United States Department of Labor
Employees' Compensation Appeals Board

CAROLYN M. MARSTON, Appellant	)	
and	)	**Docket No. 04-763**
	)	**Issued: July 15, 2004**
DEPARTMENT OF THE AIR FORCE, VANCE AIR FORCE BASE, COMMISSARY, Enid, OK, Employer	)	

Appearances:
Carolyn M. Marston, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

Appellant filed an appeal on January 28, 2004 of a September 10, 2003 decision of the Office of Workers' Compensation Programs, denying her request for a merit review. Pursuant to its regulation, the Board has jurisdiction over this nonmerit decision.[1] The Board lacks jurisdiction to review the merits of appellant's claim because more than one year has elapsed between the Office's merit decision dated July 1, 2002 and the filing of this appeal on January 28, 2004.[2]

ISSUE

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

[1] *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] *Id*.

FACTUAL HISTORY

On February 2, 1995 appellant, then a 48-year-old sales store worker, filed a notice of occupational disease (Form CA-2) alleging that she sustained degenerative disc disease, arthritis and "stress" in the performance of duty on or before October 24, 1994. She submitted job descriptions noting that her work from 1980 to 1994 required heavy lifting and repetitive bending. The Office accepted that appellant sustained a temporary aggravation of preexisting degenerative disc disease at L4-5 and L5-S1. She stopped work on December 14, 1994 and did not return.[3] Appellant received wage-loss compensation beginning December 15, 1994 and appropriate medical benefits.

Appellant first sought treatment from Dr. Adhikari M. Reddy, a Board-certified neurologist, who submitted November and December 1994 reports diagnosing degenerative disc disease of L4-5 and L5-S1. She was then treated by Dr. Tonya C. Washburn, a Board-certified physiatrist, who submitted reports from January 1995 to September 1996 diagnosing severe degenerative disc disease from L5 to S1 secondary to heavy lifting and repetitive bending at work. Dr. Washburn released appellant to full-time, sedentary work as of March 15, 1996. She was also under the care of Dr. Richard Rivers, a family practitioner, who submitted April and June 1995 reports diagnosing degenerative disc disease from L5-S1 aggravated by lifting and repetitive bending at work from 1980 to 1994.

In an August 16, 1996 report, Dr. Larry G. Willis, a Board-certified orthopedic surgeon and second opinion physician, diagnosed low back pain related to degenerative disc disease predating her federal employment. Dr. Willis opined that appellant's current symptoms were caused by a diffuse musculoskeletal pain syndrome or arthritis.

Following appellant's relocation to California in 1996 she came under the care of Dr. Yu-En Lee, a Board-certified neurologist. In a December 5, 1997 report, he diagnosed lumbar degenerative disc disease and a cervical musculoskeletal strain. Dr. Lee ordered a December 24, 1997 magnetic resonance imaging (MRI) scan which demonstrated an L4-5 disc bulge with a small annular tear and L5-S1 nerve root canal stenosis. He explained in February and March 1998 reports that appellant's preexisting degenerative disc disease was temporarily aggravated by work factors until she stopped work in December 1994. Appellant was also treated by Dr. Nitin A. Shah, a Board-certified orthopedic surgeon, who submitted reports from November 1998 to May 2001 diagnosing degenerative disc disease at L4-5 and L5-S1.

The Office referred appellant to Dr. William C. Boeck, Jr., a Board-certified orthopedic surgeon, for a second opinion examination. In a February 28, 2001 report, he diagnosed underlying lumbar degenerative disc disease temporarily aggravated by work factors until December 1994 when appellant stopped work. Dr. Boeck opined that she had no residual disability related to work factors. Dr. Boeck found appellant capable of performing limited light-duty work eight hours a day.

[3] The employing establishment terminated appellant's employment effective July 7, 1995 due to excessive absenteeism for medical conditions.

By notice dated July 31, 2001, the Office advised appellant that it proposed to terminate her wage loss and medical compensation benefits on the grounds that her injury-related residuals had ceased.

Appellant responded in an August 23, 2001 letter, alleging that the diagnosed degenerative disc disease was work related and continued to be disabling. In notes from August to November 1985, Dr. Richard E. Staerkel, an attending family practitioner, related appellant's complaints of back and left leg pain secondary to pregnancy, prescribed bedrest from August 29 to 31 and September 4 and 5, 1985 and limited lifting to 15 pounds. In a June 27, 1997 report, Dr. Ramani Lakshman, an attending Board-certified physiatrist, diagnosed degenerative joint disease of the lumbar spine and prescribed physical therapy. An October 20, 1997 chart note indicates that appellant was seen by Dr. Lee for an evaluation of low back pain. In a June 25, 2001 report, Dr. Shah noted that appellant had a June 19, 2001 onset of lumbar pain due to sitting, visiting a friend in the hospital and transporting children. In an August 29, 2001 report, he opined that appellant sustained cervical degenerative disc disease due to work factors.[4]

By decision dated September 17, 2001, the Office terminated appellant's wage loss and medical compensation benefits effective October 6, 2001 on the grounds that the residuals of the accepted lumbar condition had ceased on or before that date. The Office found that Dr. Boeck's March 27, 2001 report constituted the weight of the medical opinion.

In a September 24, 2001 letter, appellant requested an oral hearing, which was held on May 22, 2002. At the hearing, she asserted that she continued to have residual pain throughout her back and extremities from bending and lifting at work from 1980 to 1994. Appellant also alleged that working in the dairy and frozen food sections caused an episode of pneumonia.

By decision dated and finalized July 1, 2002, the Office hearing representative affirmed the Office's July 31, 2001 decision, finding that the medical evidence established that her work-related residuals ceased on or before October 6, 2001.

[4] Appellant also submitted a July 18, 1997 chart note by a physician's assistant noting that appellant was referred to Dr. Lee for a history of low back pain. However, reports from a physician's assistant are not considered medical evidence as a physician's assistant is not defined as a physician under the Federal Employees' Compensation Act. *Ricky S. Storms*, 52 ECAB 349 (2001). Appellant also submitted copies of abstracts of medical literature. However, these articles do not refer directly to her. The Board has held that excerpts from publications and medical literature are not of probative value in establishing causal relationship as they do not specifically address the individual claimant's medical situation and work factors. *Gloria J. McPherson*, 51 ECAB 441 (2000).

Appellant requested reconsideration by June 24, 2003 letter, asserting that her degenerative disc disease was caused by strenuous activity while exposed to extreme cold and heat while working in the commissary freezer section. She submitted duplicates of Dr. Staerkel's reports and the December 24, 1997 MRI performed from Dr. Lee. Appellant also submitted an occupational disease claim (Form CA-2) dated June 15, 2003, alleging that she sustained lumbar degenerative disease and facet joint disease in the performance of duty. She also submitted an undated note from Dr. Vasuki Aravagiri, an attending Board-certified internist, diagnosing chronic back pain and a June 26, 2003 report from Dr. Mace Richter, a chiropractor, diagnosing degenerative disc disease and a chronic L5-S1 subluxation complex.

By decision dated September 10, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support thereof was repetitious, cumulative or immaterial. The Office found that the additional evidence submitted did not substantiate any work-related disability on or after October 6, 2001, present a new, relevant legal argument or demonstrate that the Office committed legal error.

LEGAL PRECEDENT

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[5] Section 10.608(b) provide that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[6] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[7]

ANALYSIS

In the present case, appellant did not submit relevant and pertinent new evidence accompanying her June 24, 2003 request for reconsideration. Her June 24, 2003 letter merely repeated her prior assertions made at the May 22, 2002 hearing. She also resubmitted copies of Dr. Staerkel's reports, the December 24, 1997 MRI performed from Dr. Lee and portions of her job description. This evidence was previously of record and considered by the Office prior to the issuance of the September 17, 2001 decision. Appellant also submitted a June 15, 2003 claim form duplicative of her original February 2, 1995 claim form. The Board has held that the

[5] 20 C.F.R. § 10.606(b)(2) (2003).

[6] 20 C.F.R. § 10.608(b) (2003).

[7] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening the case.[8]

Appellant also submitted an undated note from Dr. Aravagiri, an attending Board-certified internist, diagnosing chronic back pain and a June 26, 2003 report from Dr. Richter, a chiropractor, diagnosing degenerative disc disease and an L5-S1 subluxation complex. The underlying issue in the claim is whether appellant had residuals related to her accepted lumbar condition on and after October 6, 2001. This issue is not addressed by either of these reports.[9] Therefore, this evidence is not relevant to the issue.

The Board finds that appellant did not submit relevant and pertinent new evidence not previously considered by the Office supporting that she had residuals of the accepted condition on and after October 6, 2001. As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, it properly refused to reopen her claim for further merit review. Consequently, appellant is not entitled to a review of the merits of her claim based upon any of the above-noted requirements under section 10.606(b)(2) Act's implementing regulation. The Board finds that the Office properly denied appellant's June 24, 2003 request for reconsideration.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).[10]

[8] *Denis M. Dupor*, 51 ECAB 482 (2000); *Howard A. Williams*, 45 ECAB 853 (1994); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

[9] As Dr. Richter did not address the critical issue of causal relationship, his opinion is not relevant to appellant's case. Also, as he did not indicate that he diagnosed the L5-S1 subluxation by x-ray or that he treated the subluxation with chiropractic manual manipulation, he does not qualify as a physician for the purposes of this case and his opinion carries no probative medical value. Section 8101(2) of the Act provides that medical opinion, in general, can only be given by a qualified physician. 5 U.S.C. § 8101(2). This section defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by stated law. Section 8101(3) of the Act, which defines services and supplies, limits reimbursable chiropractic services 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 U.S.C. § 8101(3). *See Thomas W. Stevens*, 50 ECAB 288 (1999); *George E. Williams*, 44 ECAB 530 (1993).

[10] The Board notes that the case record contains reports pertaining to another claimant. These documents were apparently associated with appellant's case record in error and should be removed and associated with the appropriate record.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 10, 2003 is affirmed.

Issued: July 15, 2004
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member