United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 06-1389**
	)	**Issued: March 19, 2007**
DEPARTMENT OF THE AIR FORCE, IDAHO AIR NATIONAL GUARD, Boise, ID, Employer	)	

Appearances:
Wendy Hatten, for the appellant
No appearance, for the Director

Oral Argument February 20, 2007

DECISION AND ORDER

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

JURISDICTION

On May 30, 2006 appellant filed a timely appeal from the nonmerit decisions of the Office of Workers' Compensation Programs dated December 15, 2005 and March 3, 2006 denying his request for reconsideration. Because more than one year has elapsed from the last merit decision issued on November 22, 2004 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 4, 1990 appellant, then a 30-year-old aircraft mechanic, filed a traumatic injury claim alleging that on May 17, 1990 he suffered hyperextension of his neck and shoulder muscles when he was ejected from an RF-4C aircraft. The claim was accepted for cervical

strain. On October 31, 2002 appellant filed a claim alleging a recurrence of disability due to the May 17, 1990 employment injury on December 30, 1996. By decision dated November 22, 2004, the Office denied appellant's claim for a recurrence. The Office found that appellant did not submit sufficient medical evidence to establish a recurrence of his accepted cervical strain injury of May 17, 1990 commencing on December 30, 1996. The Office noted that the medical evidence addressed appellant's lower back condition, which was not an accepted injury.

By letter dated November 21, 2005, appellant requested reconsideration. He resubmitted medical reports that were already considered in the previous decision. Appellant also requested independent medical review of his three cases that were before the Office. By decision dated December 15, 2005, the Office denied appellant's reconsideration request without further merit review. The Office also stated that appellant's request for independent review was not authorized.

By letter dated January 30, 2006, appellant indicated that 86 pages of evidence had been submitted in support of his prior request for reconsideration, but that these pages were missing from the file and not considered by the Office. In a decision dated March 3, 2006, the Office noted that this evidence had been incorrectly indexed with appellant's other claim. Therefore, the Office considered appellant's letter as a new request for reconsideration. This aforementioned evidence consisted of numerous medical reports already of record. In addition, appellant submitted medical reports dated February 23 and August 26, 2006 by Dr. Richard Radnovich, an osteopath. These reports assessed appellant with depression, lumbalgia and other enthesocpathy of the elbow. Appellant also submitted physical therapy notes.

By decision dated March 3, 2006, the Office denied appellant's request without a merit review.

LEGAL PRECEDENT

To require the Office to reopen a case for merit reviews under section 8128(a) of the Federal Employees' Compensation Act, the Office regulations provide that the application for reconsideration, including all supporting documents, 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.[1]

ANALYSIS

The Board finds that appellant has not submitted any relevant and pertinent new evidence, advanced a legal argument not previously considered by the Office, nor established that the Office erroneously interpreted a point of law. Most of the evidence submitted on reconsideration was already considered by the Office. The Board has held that evidence that repeats or duplicates evidence already of record does not constitute a basis for reopening a claim for merit review.[2] Dr. Radnovich's opinions do not address the underlying issue of whether

[1] 20 C.F.R. § 10.606(b)(2)(i-iii).

[2] *See James E. Norris*, 52 ECAB 93 (2000).

appellant established a recurrence of his cervical strain commencing on December 30, 1996 and are therefore not relevant to the issue on reconsideration. Furthermore, health care providers such as nurses, acupuncturists, physicians assistants and physical therapists are not physicians under the Act.[3]

With regard to appellant's specific arguments, the Office acted properly in denying appellant's claim for an independent medical review. Appellant has the burden of proof to establish his claim for recurrence.[4] The November 17, 2003 report by Dr. Roy Tyler Frizzel, a Board certified neurosurgeon, was evaluated by the Office in its November 22, 2004 merit decision. As appellant filed his appeal with the Board over one year after the issuance of the November 22, 2004 decision, the Board does not have jurisdiction to review this decision or report. Appellant refers to a March 27, 2004 functional capacity evaluation by Dr. Frizzel. The Board presumes that appellant is referring to Dr. Frizzel's May 27, 2004 functional capacity evaluation. This report, submitted on reconsideration, does not address the relevant issue of whether appellant sustained a recurrence on December 30, 1996 and, accordingly, is not sufficient to reopen appellant's case. Finally, appellant contends that the Office did not give adequate consideration to the rare circumstances that caused appellant's employment injury. However, the issue of recurrence was denied due to lack of medical evidence. The Office has accepted the incident of appellant's being ejected from a plane. The fact that appellant sustained his accepted condition of cervical strain in this unusual manner does not alter the fact that appellant did not submit sufficient medical evidence to require the Office to further review the merits of his case.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

[3] The term "physician" is defined in the Act at 5 U.S.C. § 8101(2).

[4] *See Mary A. Ceglia*, 55 ECAB 626 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 3, 2006 and December 15, 2005 are affirmed.

Issued: March 19, 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