

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

C.H., Appellant)

and)

DEPARTMENT OF THE ARMY, ARMY)
DEPOT, New Cumberland, PA, Employer)

**Docket No. 08-1310
Issued: August 26, 2009**

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 April 2, 2008 appellant filed a timely appeal from a July 16, 2007 nonmerit decision of the Office of Workers' Compensation Programs which denied his request for reconsideration. As more than one year had lapsed since the most recent merit decision of July 3, 2006 to the filing of this appeal, the Board lacks jurisdiction over the merits of the appeal pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d).

ISSUE

The issue is whether the Office properly denied appellant's request for further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 11, 1981 appellant, then a 27-year-old warehouse worker, sustained a back injury after lifting several 50-pound boxes. He stopped work on December 14, 1981. The Office accepted appellant's claim for a disc herniation at L5-S1 for which he underwent a laminectomy on January 27, 1982. Appellant received compensation benefits for total disability.

In an October 23, 1995 decision, the Office terminated appellant's compensation benefits as of November 12, 1995.¹ On October 16, 1996 an Office hearing representative affirmed the termination of appellant's wage-loss benefits but reversed the termination of his medical benefits. The Board notes that appellant did not appeal from these decisions. The record indicates that he obtained employment in the private sector.

On May 5, 2006 appellant filed a claim contending that he sustained a recurrence of disability on July 18, 2002. In a June 26, 2006 report, Dr. David A. Wait, a Board-certified internist, stated that appellant was seen for neck and shoulder pain with numbness in both arms and for right knee pain. He stated that appellant had multiple orthopedic injuries for which he was referred to specialists in neurology and orthopedic surgery.

In a July 3, 2006 decision, the Office denied appellant's recurrence of disability claim. It noted that he had not addressed an injury sustained in private employment in 1998 when he fell on ice and was disabled for two months. In addition, the record revealed that appellant was employed in a hospital since 2000 and his duties included lifting and pushing. The medical evidence was found insufficient to establish that he sustained disability since July 18, 2002 due to his 1981 back injury.

On June 24, 2007 appellant requested reconsideration. In a June 20, 2007 letter, he addressed the October 16, 1996 decision of the Office hearing representative noting that the termination of his medical benefits had been reversed. He listed a number of outstanding medical bills which he contended had not been paid.² Appellant also addressed correspondence and documents of record, contending error in the Office's 2006 decision. He argued that the Office had improperly relied upon Dr. Ernest R. Rubbo, a Board-certified orthopedic surgeon, to terminate his wage-loss benefits in 1995.

In a January 29, 2003 report, Dr. Wait stated that, since appellant's 1981 lumbar laminectomy, he experienced increasing pain and was unable to perform certain activities. Appellant's symptoms were progressive and he was off work due to back pain and weakness. Dr. Wait reviewed radiological studies which showed moderate central spinal stenosis at C5-6 and C6-7, which had progressed since prior films. He advised that appellant was unable to perform his current work duties.³

Appellant submitted medical records pertaining to treatment he received at the Veteran's Administration Medical Center. In a March 2, 2005 progress note, April J. Sabia, a physician's assistant, diagnosed recurrent disc herniation at L5-S1 with surgical scar tissue, and noted treatment for pulmonary, hepatitis C, emotional erectile and bilateral leg and foot conditions. She was unable to determine whether his conditions were caused by his military service. In an April 28, 2005 progress note, Dr. Lee J. Sanders, a Board-certified podiatrist, stated that he was

¹ The Office accorded the weight of medical opinion to Dr. Ernest R. Rubbo, a treating physician Board-certified in orthopedic surgery.

² Appellant also submitted materials pertaining to his allegations of mail fraud by various governmental agencies.

³ A September 18, 2003 magnetic resonance imaging (MRI) scan noted a likely recurrent disc herniation at L5-S1. An August 9, 2004 MRI scan of the right shoulder revealed a small full thickness supraspinatus tendon tear.

unable to determine whether a relationship existed between appellant's *pes planus*, *tinea pedis* and plantar fasciitis and his military service.

In an October 28, 2005 report, Dr. Bernard I. Zeliger, an osteopath, stated that appellant had retrolisthesis of L5 in relation to S1 with marked degenerative disc disease at L5-S1 with foraminal stenosis and impingement of the L5 nerve root and postoperative fibrosis of the left S1 nerve root. He also had a bulging disc at L4-5 with no frank herniation. Dr. Zeliger stated that the changes were due to scar tissue from appellant's previous surgery and bulging disc at L4-5. Appellant also had spondylosis at C5-6 and C6-7 with significant bulging discs at both levels and a chronic strain of the cervical spine. Dr. Zeliger opined that appellant had never fully recovered from the December 11, 1981 employment-related injury and was unable to work due to continued pain in his neck and back. On March 7, 2006 Dr. Zeliger opined that appellant's work-related right shoulder and neck injuries which he sustained on November 16, 2002 while working at Harrisburg State Hospital prevented him from performing his regular work duties. He noted that appellant's May 1998 motor vehicle accident and January 19, 1999 fall had aggravated his employment-related back condition and caused neck and left shoulder symptoms. Dr. Zeliger advised that appellant was totally disabled.

In a February 27, 2006 report, Dr. Balint Balog, a Board-certified orthopedic surgeon, reviewed a history of the December 11, 1981 employment injury and appellant's medical treatment. He diagnosed chronic low back pain and some degree of left-sided lumbosacral radiculitis since 1981. Dr. Balog noted that the medical records he reviewed indicated that appellant was chronically disabled due to various diagnosed conditions and had been found disabled by the Social Security Administration. He advised that he could perform light-duty work with restrictions but noted that no such position was available.

In a May 29, 2006 report, Dr. Stanley R. Goldman, a Board-certified internist, stated that appellant had been under his care from February 19, 1999 to October 17, 2005 and treated by his former associate, Dr. Wait. He reviewed appellant's treatment records and could not verify any right shoulder injury on November 16, 2002 from pulling a patient in a Geri-chair while employed at the Harrisburg State Hospital. On September 12, 2003 appellant was seen for complaint of low back pain aggravated by work on hard surfaces at work. Dr. Goldman could not confirm any specific low back injury sustained at work between July 18, 2002 and September 8, 2003. He opined that appellant's employment at the hospital involved physical hardship as could reasonably be expected to aggravate his preexisting back condition.

In an August 3, 2006 report, Dr. Steven E. Morganstein, a Board-certified physiatrist, treated appellant for complaints of cervical and low back pain. He noted that appellant had a history of prior lumbar surgery, herniated nucleus pulposus at L5-S1, and that neurologic testing of the lower extremities revealed no focal motor or sensory deficit. Dr. Morganstein diagnosed chronic neck pain secondary to cervical degenerative disc disease, right rotator cuff syndrome and right knee pain. In reports dated August 11 and September 13, 2006, he opined that appellant's chronic back symptoms were causally related to the December 11, 1981 employment injury. On March 14, 2007 Dr. Morganstein stated that appellant sustained acute and chronic S1 radiculopathy, left greater than the right based on an electromyogram.

In an October 4, 2006 report, Dr. Stephen K. Powers, a Board-certified neurosurgeon, reviewed diagnostic studies of the cervical and lumbar spine obtained in 2006 and noted findings consistent with some foraminal narrowing and lateral recess stenosis, which was minimal on the left at L5-S1 without clear nerve root compression and no findings on examination. He found that appellant was not a surgical candidate. Dr. Powers advised that appellant's pain and discomfort may be related to underlying fibromyalgia and just generalized arthritic disease of the spine.

In a July 16, 2007 decision, the Office denied appellant's request for reconsideration. It noted that the medical evidence addressed several accidents after 1993 while at home and employed in the private sector. The evidence submitted was found immaterial to his recurrence claim as it did not address his disability on or after July 18, 2002.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,⁴ the Office's regulation provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁵ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.⁷

ANALYSIS

As a preliminary matter the Board notes that in 2006 appellant filed a claim for a recurrence of disability as of July 18, 2002. This is the underlying issue on appeal and is medical in nature. In 1981 appellant sustained a back injury accepted for an L5-S1 disc herniation for which he underwent surgery in 1982. On October 23, 1995 the Office terminated his compensation benefits, finding that the report of his attending orthopedic surgeon established that he had no ongoing work-related disability. In decisions dated October 16, 1996, September 29, 1997 and November 24, 1998, the termination of benefits was affirmed.⁸ There

⁴ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(1)-(2); see *Susan A. Filkins*, 57 ECAB 630 (2006).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.608(b); see *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006) (when an application for review of the merits of a claim does not meet at least one of the three regulatory requirements the Office will deny the application for review without reviewing the merits of the claim).

⁸ It is noted that the decision of the Office hearing representative dated October 16, 1996 set aside the termination as to medical benefits. To the extent appellant claims that there are outstanding medical bills, the Office has not issued a final decision on this aspect of his claim and it is not before the Board in this appeal. See 20 C.F.R. § 501.2(c).

was no appeal taken from the termination decisions to the Board within one year of issuance and the Board does not currently have jurisdiction over this aspect of his claim. Therefore, appellant's argument that the Office had improperly relied on the opinion of Dr. Rubbo to terminate benefits in 1995 is not relevant to the issue of whether he sustained a recurrence of disability on July 18, 2002. This argument does not constitute a basis for reopening his recurrence claim for further merit review. Similarly, appellant's arguments pertaining to the medical evidence of record which predates July 18, 2002 and his allegations of mail fraud by various agencies are not relevant to the underlying medical issue of disability on or after that date due to his accepted injury in 1981. Further, the Office only accepted a disc herniation at L5-S1 for which he underwent surgery in 1982. Appellant's arguments addressing his cervical spine, shoulders, or other nonaccepted conditions are not relevant to the underlying issue of whether he sustained disability in 2002 due to residuals of his lumbar condition.

On January 29, 2003 Dr. Wait noted that appellant had been experiencing increasing pain and had been unable to perform certain activities since his 1981 lumbar laminectomy. He further stated that his symptoms were progressive and that he had been off work several times due to back pain and weakness. Dr. Wait also stated that appellant sustained moderate central spinal stenosis at C5-6 and at C6-7 based on radiological studies, which was a progression from previous films. He opined that appellant's prognosis was poor and that he was unable to perform his private-sector work duties. However, Dr. Wait did not provide any opinion addressing appellant's disability on or after July 18, 2002 or its relationship to the accepted December 11, 1981 employment-related injury. Therefore, his report is not relevant to the medical issue in this case and is insufficient to warrant reopening appellant's claim for further merit review.

The medical records from the Veterans Medical Center reveal treatment for multiple physical conditions. However, the notes from the physicians do not address the issue of whether appellant sustained disability as of July 18, 2002 as claimed or how any such disability was due to his federal employment injury in 1981. For example, Dr. Sanders addressed appellant's foot condition and stated that he was unable to determine if it was related to his prior military service. Those records submitted from physician's assistants at the medical center are not relevant as a physician's assistant is not a physician as defined under the Act.⁹ This evidence did not warrant reopening appellant's claim for further merit review.

On October 28, 2005 Dr. Zelig diagnosed retrolisthesis of L5-S1 with marked degeneration of the lumbar spine and foraminal stenosis. He advised the changes were due to scar tissue from appellant's previous surgery and a bulging disc at L4-5. Dr. Zelig opined that appellant had never fully recovered from the December 11, 1981 employment-related injury and that he had been unable to work due to continued pain in his neck and back. On March 7, 2006 he advised that appellant's November 16, 2002 injuries sustained at Harrisburg State Hospital prevented him from performing his regular work duties. Dr. Zelig also found that a May 1998 motor vehicle accident and January 19, 1999 fall aggravated his accepted injury and caused his neck and left shoulder symptoms. However, this evidence is not relevant to the underlying issue in this case. Dr. Zelig addressed appellant's disability as of 2005 and attributed appellant's condition to injuries sustained while employed in the private sector. He did not address the issue

⁹ See *Ricky S. Storms*, 52 ECAB 349 (2001).

of whether the December 11, 1981 employment-related injury caused disability on or after July 18, 2002. The Board therefore finds that this evidence is insufficient to warrant further merit review.

In February 2006, Dr. Balog addressed appellant's medical records at the request of his legal counsel, noting the 1981 injury and follow-up treatment. He also addressed appellant's employment injuries in the private sector and noted that he had been found disabled by the Social Security Administration. Dr. Balog advised that appellant could perform light-duty work but that such positions were not available. He did not address the issue of whether appellant sustained disability on or after July 18, 2002 due to the 1981 injury. Similarly, Dr. Goldman noted a history of appellant's prior care medical care and could not verify any shoulder injury in private employment on November 16, 2002. Treatment records of September 12, 2003 noted that appellant attributed his complaint of low back pain to working on hard surfaces in private employment. Dr. Morganstein treated appellant for low back complaints, noting that neurologic testing of the lower extremities did not reveal any focal motor or sensory deficit. He diagnosed degenerative disc disease and noted that the symptoms for which he treated appellant in 2006 related back to the 1981 injury. Dr. Powers reviewed diagnostic testing on October 4, 2006 and noted some foraminal narrowing and lateral stenosis on the left at L5-S1, which he described as minimal and without evidence of nerve root compression. He advised that appellant was not a surgical candidate. These reports, however, do not address the relevant issue of a spontaneous recurrence of disability commencing July 18, 2002 due to residual of the 1981 injury. The Board finds that appellant did not submit evidence sufficient to warrant further merit review of his recurrence claim.

CONCLUSION

The Board finds that the Office properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2007 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: August 26, 2009
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