United States Department of Labor
Employees' Compensation Appeals Board

ALAN FULLER, Appellant	)	
and	)	**Docket No. 06-968**
	)	**Issued: July 19, 2006**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, TINKER AIR FORCE BASE, OK, Employer	)	

Appearances:
Alan Fuller, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 16, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' nonmerit decision dated December 6, 2005, denying his request for reconsideration of decisions which terminated his compensation benefits for refusing an offer of suitable work. The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office abused its discretion in denying appellant's request for reconsideration.

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

FACTUAL HISTORY

On October 31, 2002 appellant, then a 40-year-old supply technician, filed a traumatic injury claim alleging that on October 21, 2002 he felt a sharp pain in his back, buttocks and legs when he bent over to pick up some papers. The emergency room physician, Dr. John P. Clemons, diagnosed an acute back strain, rule out a herniated disc. The Office accepted appellant's claim for a lumbar strain.

In a November 4, 2002 report, Dr. John W. Ellis, an attending Board-certified family practitioner, stated that a magnetic resonance imaging (MRI) scan of October 31, 2002 revealed a disc protrusion at L4-5 with pressure on the L5 nerve root. He referred appellant to Dr. Jeffrey P. Nees, a Board-certified neurosurgeon, for further medical evaluation and treatment.

Effective December 26, 2002, appellant was placed on the periodic compensation rolls to receive compensation for temporary total disability.

In a report dated November 11, 2002, Dr. Nees provided a history of appellant's condition, the results of an MRI scan and findings on physical examination. He diagnosed degenerative disc disease at L3-4 and L4-5 and a herniated disc at L4-5, as shown on an MRI scan. On January 17, 2003 Dr. Nees performed surgery consisting of bilateral laminectomies at L4-5 and a repeat left L4-5 microdiscectomy. On March 25, 2003 he referred appellant for four weeks of physical therapy for his status post lumbar decompression.

On July 30, 2003 the Office of Personnel Management approved appellant's application for disability retirement.

On July 31, 2003 appellant asked the Office for authorization for a change in physician from Dr. Nees back to Dr. Ellis for chronic pain management. On August 13, 2003 the Office denied appellant's request for a change in physician but authorized a one-time consultation with Dr. Ellis.

On August 15, 2003 Dr. Nees indicated that appellant could perform limited-duty work for eight hours a day and provided a list of specific work restrictions.

On September 2, 2003 the employing establishment offered appellant a modified supply technician position within the medical restrictions provided in the August 15, 2003 work capacity evaluation of Dr. Nees.

On September 16, 2003 the Office found the position offered by the employing establishment to be suitable in accordance with the medical limitations provided by Dr. Nees. The Office advised appellant that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation. Appellant was allotted 30 days in which to accept the position or provide a written explanation for his failure to accept it.

On October 3 and 21, 2003 appellant responded that Dr. Ellis did not find the position to be suitable. He also noted that he had been approved for disability retirement. In a September 23, 2003 report, Dr. Ellis provided findings on physical examination and diagnosed a

lumbosacral strain, deranged disc at L4-5, failed back syndrome, aggravation of multilevel degenerative disc disease, bilateral lower extremity radiculopathy with nerve root impingement and neurogenic bladder/spastic bladder secondary to spinal injury. He indicated that appellant also had a right shoulder condition that was a consequential injury related to his October 21, 2002 employment injury. Dr. Ellis provided a list of permanent work restrictions. He opined that appellant could not perform the position offered by the employing establishment.

By letter dated October 15, 2003, the Office advised appellant that his reasons for refusing the offered position were not valid. It stated that retirement was not a valid reason for refusing an offer of suitable work. The Office stated that the report from Dr. Ellis lacked probative value because he was not the approved physician of record. Appellant was allotted 15 days in which to accept the position or have his compensation benefits terminated. He did not accept the position.

By decision dated November 4, 2003, the Office terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work.

Appellant requested an oral hearing that was held on May 26, 2004.

By decision dated September 23, 2004, an Office hearing representative affirmed the November 4, 2003 termination decision.

Appellant requested reconsideration and submitted additional evidence.

In reports dated December 14, 2004 and June 21 and August 24, 2005, Dr. Ellis diagnosed a lumbosacral strain, deranged disc at L4-5, status post surgery, failed back syndrome, aggravation of multilevel degenerative disc disease, bilateral lower extremity radiculopathy with nerve root impingement and neurogenic bladder/spastic bladder secondary to spinal injury. He provided a list of permanent work restrictions but noted that appellant had retired as of August 15, 2003. Dr. Ellis indicated that appellant had a right shoulder condition that was a consequential injury related to his October 21, 2002 employment injury. He opined that appellant could not perform the position offered by the employing establishment.

Appellant also submitted a copy of notes from a physician's assistant and copies of medical reports previously of record.

By decision dated December 6, 2005, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant further merit review.[2]

[2] Appellant submitted additional evidence subsequent to the Office decision of December 6, 2005. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[3] vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[4] When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[5]

ANALYSIS

The merits of the Office's termination of appellant's compensation benefits are not within the jurisdiction of the Board on this appeal. Therefore, the only issue is whether the evidence submitted by appellant with his request for reconsideration was sufficient to warrant further merit review.

In reports dated December 14, 2004 and June 21 and August 24, 2005, Dr. Ellis diagnosed a lumbosacral strain, deranged disc at L4-5, status post surgery, failed back syndrome, aggravation of multilevel degenerative disc disease, bilateral lower extremity radiculopathy with nerve root impingement and neurogenic bladder/spastic bladder secondary to spinal injury. He provided a list of permanent work restrictions but noted that appellant had retired as of August 15, 2003. Dr. Ellis indicated that appellant had a right shoulder condition that was a consequential injury related to his October 21, 2002 employment injury. He opined that appellant could not perform the position offered by the employing establishment. The Board finds that these reports are essentially the same as the September 23, 2003 report of Dr. Ellis. Moreover, as these reports concern physical examinations which occurred in 2004 and 2005, subsequent to the September 2, 2002 job offer, they are not relevant to appellant's capacity to perform the job at the time it was offered. For these reasons, the reports of Dr. Ellis do not constitute relevant and pertinent evidence not previously considered by the Office.

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b)(2).

[5] 20 C.F.R. § 10.608(b).

Appellant also submitted notes from a physician's assistant. However, a physician's assistant, does not qualify as a physician under the Act.[6] Consequently, these notes are of no probative value on the issue of whether he refused an offer of suitable work and do not constitute relevant and pertinent evidence not previously considered by the Office.

Appellant argued that Dr. Nees did not approve the position offered. However, the record shows that the September 2, 2002 job offer incorporated the physical restrictions provided by Dr. Nees on August 15, 2003. Therefore, this argument does not constitute a relevant legal argument not previously considered by the Office. Appellant argued that his retirement excused his refusal to accept the position offered. Retirement, however, is not considered an acceptable reason for refusing an offer of suitable work.[7] Therefore, this argument does not constitute a relevant legal argument not previously considered by the Office.

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument or submit relevant and pertinent evidence not previously considered by the Office. Therefore, the Office properly denied his claim.

CONCLUSION

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration.

[6] Registered nurses, licensed practical nurses and physicians assistants are not physicians as defined under the Act and their opinions are of no probative value. *See* 5 U.S.C. § 8101(2) which provides: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law"; *see also Roy L. Humphrey*, 57 ECAB ___ (Docket No. 05-1928, issued November 23, 2005).

[7] *Charles E. Nance*, 54 ECAB 447 (2003); *Robert P. Mitchell*, 52 ECAB 116 (2000) (in these cases the claimants chose to receive disability retirements rather than accept a position offered by the employing establishment).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 6, 2005 is affirmed.

Issued: July 19, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees'' Compensation Appeals Board