United States Department of Labor
Employees' Compensation Appeals Board

D.H., Appellant	)	
and	)	**Docket No. 07-716**
	)	**Issued: July 3, 2007**
DEPARTMENT OF ENERGY, TRANSPORTATION SAFEGUARDS DIVISION, Albuquerque, NM, 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 January 22, 2007 appellant filed an appeal of a July 18, 2006 merit decision of the Office of Workers' Compensation Programs denying his claim for a recurrence of a medical condition, and a January 8, 2007 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of a medical condition causally related to his March 13, 1991 employment injury; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 13, 1991 appellant, then a 42-year-old nuclear material courier, filed a traumatic injury claim, alleging that he injured his lower legs and left hip while running during a training session. His claim was accepted for sciatica, left. On May 24, 1993 the Office authorized back surgery. Appellant returned to full duty on October 22, 1993.

On July 14, 2005 appellant filed a notice of recurrence of a medical condition alleging that the pain from his March 13, 1991 injury had "continued to get worse." He indicated that he was seeking medical treatment only, not time lost from work. James Roberson, supervisor, stated that appellant had not stopped working. He indicated that appellant had sustained a recurrence on August 30, 2004 and had sustained an injury to his lower back after his return to work on January 31, 2000.

Appellant submitted medical reports from Dr. Jeffrey D. Cone, a Board-certified neurological surgeon, Dr. M.E. Thurmond-Anderle, a Board-certified internist, and Dr. Carroll T. Moore, a Board-certified orthopedic surgeon, for the period July 7, 1993 through October 21, 1996. Dr. Cone noted that appellant suffered from sciatica and acute gout of the #1 left toe, for which he underwent surgery on June 9, 1993. Dr. Thurmond-Anderle diagnosed degenerative disc disease with sciatica and gout in the #1 left toe. He stated that appellant had developed gout as a result of his surgery. On October 21, 1996 Dr. Moore diagnosed gouty arthritis affecting the first metatarsal phalangeal joint of both toes, severe, indicating that the condition had developed in the period following his June 1993 surgery.

On September 22, 2005 the Office informed appellant that the information submitted was insufficient to establish his claim. Appellant was advised to submit within 30 days details of the circumstances surrounding the alleged recurrence and a doctor's report, providing a diagnosis and an opinion regarding the causal relationship between appellant's current condition and the accepted March 13, 1991 employment injury.

In a November 1, 2005 report, Dr. Cone stated that appellant "developed acute gouty attack" following a 1993 back surgery. He stated his understanding that an acute gouty attack may be triggered by a stressor such as major surgery and attested "to the fact that this did in fact occur following back surgery in 1993."

By decision dated December 21, 2005, the Office denied appellant's recurrence claim. Noting that his claim had been accepted for sciatica, spinal stenosis and bilateral gouty arthropathy, the Office found the evidence insufficient to establish that his current medical condition was due to his accepted condition.

On May 3, 2006 appellant requested reconsideration of the December 21, 2005 decision. In a March 3, 2006 procedure report, Dr. Bryan P. Bullard, a podiatrist, performed an "arthroplasty with implant on the 1st MPJ [metatarsophalangeal joint] region bilaterally and AKIN osteotomy proximal phalanx left great toe." In a May 1, 2006 report, Dr. Bullard stated that he had treated appellant since February 2006 for severe degenerative joint disease to his first MPJ region bilaterally, secondary to his chronic, recurrent gout. He indicated that appellant's original gout attack occurred following a June 2003 back surgery. Dr. Bullard stated that "it has

been well documented in the patient's medical record that his initial episode has now led us to his significant degenerative joint disease and hallux limitus component bilaterally." Appellant submitted duplicates of previously submitted reports from Drs. Cone and Thurmond-Anderle and a September 28, 1993 x-ray report. In a February 12, 1996 report, Jean S. Hollis, a physician's assistant, indicated that appellant had gout, sciatica and degenerative disc disease of the back. In a statement dated June 21, 2006, Mr. Roberson stated that, as a federal agent, appellant was required to train for cardiovascular endurance on a regular basis. His training involved running and walking extended distances on a daily basis in a variety of terrains while carrying very heavy equipment. Mr. Roberson stated that a federal agent has a tendency toward foot injury due to the requirements of his job and that he was not surprised that appellant had "issues with his feet."

On July 18, 2006 the Office denied modification of its December 21, 2005 decision. The Office found that appellant had not established that his current condition was causally related to the original March 13, 1991 employment injury.

On December 14, 2006 appellant requested reconsideration of the July 18, 2006 decision. In a letter dated December 12, 2006, he pointed out that the Office stated in its decision that "Gout Arthropathy, Bilateral" was an accepted condition. He indicated that Dr. Bullard had sent him a letter dated November 1, 2006; however, the record does not contain a copy of the November 1, 2006 letter. Appellant submitted a copy of Mr. Roberson's June 21, 2006 statement.

By decision dated January 8, 2007, the Office denied appellant's request for reconsideration on the grounds that he had failed to raise a substantive legal question and had not presented new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking compensation under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.[2] In this case, appellant has the burden of establishing that he sustained a recurrence of a medical condition causally related to his March 13, 1991 employment injury. This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical rationale.[3] Where no such rationale is present, the medical evidence is of diminished probative value.[4]

[1] 5 U.S.C. §§ 8101-8193.

[2] *Edward W. Spohr*, 54 ECAB 806 (2003).

[3] *Ronald A. Eldridge*, 53 ECAB 218 (2001).

[4] *Mary A. Ceglia*, 55 ECAB 626 (2004); *Albert C. Brown*, 52 ECAB 152 (2000).

Office regulations define a recurrence of medical condition as the documented need for further medical treatment after release from treatment of the accepted condition when there is no work stoppage. Continued treatment for the original condition is not considered a renewed need for medical care, nor is examination without treatment.[5]

The Office's procedure manual provides that, after 90 days of release from medical care (based on the physician's statement or instruction to return PRN (as needed), or computed by the claims examiner from the date of last examination), a claimant is responsible for submitting an attending physician's report which contains a description of the objective findings and supports causal relationship between the claimant's current condition and the previously accepted work injury.[6]

ANALYSIS -- ISSUE 1

The Board finds that appellant has failed to establish a recurrence of his accepted medical condition. The Office accepted appellant's claim for sciatica, left and approved surgery which occurred on June 9, 1993. Appellant returned to full duty on October 22, 1993. He has not submitted any medical evidence showing that he was disabled from work. Appellant contends, however, that he requires further medical treatment for his continuing employment-related condition.

The record reflects that appellant was treated for his accepted condition by Drs. Cone, Thurmond-Anderle and Moore through October 21, 1996. There is no evidence of record establishing that appellant received medical treatment for his accepted condition between October 21, 1996 and November 1, 2005, when he returned to Dr. Cone. As computed from the date of Dr. Moore's last examination on October 21, 1996, the treatment on November 1, 2005 was rendered more than 90 days after appellant's release from medical care. Therefore, appellant is responsible for submitting an attending physician's report containing a description of the objective findings and supporting causal relationship between his current condition and the previously accepted work injury.[7] He had the burden of submitting sufficient medical evidence to document the need for further medical treatment.[8] Appellant did not submit the evidence required and thus failed to establish a need for continuing medical treatment.[9]

In a report dated November 1, 2005, Dr. Cone indicated that appellant developed an acute gouty attack following his 1993 back surgery and noted that such attacks may be triggered by a

[5] 20 C.F.R. § 10.5(y).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5(b) (September 2003). The procedure manual provides, with certain exceptions, that, within 90 days of release from medical care (as stated by the physician or computed from the date of last examination or the physician's instruction to return PRN), a claims examiner may accept the attending physician's statement supporting causal relationship between appellant's current condition and the accepted condition, even if the statement contains no rationale. *Id*. at Chapter 2.1500.5(a).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5(b) (September 2003).

[8] 20 C.F.R. § 10.5(y).

[9] *See J.F.*, 58 ECAB ___ (Docket No. 06-186, issued October 17, 2006).

stressor such as major surgery. However, he did not opine as to whether his current flare-up was causally related to the 1991 injury, or to some other stressor. His report did not contain a description of objective findings or a reasoned opinion supporting a causal relationship between appellant's current condition and the previously accepted work injury, as required by Office procedures.[10] Although Dr. Cone apparently reviewed appellant's treatment records at the time of the November 1, 2005 report, there is nothing in his report to indicate that he had examined appellant since 1993. For these reasons, his report is of diminished probative value.

On May 1, 2006 Dr. Bullard stated that he had treated appellant since February 2006 for severe degenerative joint disease to his first MPJ region bilaterally, secondary to his chronic, recurrent gout. Noting that appellant's first gout attack occurred following a June 1993 surgery, Dr. Bullard stated that "it has been well documented in the patient's medical record that his initial episode has now led us to his significant degenerative joint disease and hallux limitus component bilaterally." However, he did not provide any objective findings or explain how appellant's current diagnosed condition was causally related to the original injury, as opposed to the lower back injury sustained in 2000. Without such rationale, his opinion is of diminished probative value.[11]

In a June 21, 2006 statement, Mr. Roberson stated that, as a federal agent, appellant was required to train for cardiovascular endurance on a regular basis, and that his training involved running and walking extended distances on a daily basis in a variety of terrains while carrying very heavy equipment. He indicated that a federal agent has a tendency toward foot injury due to the requirements of his job and that he was not surprised that appellant had "issues with his feet." Ms. Roberson's lay opinion on appellant's need for further medical treatment is not relevant, as the Board has held that lay individuals are not competent to render a medical opinion.[12] Reports from Drs. Cone, Thurmond-Anderle and Moore through October 21, 1996 are not, by virtue of their dates, relevant to appellant's current medical condition and, therefore, do not support his claim. Similarly, the February 12, 1996 report from Ms. Hollis, a physician's assistant, is not relevant to the issue at hand. Moreover, the Board has found a physician's assistant is not a physician as defined under the Act. Therefore, she is not competent to provide medical evidence and her report lacks probative value.[13]

Stating that the pain in his big toes bilaterally had continued to worsen since the original 1991 injury, appellant contended that his current condition was caused by the Office-approved back surgery in 1993. The mere fact that a disease manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the disease became apparent during a period of employment, nor appellant's

[10] *Id.*

[11] *Mary A. Ceglia, supra* note 4; *Albert C. Brown, supra* note 4.

[12] *Gloria J. McPherson,* 51 ECAB 441 (2000).

[13] 5 U.S.C. § 8101(2); *see Ricky S. Storms,* 52 ECAB 349 (2001).

belief that the disease was caused or aggravated by employment conditions, is sufficient to establish causal relation.[14]

Appellant noted that the Office's decisions denying his claim indicated that his claim had been accepted for gout. However, the record does not contain a rationalized medical opinion explaining how his current diagnosed condition, which includes degenerative joint disease and hallux limitus component bilaterally, is causally related to his March 13, 1991 employment injury. The fact that appellant may be receiving treatment for a condition that was previously accepted by the Office, does not reduce appellant's burden in this case.

The Office informed appellant of the type of evidence necessary to establish his claim by letter dated September 22, 2005. The evidence submitted was insufficient to establish that appellant sustained a recurrence of a medical condition and the Office properly denied his claim.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[15] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulation, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(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 [the Office].[16]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[17]

Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[18]

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[14] *Froilan Negron Marrero*, 33 ECAB 796 (1982).

[15] 5 U.S.C. § 8128(a).

[16] 20 C.F.R. § 10.606(b).

[17] 20 C.F.R. § 10.608(b).

[18] *Edward W. Malaniak*, 51 ECAB 279 (2000); *Eugene F. Butler*, 36 ECAB 393 (1984).

ANALYSIS -- ISSUE 2

Appellant's December 14, 2006 reconsideration request neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also failed to meet the third requirement of submitting relevant and pertinent new evidence. He submitted a copy of Mr. Roberson's June 21, 2006 statement. The Board has held that submission of duplicative or repetitious evidence is insufficient to require the Office to reopen a case for merit review.[19] Appellant's December 12, 2006 letter did not contain any new evidence, but rather merely referenced the Office's July 18, 2006 decision, pointing out the conditions which the Office had accepted. He stated that he had received a letter dated November 1, 2006 from Dr. Bullard. However, the record does not contain a copy of the letter referenced by appellant.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his December 14, 2006 request for reconsideration.

CONCLUSION

The Board finds that appellant failed to establish that he sustained a recurrence of a medical condition causally related to his March 13, 1991 employment injury. The Board further finds that the Office properly denied appellant's request for a merit review.

[19] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 8, 2007 and July 18, 2006 are affirmed.

Issued: July 3, 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