

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

G.O., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Brooklyn, NY, Employer**

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**Docket No. 06-1351
Issued: January 3, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 25, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' March 9, 2006 nonmerit decision denying his request for reconsideration. Because more than one year has elapsed between the most recent merit decision dated December 22, 2004 and the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

On April 20, 2004 appellant, a 53-year-old rural medical instrument technician, filed a claim for a recurrence of disability relating to an April 5, 2003 injury that was accepted for left rotator cuff tear and impingement syndrome, lumbosacral sprain and cervical sprain/strain.

Appellant alleged that on April 13, 2004 after returning to a limited-duty assignment, he experienced pain in his lower back while standing and sitting. He reported to his supervisor that he reinjured himself while reaching to scratch his arm. On June 21, 2004 appellant filed a claim for recurrence of disability, alleging that on May 25, 2004 he experienced pain in his lower back and left shoulder while walking and standing at work. His supervisor related appellant's claim that he reinjured himself while reaching to scratch his arm.

On July 15, 2004 the Office informed appellant that the information submitted was insufficient to establish his recurrence claim. It advised him to submit, within 30 days, additional factual information reflecting a change in the nature and extent of his injury-related condition or a change in the nature and extent of his limited-duty assignment. In an August 9, 2004 statement, appellant noted that after returning to light duty on March 14, 2004 pain in his lower back continued and worsened with prolonged sitting. In another statement dated August 9, 2004, he reported that on May 24, 2004 he felt a strain in his back when he used his left hand. The record contains numerous physical therapy reports and notes beginning May 5, 2003. In an August 16, 2004 development letter, the Office again advised appellant to submit additional information and evidence in support of his recurrence claim.

In a September 20, 2004 report, Dr. Mehran Manouel, a Board-certified orthopedic surgeon, provided a history of appellant's April 5, 2003 injury. He noted a "shoulder arthroscopy s/p work-related injury with persistent shoulder pain." Appellant submitted reports from Dr. Carlisle Saint Martin, a treating physician, dated April 4, June 16, September 13 and 20 and October 4 and 25, 2004. On April 14, 2004 Dr. Saint Martin stated that appellant believed "he hurt his shoulder as he stretched to scratch." He noted that he had increased pain on sitting. On September 20, 2004 Dr. Saint Martin reiterated appellant's belief that he injured his shoulder when he stretched to scratch. He stated: "This is a recurrence from original as he had exacerbation of lumbar derangement." On October 4, 2004 Dr. Saint Martin diagnosed chronic pain, lumbar derangement. Appellant submitted illegible progress notes dated February 2 through September 13, 2004 from Dr. Leon M. Bernstein, a Board-certified orthopedic surgeon. In a May 17, 2004 order for physical therapy, Dr. Bernstein provided diagnoses of left shoulder sprain tendinitis and rotator cuff impingement syndrome.

On November 10, 2004 the Office determined that appellant's recurrence claim would be processed as a new traumatic injury claim as he had alleged a condition resulting from work-related injuries sustained on April 13, 2004.

On November 17, 2004 the Office informed appellant that the information submitted was insufficient to establish his traumatic injury claim. The Office advised appellant to submit a detailed narrative describing how the alleged injury occurred and a doctor's report with a diagnosis and rationalized medical opinion explaining how the injury could have caused the diagnosed condition. Appellant submitted reports from Dr. Saint Martin dated May 4 and 24, June 2 and 16, July 6, August 9 and November 18 and 22, 2004. These reports reiterated appellant's belief that he reinjured himself when he reached to scratch his arm. On May 24, 2004 Dr. Saint Martin provided an impression of postoperative left shoulder derangement and an exacerbation of lumbar degeneration. On November 22, 2004 he stated that appellant's injuries

were “simply an exacerbation of prior -- and the repeat surgery to shoulder is directly related to his work.”

In a December 2, 2004 narrative statement, appellant indicated that he had returned to work on April 12, 2004, following reconstructive shoulder surgery resulting from an April 5, 2003 work injury. He alleged that, on his first day back to work, he developed low back pain that persisted and worsened until April 13, 2004, when he stopped working.

By decision dated December 22, 2004, the Office denied appellant’s claim on the grounds that he failed to establish fact of injury on April 13, 2004. The Office further found that since no initial injury was established, the issue of a recurrence in May 2004 was moot.

On December 18, 2005 appellant, through his representative, requested reconsideration of the Office’s December 22, 2004 decision. Counsel repeated earlier allegations that appellant sustained a work-related injury due to prolonged sitting on April 13, 2004. He contended that the factual and medical evidence established the fact of injury under the existing law. The representative further contended that the medical evidence of record was well rationalized and established that appellant sustained an injury on April 14, 2004 causally related to his employment. Stating his belief that the Office had failed to consider it, counsel indicated that he was attaching a copy of Dr. Saint Martin’s April 14, 2004 report.

On March 9, 2006 the Office denied appellant’s reconsideration request without reviewing the merits of the claim, finding that appellant provided no new relevant evidence or legal argument to support his claim for injury.

LEGAL PRECEDENT

The Federal Employees’ Compensation Act¹ 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 may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”²

The application for reconsideration 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.³

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 these standards. If

¹ 5 U.S.C. §§ 8101 *et seq.*

² 20 C.F.R. § 10.605.

³ 20 C.F.R. § 10.606.

reconsideration is granted, the case is reopened and the case is reviewed on its merits.⁴ 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

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.⁶

ANALYSIS

Appellant's December 18, 2005 request for reconsideration neither showed that the Office erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered. His representative recited the law as it relates to his burden in establishing the fact of injury and strongly contended that appellant met his burden. However, appellant failed to show how the Office erred, nor did he advance a relevant legal argument not previously considered. Counsel merely disagreed with the Office's conclusion that appellant failed to establish the fact of injury. He contended that the evidence of record establishes that prolonged sitting caused an injury and that appellant's allegations should stand unless refuted by strong or persuasive evidence. However, in denying appellant's claim, the Office found that the factual basis for the claim was unclear and, in fact, that the medical record was inconsistent with his presentation of the facts. Therefore, the Office considered the argument made by appellant's representative when it denied the claim. The Board finds that appellant has failed to satisfy either of the first two requirements under section 10.606(b)(2).

Appellant also failed to satisfy the third requirement listed in section 10.606(b). He did not submit any relevant and pertinent new evidence not previously considered by the Office. Although counsel indicated that he was including a copy of Dr. Saint Martin's April 14, 2004 report as "Exhibit B," no such report was contained in the record. The Board notes that a copy of Dr. Saint Martin's April 14, 2004 report was previously submitted and was considered by the Office in its December 22, 2004 decision.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's December 18, 2005 request for reconsideration without conducting a merit review of the claim.

⁴ *Donna L. Shahin*, 55 ECAB 192 (2003).

⁵ 20 C.F.R. § 10.608.

⁶ *See Helen E. Paglinawan*, 51 ECAB 591 (2000).

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 3, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board