United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 07-264**
	)	**Issued: April 23, 2007**
DEPARTMENT OF HOMELAND SECURITY, BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, Detroit, MI, 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
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 7, 2006 appellant filed a timely appeal from the August 23, 2006 nonmerit decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision. The Board has no jurisdiction to review the Office's March 8 or August 2, 2005 decisions denying a recurrence of disability on October 12, 2004, as appellant filed his appeal to the Board more than one year after the date of those decisions.

ISSUE

The issue is whether the Office properly denied appellant's July 15, 2006 request for reconsideration.

FACTUAL HISTORY

On September 28, 2004 appellant, then a 38-year-old special agent and senior firearms instructor, injured his low back in the performance of duty: "I was changing a flat tire on

government truck as roadside emergency while on way to work; back injury occurred while taking flat tire from rim on vehicle -- same back pain from original work injury."[1] The Office accepted his claim for lumbar strain and authorized continuation of pay through October 10, 2004.

Dr. Ronald L. Meyers, a family physician specializing in osteopathic manipulation, released appellant to return to regular work on October 12, 2004. Appellant attempted to return to work that day but had to leave midday due to hip and leg pain. He was totally disabled for work from that day forward and claimed compensation for wage loss.

In a decision dated March 8, 2005, the Office denied a compensation for a recurrence of disability. It noted that Dr. Meyers reported on October 12, 2004 that appellant had reinjured his back that day while on the gun range. The Office found that the factual and medical evidence failed to establish that the claimed recurrence resulted from the accepted work injury.

On April 25, 2005 appellant requested reconsideration. He explained that on October 12, 2004 he was unable to perform any of his normal duties properly due to the continued pain from his September 28, 2004 employment injury. On April 15, 2005 Dr. Meyers explained that appellant probably ruptured at least one lumbar disc on December 3, 2001 while moving ammunition and severely exacerbated his low back condition while changing a tire on September 28, 2004.

On July 15, 2005 Dr. Daniel P. Elskens, appellant's neurologist, advised the Office that he found it difficult or impossible to answer the questions posed to him. He noted that he saw appellant only once on January 28, 2005 and therefore could make no distinction between his 2001 and 2004 employment injuries. Dr. Elskens explained that lumbar strain was really not a complete diagnosis; it was a very broad diagnosis that could include everything contained in his January 28, 2005 report.[2] He stated that appellant's herniated disc "clearly could come from the injuries" the Office had accepted.

In a decision dated August 2, 2005, the Office reviewed the merits of appellant's case and denied modification of its March 8, 2005 decision. The Office determined that the etiology of appellant's disabling lumbar disc condition was not related to his accepted work injuries. Specifically, the Office found that Dr. Meyers' opinion lacked sufficient medical reasoning and findings:

> "In other words, Dr. Meyers has not persuasively explained how you sustained a more serious and persistent back condition from the December 3, 2001 injury when your back condition from this injury was previously classified as being 'almost totally resolved' in an office note of December 10, 2001 and you did not

[1] On December 3, 2001 appellant sustained an injury in the performance of duty when he picked up a 50-pound carton from the floor. He resumed full regular duties on January 2, 2002. The Office accepted the claim for lumbar strain. OWCP File No. 092029237.

[2] In his January 28, 2005 report, Dr. Elskens noted that appellant had pain off and on for a long period of time but had pain daily since September 2004. Appellant was in no apparent distress on physical examination, but diagnostic studies showed a "breakdown" of the disc at L3-4, L4-5 and L5-S1 and "somewhat of a herniation of the disc also."

seek follow-up medical care for your back until one and [a] half years following the injury."

The Office also noted that Dr. Elskens declined to give his expert medical opinion on the cause of appellant's current back complaints.

On July 15, 2006 appellant requested reconsideration. He argued that the Office and his employer had provided him little guidance. Appellant submitted a September 20, 2005 opinion from Dr. Elskens:

> "[Appellant] is a gentleman who has a reported accepted workman's compensation injury to his back in 2001 and one in 2004. The diagnosis has always involved things such as lumbar strain, back pain, etc. These are very highly nonconclusive diagnoses that are usually very general in nature. This gentleman had evidence of failure of L4-5 and L5-S1 discs in terms of a mechanical nature, all completely consistent, to the best of our medical ability, with his previously-stated injuries. There is no medical nor legal way to separate in 2005 how much of his disease came from [the] injury of 2001 versus [the] injury of 2004. Since I never had the opportunity of seeing the patient between 2001 and 2004 that is mostly irrelevant.
>
> "There has been some discussion by the Department of Labor that his injuries are not compensable and I think that basically this is a mistaken judgment by the Department of Labor and that if [appellant] were to pursue legal recourse I think the medical facts would clearly show that his problems are compensable under [w]orkman's [c]ompensation and I would be more than happy to support him in that endeavor."

Appellant also submitted a March 27, 2006 report from Dr. Meyers, who addressed osteopathic manipulative medicine and his use of the phrase "chiropractic back."

In a decision dated August 23, 2006, the Office denied appellant's request for reconsideration. The Office found that appellant's request provided no relevant new evidence or legal argument addressing the deficiencies of his claim. The Office noted: "There is no evidence which addresses how your October 12, 2004 work stoppage was necessitated by a spontaneous worsening of your accepted condition without intervening cause."

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[3]

[3] 20 C.F.R. § 10.605 (1999).

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[4]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[5]

ANALYSIS

Appellant's July 15, 2006 request for reconsideration does not show that the Office erroneously applied or interpreted a specific point of law, nor does it advance a relevant legal argument not previously considered by the Office. Appellant submitted reports from his family physician, Dr. Meyers, and his neurologist, Dr. Elskens, but these reports do not constitute new and relevant evidence warranting a reopening of his case for a review on the merits.

Dr. Meyers' March 27, 2006 explanation of his use of the phrase "chiropractic back" does not show that the lumbar disc condition that disabled appellant beginning October 12, 2004 was a result of incidents that occurred at work on December 3, 2001 or September 28, 2004. Dr. Elskens' September 20, 2005 report adds nothing new to the record. It is substantially similar to his July 5, 2005 report, which the Office considered when it issued its August 2, 2005 decision denying compensation for disability beginning October 12, 2004. Dr. Elskens again explained the nonconclusive nature of such general diagnoses as lumbar strain and back pain, and he reported that the failure of appellant's discs could have come from his injuries in 2001 and 2004, but there was no way for him to distinguish the two. His opinion on the compensability of appellant's condition under workers' compensation law lies outside the realm of his medical expertise.[6]

Because appellant's July 15, 2006 request for reconsideration fails to meet at least one of the three standards for obtaining a merit review of his case, the Board finds that the Office properly denied reopening his case for a merit review. The Board will affirm the Office's decision denying his request.

[4] *Id*. at § 10.606.

[5] *Id*. at § 10.608.

[6] It is the function of the medical expert to give opinion only on medical questions. *See George Tseko*, 40 ECAB 948 (1989); *James E. Chambers*, 8 ECAB 461 (1955).

CONCLUSION

The Board finds that the Office properly denied appellant's July 15, 2006 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 23, 2007
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