United States Department of Labor
Employees' Compensation Appeals Board

DESIREE D. MARKS, Appellant	)	
and	)	**Docket No. 05-109**
	)	**Issued: March 18, 2005**
U.S. POSTAL SERVICE, SEVEN OAKS POST OFFICE, Detroit, MI, Employer	)	

Appearances:
Desiree D. Marks, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On October 13, 2004 appellant filed a timely appeal from the July 13, 2004 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this denial. The Board has no jurisdiction to review the Office's June 24, 2003 merit decision denying modification of the termination of her benefits, as she filed her appeal more than one year after the date of that decision.

ISSUE

The issue is whether the Office properly denied appellant's June 22, 2004 request for reconsideration.

FACTUAL HISTORY

On February 23, 1999 appellant, then a 32-year-old letter carrier, sustained an injury in the performance of duty when she stepped off a porch and came down hard on her left foot. The

Office accepted her claim for left ankle strain and left lumbar sciatica. Appellant received compensation for wage loss.

On December 18, 2000 Dr. Thomas Ditkoff, an orthopedic surgeon and Office referral physician, reported that a July 6, 2000 magnetic resonance imaging (MRI) scan was unremarkable and that appellant no longer had complaints of leg pain or physical findings indicative of radiculopathy. His examination revealed almost nothing of an objective nature. Having examined appellant on several occasions during the year and having documented improvement, Dr. Ditkoff reported that he was no longer able to support a diagnosis of mechanical lower back pain. He reported that she had improved to the point where she no longer required restrictions and was able to resume her regular activities at work.

The Office proposed to terminate appellant's compensation benefits.

On February 23, 2001 appellant's attending physician, Dr. Laran Lerner, an osteopath specializing in physical medicine and rehabilitation, reported that she continued to have low back pain with tenderness and decreased range of motion and intermittent trigger points. He stated that her left ankle pain was resolved, but x-rays revealed degenerative changes in the sacroiliac joints with periarticular sclerosis. Nerve conduction studies and an electromyogram on December 3, 1999 revealed evidence of left S1 irritation compatible with a left lumbosacral radiculopathy. Dr. Lerner diagnosed chronic mechanical low back pain with chronic sacroiliitis, degenerative arthritis of the sacroiliac joints with periarticular sclerosis and remission of chronic left sciatica and chronic left lumbar radiculopathy with current restrictions of working four hours a day doing sedentary work. Dr. Lerner explained that, if appellant were to return to work eight hours a day, "she would have a flare-up, exacerbation and aggravation of her chronic left lumbar radiculopathy and chronic left sciatica such that she would have return of her prior left sciatica symptoms. Appellant does have persistent mechanical low back pain." He recommended continued work restrictions.

In a decision dated March 14, 2001, the Office terminated appellant's compensation benefits on the grounds that the weight of the medical evidence, as represented by the opinion of Dr. Ditkoff, supported no residuals from the accepted conditions. Dr. Lerner clearly stated that appellant's left ankle pain had resolved and that she no longer had pain down the left leg. Further, he diagnosed "remission" of chronic left sciatica and chronic left lumbar radiculopathy. The Office explained that it had not accepted mechanical low back pain or degenerative arthritis as work-related conditions. The Office also explained that while work restrictions might be necessary to prevent a "flare up," fear of future injury was not compensable.

On August 2, 2001 Dr. Lerner reported that appellant had continued low back pain. He explained that, although she did not currently have radiation to her left leg, if she were to return to work eight hours a day she would aggravate her underlying left lumbar radiculopathy and left sciatica. These conditions, he stated, were not resolved. They were persistent but came and went depending on appellant's level of activity. Dr. Lerner addressed the nature of mechanical low back pain and its relationship to lumbar radiculopathy and sciatica. He added that appellant's degenerative arthritis of the sacroiliac joints, which was also a pain-producing condition, was either caused or aggravated by her initial injury on February 23, 1999.

In a decision dated October 2, 2001, an Office hearing representative affirmed the termination of appellant's compensation benefits.

On February 1, 2002 Dr. Lerner reported that appellant complained of low back pain, continued difficulty with bending, twisting and turning and increased low back pain with prolonged sitting, standing and walking. He reported that she had intermittent radiating pain to her left leg, especially with increased activity. Dr. Lerner added:

> "Although [appellant's] left ankle condition has resolved she does continue to have mechanical low back pain, degenerative arthritis and chronic left lumbar radiculopathy with chronic left sciatica. These conditions have not resolved and are not in remission. [Appellant's] low back pain continues from her injury on February 23, 1999 at the [employing establishment]. This patient's lumbar condition is caused from her work at the [employing establishment]. Please see further explanation in the report dated August 2, 2001.
>
> "[Appellant] does have persistent tenderness in the low back with decreased straight leg raising test to 50 degrees bilaterally with Lasegue's test positive. She remains disabled from work at this time. The prognosis is guarded."

In a decision dated May 28, 2002, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office found that Dr. Lerner had simply repeated and summarized his prior reports.

On June 22, 2004 appellant requested reconsideration. To support her request, she submitted a June 11, 2004 report from Dr. Lerner, who examined her that day and reported her complaints:

> "[Appellant] came to my office complaining of increased low back pain radiating to her left lower extremity. Her low back pain was worse. [Appellant's] injuries have continued as a result of her work-related injury on February 23, 1999 when she was working as a mail carrier. She has been under my medical treatment and care until the present time."

Dr. Lerner related his findings on physical examination and reported that nerve conduction studies and an electromyogram obtained that day revealed objective evidence of ongoing left S1 irritation compatible with a left lumbosacral radiculopathy. He diagnosed chronic lumbar myofascial ligamentous strain with chronic left lumbosacral radiculopathy and left sciatica. Dr. Lerner stated that his diagnoses were consistent with the diagnoses reported by other physicians, including chronic lumbar myofascitis and lumbar disc pain syndrome. He stated that left sciatica and lumbar myofascial ligamentous strain were synonymous with mechanical low back pain. Dr. Lerner explained that, although appellant might have had some temporary improvement in her condition, her lumbar condition then flared up to its original condition as a result of the original work-related injury in February 1999. He stated that she had ongoing disability resulting from her continued left lumbar radiculopathy as a result of her February 23, 1999 work injury.

In a decision dated July 13, 2004, the Office denied appellant's request for reconsideration. The Office explained that Dr. Lerner's June 11, 2004 report added nothing new to reports previously submitted and considered: "In whole, the report of June 11, 2004 is devoid of any new argument or medical reasoning which would counter the opinion of [the Office referral physician], which found that your allowed lumbar strain had resolved no later than December 13, 2000." The Office concluded that the evidence appellant submitted in support of her request for reconsideration was clearly insufficient to warrant a merit review of the record.

LEGAL PRECEDENT

The Federal Employees' Compensation Act 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 shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[1]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and 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.[2]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. 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.[3]

ANALYSIS

To support her June 22, 2004 request for reconsideration, appellant made no attempt to show that the Office erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by the Office. Instead, she submitted the June 11, 2004 report of her attending osteopath, Dr. Lerner. The only issue for determination, therefore, is whether this report constitutes, under the third standard above, "relevant and pertinent new evidence not previously considered by the Office."

The Board finds that Dr. Lerner's June 11, 2004 report does not satisfy the third standard for obtaining a merit review. While the opinion expressed is clearly relevant to the termination

[1] 20 C.F.R. § 10.605 (1999).

[2] *Id*. at § 10.606.

[3] *Id*. at § 10.608.

of appellant's compensation benefits for the condition of left lumbar sciatica, the report added nothing new to reports that were previously submitted to and considered by the Office. Dr. Lerner had already reported subjective complaints, objective findings, flare-ups with increased activity and a stated causal relationship to the February 23, 1999 employment injury. So his June 11, 2004 report merely restates the case that he made in his February 23, August 2, 2001 and February 1, 2002 reports. It is not the Board's function on this appeal to assess the probative value of this opinion or to determine whether it is sufficient to create a conflict in medical opinion necessitating referral to an impartial medical specialist,[4] only to find whether the evidence is relevant and not previously considered by the Office. As the Office has previously considered the substance of Dr. Lerner's July 11, 2004 report, the Board finds that it does not meet the third standard of review.

Because appellant's June 22, 2004 request for reconsideration does not meet at least one of the standards for obtaining a review of the merits of her claim, the Board will affirm the Office's decision denying that request.

CONCLUSION

The Office properly denied appellant's June 22, 2004 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[4] *See* 5 U.S.C. § 8123(a) (if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination).