United States Department of Labor
Employees' Compensation Appeals Board

G.B., Appellant	)	
	)	**Docket No. 08-1316**
and	)	**Issued: October 20, 2008**
	)	
DEPARTMENT OF DEFENSE, DEFENSE FINANCE & ACCOUNTING SERVICE, San Antonio, TX, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 25, 2008 appellant filed a timely appeal from a January 11, 2008 decision of the Office of Workers' Compensation Programs which denied merit review. Because more than one year has elapsed between the most recent merit decision dated April 21, 2006 and the filing of this appeal on March 25, 2008, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly refused to consider the merits of appellant's claim.

FACTUAL HISTORY

On August 12, 2005 appellant, then a 50-year-old accountant, filed a traumatic injury claim alleging that on August 5, 2005, while at work, she bent over to pick up a piece of paper and felt a pop in her back. She did not stop work.

Appellant submitted a report from Dr. Joe Flood, a chiropractor, dated August 18, 2005, who noted a history of injury and diagnosed facet syndrome, myofascial pain syndrome, radiculitis, displacement of lumbar, lumbosacral sprain/strain and S1 sprain/strain. She also submitted treatment notes prepared by a health care professional dated August 18 to September 15, 2005, who treated her for low back pain.

In a decision dated September 29, 2005, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that her condition was caused by the factors of employment.

On October 12, 2005 appellant requested reconsideration. She submitted a January 7, 2005 magnetic resonance imaging (MRI) scan of the left knee. Appellant also submitted an MRI scan of the lumbar spine. She submitted reports from Dr. Fernando T. Avila, a Board-certified anesthesiologist, from June 25 to September 23, 2005, who treated appellant for injuries sustained in a January 1, 2004 car accident. Dr. Avila diagnosed lumbar disc disease, lumbar nerve root dysfunction, lumbar facet syndrome, bilateral sacroiliac joint pain and situational depression and recommended epidural steroid injections. In a September 23, 2005 report, he noted treating appellant on August 18, 2005 for a work injury occurring on August 5, 2005 when she picked up a piece of paper from the floor and experienced back pain. Reports from a health care professional from September 19 to November 3, 2005 noted appellant's treatment for persistent back pain and a recent work-related disc injury. Appellant was treated by Dr. C.P. Garcia, a Board-certified internist, on September 20, 2005, who noted a history of injury and diagnosed facet syndrome, myofascial pain syndrome, radiculitis, displacement of the lumbar, lumbosacral sprain/strain and S1 sprain/strain. Other reports from Dr. Stephen E. Earle, a Board-certified orthopedist, dated October 18 and November 1, 2005, noted appellant's treatment for back and leg pain which developed after an August 5, 2005 work injury. He diagnosed left radiculopathy, rule out herniated nucleus pulposus.

In a decision dated December 22, 2005, the Office denied modification of the prior decision.

On April 4, 2006 appellant requested reconsideration. She submitted a report dated November 10, 2005 from Dr. Avila who diagnosed lumbar disc disease lumbar nerve root dysfunction, lumbar facet syndrome, bilateral sacroiliac joint pain and situational depression. On March 1, 2006 Dr. Avila opined that appellant's current condition was exacerbated by the work injury of August 5, 2005. He recommended epidural injections and advised that appellant was totally disabled as of August 12, 2005.

In a decision dated April 21, 2006, the Office denied modification of the prior decision.

On November 27, 2007 appellant requested reconsideration and asserted she submitted adequate medical evidence to support that her low back condition was work related. She submitted reports from Dr. Roger J. Beal, a podiatrist, dated May 5, 1998 to April 17, 2006, who treated appellant for worsening foot pain and diagnosed metatarsal bursitis secondary to bunions and distal plantar fasciitis. Also submitted were diagnostic test results including MRI scans of the lumbar spine and left knee that were previously of record. A functional capacity evaluation dated February 28, 2006 which recommended electrical muscle stimulation. In a report dated

August 12, 2005, Dr. Avila noted performing a transformational epidural lumbar block and diagnosed lumbar radiculopathy, nerve root dysfunction, lumbar facet spondylosis and bilateral sacroiliac joint arthritis. On April 6, 2006 he described appellant's treatment for injuries sustained in a January 1, 2004 automobile accident and an August 5, 2005 work injury. Dr. Avila diagnosed lumbar disc disease, lumbar radiculopathy -- aggravation of preexisting condition, lumbar facet dysfunction, bilateral sacroiliitis, cervical disc disease, cervical radiculopathy, bilateral lateral epicondylitis, bilateral carpal tunnel syndrome, bilateral shoulder impingement and right plantar fasciitis and advised that appellant was totally disabled. Appellant submitted an August 18, 2005 report from Dr. Flood and treatment notes from a health care practitioner dated August 18 to September 30, 2005 which were previously of record. Also submitted was an August 17, 2006 report from Dr. Garcia who noted a history of injury and diagnosed post-traumatic stress disorder, cervical, thoracic and lumbar strain, right and left shoulder strains, rule out bilateral carpal tunnel syndrome and tennis elbow.

By decision dated December 5, 2007, the Office denied appellant's reconsideration request on the grounds that the evidence submitted in support of her request for reconsideration was repetitious and immaterial and insufficient to warrant review of the prior decision.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,[1] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[2] which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(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]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[3]

[1] 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.606(b).

[3] *Id.* at § 10.608(b).

ANALYSIS

Appellant's November 27, 2007 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted reports from Dr. Roger J. Beal, a podiatrist, dated May 5, 1998 to April 17, 2006, who diagnosed metatarsal bursitis secondary to bunions and distal plantar fasciitis. However, Dr. Beal's reports, while new, are not relevant because he did not address whether the August 5, 2005 employment incident caused a diagnosed condition. Additionally, his treatment appears to be for a foot condition unrelated to appellant's current claim as she did not allege she sustained a foot injury causally related to the August 5, 2005 work incident. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review. Likewise, reports of diagnostic testing provided by appellant are not relevant because they do not address whether the August 5, 2005 work incident caused a diagnosed condition

Appellant submitted an August 12, 2005 report from Dr. Avila who noted treating appellant for injuries sustained in an automobile accident on January 1, 2004 and a work injury on August 5, 2005. Dr. Avila diagnosed lumbar disc disease, lumbar radiculopathy -- aggravation of preexisting condition and lumbar facet dysfunction. Likewise, an August 17, 2006 report from Dr. Garcia noted a history of injury and diagnosed post-traumatic stress disorder, cervical, thoracic and lumbar strain, right and left shoulder strains, rule out bilateral carpal tunnel syndrome and tennis elbow. However, these reports are insufficient to require a merit review as they are similar to the physicians' prior reports already contained in the record[4] and were previously considered by the Office.

Appellant submitted a report from Dr. Flood, a chiropractor, dated August 18, 2005, who noted treating appellant for back pain. However, the underlying issue in the case is medical in nature and section 8101(2) of the Act provides that chiropractors are considered physicians "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary."[5] Thus, where x-rays do not demonstrate a subluxation (a diagnosis of a subluxation based on x-rays has not been made), a chiropractor is not considered a "physician," and his or her reports cannot be considered as competent medical evidence under

[4] 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; *see Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[5] 5 U.S.C. § 8101(2).

the Act.[6] In the present case, Dr. Flood did not diagnose a subluxation as demonstrated by x-ray to exist, and therefore his reports are not those of a physician.

Appellant also submitted reports, dated August 18 to September 30, 2005, from an individual characterized as a "health care practitioner," whose signature is not legible. However, as noted above, the underlying issue in the case is medical in nature and documents from a health care practitioner are not considered medical evidence because a health care provider is not a physician under the Act.[7]

Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did she submit relevant and pertinent evidence not previously considered by the Office."[8]

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied her November 27, 2007 request for reconsideration.[9]

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration.

[6] *See Susan M. Herman*, 35 ECAB 669 (1984).

[7] *See* 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

[8] 20 C.F.R. § 10.606(b).

[9] Following the Office's December 5, 2007 decision, appellant submitted additional evidence to the Office. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 20, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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