motor deficits or other specific disorders. The physician concluded that appellant had reached maximum medical improvement on September 25, 2001 and that based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (A.M.A., *Guides*) fifth edition, page 384, Table 15-3, Category II, appellant's condition equated to an eight percent impairment of the whole person.

At the request of the Office, an Office medical adviser reviewed Dr. Green's findings and conclusions. In a report dated March 7, 2002, the Office medical adviser stated that Dr. Green noted no motor or sensory abnormalities and did not find any impairment of the extremities as a result of appellant's back condition and as his eight percent impairment rating was based on that portion of the A.M.A., *Guides* pertaining to impairments due to lumbar spine injuries, which are not compensable under the Federal Employees' Compensation Act,[1] appellant was not entitled to a schedule award.

In a decision dated May 16, 2002, the Office denied appellant's claim finding that, as he failed to provide sufficient evidence to establish that he sustained an impairment of any member or function of the body enumerated by section 8107 of the Act, he was not entitled to a schedule award.

By letter dated March 24, 2003, appellant requested reconsideration of the Office's prior decision. In support of his request, appellant submitted the results of a November 12, 2002 electromyography (EMG) study and progress notes dated September 30, October 14 and November 25, 2002 from Dr. Joel T. Patterson, his treating Board-certified neurological surgeon.

In a decision dated April 4, 2003, the Office denied appellant's request for reconsideration on the grounds that the request neither raised substantive legal questions nor included new and relevant evidence and, therefore, was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations 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 (3) submitting relevant and pertinent new evidence not previously considered by the Office.[2] 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

[1] 5 U.S.C. §§ 8107.

[2] 20 C.F.R. § 10.606(b)(2) (1999).

reopening the case for a review on the merits.[3] Evidence or argument that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[4] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[5]

ANALYSIS

The only decision before the Board in this appeal is that dated April 4, 2003, in which the Office denied appellant's application for merit review. As more than one year had elapsed between the date of the Office's most recent merit decision dated May 16, 2002 and the filing of appellant's appeal postmarked September 25, 2003, the Board lacks jurisdiction to review the merits of appellant's claim.[6] In his letter requesting reconsideration, appellant asserted that he had submitted additional medical evidence for consideration by the Office. Appellant did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or 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).

With respect to the third above-noted requirement under section 10.606(b)(2), however, the Board finds that appellant did submit new and relevant medical evidence from Dr. Joel T. Patterson and Dr. Linda L. Walby, a Board-certified physiatrist. In his treatment note dated September 30, 2002, Dr. Patterson stated that appellant continued to complain of pain radiating down his leg and that he would repeat the magnetic resonance imaging (MRI) scan. Dr. Patterson noted that he had originally requested authorization to perform an EMG, but permission had been refused. In his follow-up report dated October 14, 2002, Dr. Patterson noted that the MRI scan demonstrated degenerative disease up and down appellant's lumbar spine, with no disc herniation and again stated that he would like to see some EMG results to document any nerve root compression. Dr. Patterson added that if acute changes were seen on EMG, surgery would have to be considered. In his final progress note dated November 25, 2002, Dr. Patterson noted that a recent EMG showed the presence of bilateral S1 radiculopathy.

In her report dated November 12, 2002, Dr. Walby set forth the results of the EMG performed that day, noting that the results confirmed bilateral mild S1 radoculopathies. These reports have not been previously considered by the Office and are relevant to the issue of whether appellant suffered a peripheral nerve injury, for which he could be entitled to a schedule award, as set forth in section 17.2l, page 550 of the A.M.A., *Guides*. Therefore, appellant met

[3] 20 C.F.R. § 10.608(b) (1999).

[4] *Helen E. Paglinawan*, 51 ECAB 591 (2000).

[5] *Kevin M. Fatzer*, 51 ECAB 407 (2000).

[6] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office's final decision being appealed. The Board notes that, in his letter of appeal, appellant stated that he had initially submitted an appeal to the Board by certified mail on May 16, 2003, but was later told that these documents had been lost. The Board notes that it has no record of any earlier letter of appeal from appellant.

the requirements for requesting reconsideration under 20 C.F.R. § 10.606(b)(1) and (2)(iii).[7] The Board finds that the reports of Dr. Walby and Dr. Patterson, taken together, are sufficient to require reopening appellant's case for further review on its merits. As the Office failed to review these new reports, which are relevant to the issue of whether appellant is entitled to a schedule award, it improperly denied appellant's request for further merit review. The April 4, 2003 decision will be set aside and the case remanded for consideration of all of this evidence.

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 4, 2003 is set aside and the case is remanded for further action in accordance with this decision of the Board.[8]

Issued: January 28, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[7] *See Claudio Vazquez*, 52 ECAB 496 (2001).

[8] The Board notes that following the Office's April 4, 2003 decision, appellant submitted additional medical evidence to the Office in support of his claim. Appellant submitted this same evidence to the Board together with his letter of appeal. However, the Board may not consider this evidence on appeal as its review of the case is limited to the evidence of record, which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).