

injured his low back and left arm. Appellant stopped work on August 18, 2003 and returned to light-duty work on September 22, 2003.

By letter dated September 10, 2003, the Office advised appellant of the factual and medical evidence needed to establish his claim. It requested that he submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors.

Appellant submitted a note from Dr. Andrew E. Barber, Jr., Board-certified in occupational medicine, dated August 25, 2003. Dr. Barber indicated that appellant could return to work with limitations on lifting no more than 30 pounds. Appellant submitted a report from Dr. Rupen Joshi, a Board-certified internist, dated September 15, 2003. Dr. Barber noted that appellant presented with right hand stiffness. Appellant reported that he fell at work on August 15, 2003 and bruised his left elbow. Dr. Joshi diagnosed arthritis, well-controlled hypertension and diabetes mellitus. In attending physician's reports dated September 19 and October 9, 2003, he noted having treated appellant for chronic lumbar back and knee pain since 1995. He diagnosed obesity, hypertension and osteoarthritis. Dr. Joshi noted with a check mark "yes" that appellant's condition was caused or aggravated by an employment activity and advised that appellant could return to work on September 22, 2003 subject to a lifting restriction. An x-ray report of the shoulder dated September 19, 2003 revealed extensive bony changes. An x-ray of the left elbow dated September 19, 2003 revealed degenerative arthritis and an olecranon spur. An x-ray of the right hand dated September 19, 2003 revealed degenerative osteoarthritis involving the right hand. An x-ray report of the chest dated September 19, 2003 revealed no abnormalities. An x-ray report of both knees dated September 24, 2003 revealed degenerative change. In a September 25, 2003 report, Dr. Jeffrey K. Eng, a Board-certified physiatrist, noted that appellant worked as a laborer and presented with chronic low back and knee pain. He diagnosed chronic low back pain with bilateral osteoarthritis of the knees. An October 14, 2003 report from Dr. David E. Lipton, indicated that appellant presented with a bilateral prominent tibial tubercles which caused increasing difficulty. He indicated that appellant was scheduled for right knee surgery on November 4, 2003. Appellant submitted a report from Dr. Gerald K. Darnell, a psychologist, who diagnosed obstructive sleep apnea, hemorrhoids, stomach problems and economic problems.

The employing establishment controverted the claim on August 27, 2003. It noted that appellant sustained a fall at work on August 15, 2003 but failed to seek medical treatment for 10 days. The employing establishment also indicated that appellant worked a second job after sustaining the fall on August 15, 2003.

In a decision dated October 21, 2003, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that his condition was caused by the August 15, 2003 incident.

On December 18, 2003 appellant requested a review of the written record and submitted additional evidence. In a February 27, 2003 report, Dr. Ann B. McDowell, a Board-certified psychiatrist, addressed appellant's sleep apnea. In a November 7, 2003 report, Dr. E. Arnold Johnson, an osteopath, diagnosed hypertension and sleep apnea.

By decision dated April 6, 2004, the hearing representative affirmed the October 21, 2003 decision.

On August 20, 2004 appellant requested reconsideration. In reports dated January 13 and July 13, 2004, Dr. Joshi noted a history of injury and diagnosed lumbar sprain on a preexisting degenerative joint and disc disease. A report from Dr. Jirapun Laiprasert, a Board-certified neurologist, dated April 13, 2004, noted that appellant underwent an electromyogram (EMG) which revealed sensory neuropathy in the sural nerve.

By decision dated October 5, 2004, the Office denied modification of the April 6, 2004 decision.

On October 22, 2004 appellant requested reconsideration and submitted additional evidence.

By decision dated November 2, 2004, the Office denied appellant's reconsideration request on the grounds that his request neither raised substantive legal questions nor included new and relevant evidence and was insufficient to warrant further merit review.

In a letter dated October 17, 2006, appellant requested reconsideration. He submitted a September 15, 2006 letter from the Department of Veterans Affairs, Prosthetic and Sensory Aids Service.

By decision dated October 25, 2006, the Office denied appellant's reconsideration request on the grounds that his request neither raised substantive legal questions nor included new and relevant evidence and was insufficient to warrant further review of the merits.

LEGAL PRECEDENT

Under section 8128(a) of the Act,¹ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulation,² which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

“(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 Office].”

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.606(b).

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.³

ANALYSIS

Appellant's October 17, 2006 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office.

Appellant requested reconsideration but provided no additional argument on his behalf. Therefore, he did not show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact 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).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered appellant submitted a letter from the Department of Veterans Affairs, dated September 15, 2006. It listed appellant's application for reimbursement for automobile or other conveyance and adaptive equipment was being processed. However, this letter is not relevant because it does not pertain to the underlying issue of whether appellant sustained a back and left arm injury on August 15, 2003, an issue which is medical in nature. He did not provide any pertinent new and relevant evidence pertaining to the issue of whether he sustained a back and left arm injury on August 15, 2003 causally related to factors of his employment. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he submit relevant and pertinent new evidence not previously considered by the Office."⁴ Consequently, he 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).

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration.

³ *Id.* at § 10.608(b).

⁴ *See supra* note 2.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 25, 2006 is affirmed.

Issued: May 14, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board