United States Department of Labor
Employees' Compensation Appeals Board

G.D., Appellant	)	
and	)	**Docket No. 09-285**
	)	**Issued: July 27, 2009**
DEPARTMENT OF DEFENSE, BANGOR COMMISSARY, Silverdale, WA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 10, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decision dated September 17, 2008 denying his request for reconsideration without a merit review. Because more than one year has elapsed from the last merit decision dated September 7, 2007 to the filing of this appeal, the Board lacks jurisdiction over the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration without further review under section 8128(a).

FACTUAL HISTORY

On October 16, 2002 appellant, then a 53-year-old meat cutter, filed an occupational injury claim alleging that he developed disc deterioration and arthritis in his lower back and loss of left leg strength due to lifting heavy boxes. He first realized that his condition was caused or aggravated by his employment on April 26, 2001. Appellant stopped work on April 26, 2001

and returned to work on August 29, 2001.[1] He submitted an undated statement noting that on April 26, 2001 he heard a popping sound in his lower back and felt severe pain after lifting a box at work. Appellant subsequently went to a local emergency room. He described the nature of his work and the treatment sought for his condition.

In a statement dated June 17, 2003, appellant indicated that he retired from the employing establishment on April 5, 2003 because he could not fully perform at work without pain. He requested authorization for decompression surgery and approval of independent diagnostic and medical testing.

In an April 18, 2005 report, Dr. Michael McManus, Board-certified in occupational medicine, diagnosed chronic mechanical low back pain with spondylosis, degenerative disease, probable early stenosis, chronic left radicular symptoms and anterior spondylolisthesis. He opined that these conditions were work related. Dr. McManus submitted additional reports to the record.

In reports dated May 3 and June 15, 2006, Dr. Arne Andersen, a Board-certified family practitioner, noted appellant's complaint of back and leg pain. He diagnosed lumbosacral spondylosis and spondylolisthesis. Dr. Andersen also submitted additional reports to the record.

By letter dated June 27, 2006, the Office informed appellant that it had only accepted a lumbar strain due to the traumatic injury sustained on April 26, 2001. It noted that it had not accepted any preexisting conditions of spondylosis or spondylolisthesis.

In a May 11, 2007 statement, appellant advised that he had no medical records available prior to 1983. He noted that he was in the military between August 8, 1968 and April 6, 1971 and developed a sore back when he operated a deck grinder. The pain ceased after appellant stopped operating the machine.

On June 1, 2007 the Office referred appellant, together with a statement of accepted facts, to Dr. R. David Bauer, a Board-certified orthopedic surgeon, for a second opinion evaluation on August 29, 2007. Dr. Bauer opined that there was no evidence that appellant's job as a meat cutter materially affected his degenerative disc disease. He found that appellant had sustained a lumbar sprain and strain at the time of the April 26, 2001 injury and that his current back condition was not medically connected to the accepted work injury. Dr. Bauer advised that appellant's ongoing complaints were unrelated to a temporary aggravation of his underlying degenerative disease.

By decision dated September 7, 2007, the Office denied appellant's claim, finding that he did not establish that his low back condition was related to the established work-related events.

[1] The Board notes that appellant filed a separate traumatic injury claim for the lifting incident on April 26, 2001, accepted for a lumbar strain, which the Office assigned as claim file number xxxxxx574. On April 16, 2007 the Office assigned the present occupational disease claim as file number xxxxxx620 and designated this claim as the subsidiary file when it combined both claims.

In a June 20, 2008 letter, appellant requested reconsideration and noted that he was submitting reports from other treating physicians.[2] He stated that the prior medical reports were merely preliminary and that much research on his back had since taken place. Appellant asserted that the more current reports supported a work-related condition. He noted that he required back surgery with fusion to prevent the need for a wheelchair in the future.

In a report dated August 7, 2007, Dr. Richard Rapport, a Board-certified neurological surgeon, reviewed appellant's medical history of claudicating leg and back pain, with progressive numbness in the left leg and both feet and benign prostatic hypertrophy and venous hemangioma on the leg. He further noted that appellant was said to have spondylolisthesis but Dr. Rapport did not see it. On May 20, 2008 Dr. Rapport diagnosed spinal stenosis and lumbar spondylosis and significant scoliosis. He recommended instrumented fusion.

In reports dated January 24 and February 14, 2008, Dr. McManus diagnosed permanent aggravation of lumbosacral spondylosis and degenerative disease with progressive stenosis at L1-4 levels and Grade 1 spondylolisthesis at L5-S1. He noted that appellant was previously employed as a meat cutter and was being seen for follow up of mechanical low back pain with neurological symptoms.

On March 4, 2008 Dr. Andersen noted appellant's complaint of back and leg pain. He diagnosed spinal stenosis of the lumbar region, lumbosacral spondylosis, lumbar radiculopathy and degenerative joint disease of the knee. Dr. Andersen also recommended epidural steroid injections. In a June 4, 2008 report, Dr. James Wang, a Board-certified neurological surgeon, noted appellant's complaint of severe back pain that went down the left leg and shifted to the right leg. He diagnosed lateral stenosis on the right side and scoliosis. On July 1, 2008 Dr. Laurence Brostoff, a Board-certified internist, diagnosed spinal stenosis, degenerative joint disease of the lumbosacral spine, coronary artery disease, hypercholesterolemia, benign prostatic hypertrophy, depression and anxiety.

By decision dated September 17, 2008, the Office denied appellant's reconsideration request, finding that the evidence submitted was insufficient to warrant a merit review of the case.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a), the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[3] Section 10.608(b) of Office regulations provides that when an application for reconsideration does not meet at least one of

[2] The Board notes that some of the evidence submitted on reconsideration was filed under the claim file number xxxxxx574, which is also before the Board. *See supra* note 1.

[3] 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

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.[4]

ANALYSIS

In his letter requesting reconsideration, appellant did not assert that the Office erroneously applied or interpreted a specific point of law and he did not advance a relevant legal argument not previously considered by the Office. Instead he asserted that the medical evidence supported that his condition was work related. Although the evidence submitted on reconsideration was new, it does not constitute relevant and pertinent evidence sufficient to reopen the case for a merit review.

The January 24 and February 14, 2008 reports from Dr. McManus diagnosed permanent aggravation of lumbosacral spondylosis and degenerative disease with progressive stenosis at L1-4 levels and Grade 1 spondylolisthesis at L5-S1. Dr. McManus noted that appellant was being seen in follow up for low back pain. His reports are cumulative as they merely reiterate the diagnosis and his opinion was similar to his April 18, 2005 report that was already of record and considered by the Office.[5]

Dr. Andersen submitted a March 4, 2008 report but it is not relevant as it does not address the issue of causal relationship. Similarly, the reports from Dr. Rapport do not address the issue of causal relationship. The Board has held that new evidence submitted upon a reconsideration request that does not address the pertinent issue is not relevant evidence.[6] The reports from Drs. Wang and Brostoff also diagnosed appellant's condition without identifying the cause of his condition or discussing whether his employment contributed to his condition. Therefore, this medical evidence, while new, is not relevant as it does not address causal relationship.

Consequently, the Board finds that the evidence submitted on reconsideration does not constitute relevant and pertinent evidence not previously considered by the Office.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration without a merit review.

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[4] 20 C.F.R. § 10.608(b); *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

[5] *Roger W. Robinson*, 54 ECAB 846 (2003) (the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case).

[6] *E.M.*, 60 ECAB ___ (Docket No. 09-39, issued March 3, 2009); *Freddie Mosley*, 54 ECAB 255 (2002).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated September 17, 2008 is affirmed.

Issued: July 27, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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