United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 07-487**
	)	**Issued: August 21, 2007**
DEPARTMENT OF AGRICULTURE, WENATCHEE NATIONAL FOREST, Wenatchee, WA, Employer	)	

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 December 12, 2006 appellant filed a timely appeal from the September 7, 2006 decision of the Office of Workers' Compensation Programs denying reconsideration of his claim for a period of disability compensation. The most recent merit decision in the case is that dated June 28, 2005, which denied his claim for disability compensation. Because appellant filed this appeal more than a year following the last merit decision in this case, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has no jurisdiction over the merits of this case. The only decision properly before the Board is the nonmerit decision denying reconsideration.

ISSUE

The issue is whether the Office properly denied further merit review of appellant's claim for a period of disability compensation pursuant to 5 U.S.C. § 8128. On appeal, appellant contends that the Office failed to consider the findings of the second opinion physician.

FACTUAL HISTORY

On May 10, 2004 appellant, then a 65-year-old laborer, filed a traumatic injury claim, Form CA-1, alleging that he was injured as a result of being knocked into a ditch by the bucket of a backhoe on May 5, 2004. On June 1, 2004 the Office accepted his claim for right shoulder abrasion, right forearm contusion, left thigh contusion, right calf contusion, right knee abrasion, head contusion and lumbar strain. With the approval of Dr. Joseph Jensen, a family practitioner, appellant returned to work without restrictions on June 21, 2004.

On January 12, 2005 appellant filed a claim for compensation for the period December 22, 2004 to January 22, 2005. He submitted an attending physician's report dated December 22, 2004 from Dr. Douglas Burns, a Board-certified physiatrist, who indicated that appellant was disabled from work. In a progress note of the same date, Dr. Burns indicated that Dr. Jensen had transferred appellant's care and treatment to him. He noted that appellant was complaining of pain in the low back, primarily on the right side and right leg pain. Dr. Burns diagnosed low back pain with advanced degenerative disc disease, spinal stenosis at the foraminal area and radiculitis. He stated that appellant was limited to lifting and carrying not more than 10 pounds continually and 20 pounds intermittently.

On January 14, 2005 the Office notified appellant that he had submitted insufficient evidence to establish that he had experienced a recurrence of disability beginning December 22, 2004. On February 4, 2005 appellant stated that though he returned to work on June 21, 2004 he continued to have problems related to numbness in his toes and postconcussion syndrome symptoms of sleepiness and lack of concentration, which worsened steadily. He stated that he sought early layoff on September 16, 2004 because of his concussion syndrome. After appellant was refused, he used annual leave, sick leave and leave without pay to cover the remaining three pay periods prior to his seasonal layoff on October 30, 2004. Along with his written statement, he resubmitted medical reports prepared by Dr. Jensen and Dr. Burns that were already in the record, highlighting sections which discussed his right leg pain and numbness and post-traumatic stress disorder.

By decision dated June 28, 2005, the Office denied appellant's claim for disability compensation on the grounds that he had submitted insufficient evidence to establish that his disability was related to his accepted employment injury. The Office noted that on June 14, 2004 Dr. Jensen stated that there was "near-resolution of all problems" related to the employment injury and, on November 8, 2004, indicated that appellant had "never complained of inability to perform full job function." The Office found that the medical evidence submitted by appellant did not explain how his claimed period of disability was related to the May 4, 2004 employment injury and did not establish his total disability.

On February 23, 2006 the Office referred appellant to Dr. Joan Sullivan, a Board-certified orthopedic surgeon, for a second opinion on the status of his employment injuries. In a March 24, 2006 report, Dr. Sullivan stated that appellant's work-related condition had not resolved and that he was "quite symptomatic and also impaired." She opined that appellant sustained probable concussion in addition to his contusions and abrasions, that his multilevel spondylosis had been aggravated by the accepted injury, and that his "possible L5 radiculopathy" should be accepted as employment related. Dr. Sullivan stated that appellant was "disabled

totally from performing full duty." The Office sought clarification of her opinion, which she provided on May 19, 2006. Dr. Sullivan stated that what appellant's lumbar spine had sustained was more than just a strain injury in the accident and was still symptomatic. She stated that her conclusion that appellant's preexisting spinal condition had been aggravated by the employment injury was based on the fact that he had the condition but no symptoms prior to the accepted injury. Following receipt of Dr. Sullivan's reports, the Office made no other findings related to Dr. Sullivan's opinion and did not refer appellant for further medical examinations.

On June 19, 2006 appellant filed a request for reconsideration based on new medical evidence. He stated that Dr. Burns had requested an independent medical examination on July 6, 2005 to clarify the status of his claim. After initially denying this request, the Office scheduled a second opinion examination with Dr. Sullivan, who examined appellant on March 24, 2006. Appellant stated that, while he did not have a copy of Dr. Sullivan's report, a nurse in Dr. Burns' office had informed him that it declared him to be totally disabled. Along with his request, he resubmitted copies of medical reports and duty status reports already in the record.

By decision dated September 7, 2006, the Office denied further merit review of appellant's claim on the grounds that the evidence appellant had submitted "had no probative value to the issues at hand." The Office's decision did not indicate that it had considered Dr. Sullivan's reports.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act, the Office has the discretion to reopen a case for review on the merits.[1] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that: (i) shows that the Office erroneously applied or interpreted a specific point of law; (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.[2] Section 10.608(b) provides that, when an application for reconsideration 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.[3]

The Act provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim. Since the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision, it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision. As the Board's decisions are final as to the subject matter appealed, it is critical that

[1] 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.606(b)(2).

[3] 20 C.F.R. § 10.608(b).

the Office review all newly received evidence relevant to that subject matter prior to the time of issuance of its final decision.[4]

ANALYSIS

The Board finds that this case is not in posture for a decision. The Office denied appellant's claim for compensation from December 22, 2004 to January 22, 2005 on the grounds that the evidence did not establish his total disability or that it was caused by his employment injuries. Appellant requested reconsideration of this decision on the basis of the new medical evidence, including that of second opinion physician Dr. Sullivan, a Board-certified orthopedic surgeon. By decision dated September 7, 2006 the Office denied the request for reconsideration, finding that none of the evidence appellant had submitted was relevant. It does not appear that the Office reviewed the reports of Dr. Sullivan, which address the issues of disability and causation, when deciding not to review the merits of his claim. The Board has held that it is crucial that all evidence relevant to the subject matter in the record prior to the time of issuance of the final decision be considered by the Office.[5] The fact that the evidence in question was solicited by the Office does not change its status as evidence of record which the Office must review. The Board notes that, although Dr. Sullivan submitted her initial report in March 2006 and her clarifying report in May 2006, the Office did not review it in any way. It is therefore appropriate for the Office to review Dr. Sullivan's medical opinion in appellant's request for reconsideration. The Board finds that this case should be remanded for a proper review of the evidence and an appropriate final decision.

CONCLUSION

The Board finds that this case is not in posture for a decision. On remand, the Office should review all medical opinion evidence which it has not formerly considered, including Dr. Sullivan's reports, in its determination of whether appellant is entitled to a review on the merits. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.

[4] *William A. Couch*, 41 ECAB 548 (1990).

[5] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the decision dated September 7, 2006 is set aside and the case is remanded for action consistent with this opinion.

Issued: August 21, 2007
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