

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
L.B., Appellant)	
)	
and)	Docket No. 09-1989
)	Issued: April 9, 2010
)	
DEPARTMENT OF THE NAVY, NAVY)	
PUBLIC WORKS DEPARTMENT,)	
San Diego, CA, 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 July 30, 2009 appellant filed a timely appeal from a June 29, 2009 nonmerit decision of the Office of Workers' Compensation Programs' denying his request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision of the Office was a January 14, 2009 decision denying appellant's request to accept additional conditions. Because more than 180 days elapsed between the Office's last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.¹

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ See 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

The Office accepted appellant's January 2, 2004 traumatic injury claim for right wrist distal radial fracture; aggravation of herniated disc at L4-5; left-sided sciatica; internal complication of orthopedic right wrist implant; traumatic tenosynovitis of right wrist. Appellant underwent multiple surgeries for his right arm and L4-5 disc.

By decision dated November 28, 2007, the Office denied appellant's request to expand his claim to include bilateral feet, left thigh and calf, buttocks, left shoulder and neck conditions as causally related to the accepted injury. On June 9, 2008 the Branch of Hearings and Review affirmed the November 28, 2007 decision. By decision dated January 14, 2009, the Office denied modification of its previous decisions on the grounds that the medical evidence was insufficient to establish a causal relationship between the January 2, 2004 injury and the claimed additional conditions.²

On April 7, 2009 appellant requested reconsideration of the Office's January 14, 2009 decision. In support of his request, he submitted physicians' notes and reports, diagnostic test results and radiology reports.

In reports dated January 26, February 24, March 24 and April 27, 2009, Dr. William Wilson, a Board-certified anesthesiologist, listed appellant's complaints of low back and lower extremity pain that he described as a constant, aching, sharp, shooting and burning pain. He diagnosed: status post lumbar discectomy and fusion, L4-5; probable left chronic L5 radicular pain; status post cervical C1-2 fusion due to instability with concomitant and central stenosis; right ankle pain -- stable; status post left wrist fusion; and symptoms consistent with reactive depression and anxiety, secondary to chronic pain.

In a December 16, 2008 report, Dr. Steven R. Garfin, an attending Board-certified orthopedic surgeon, noted that appellant continued to experience back and left leg pain, weakness and numbness. Examination revealed tight lumbar paraspinal muscles in the left gluteus. Deep tendon reflexes were absent and symmetric at the knees and ankles. There was markedly positive left straight leg raising, sitting at 20 degrees, and negative right straight leg raising. Appellant's left foot turned in on the left, as compared to the right, when he was in a sitting position.

In a February 19, 2009 letter, Dr. Garfin opined that appellant's ongoing bilateral foot pain was a result of his spine-related injury, "whether or not the ongoing pain, numbness and weakness [was] due to a radiculitis, irritation of the screws that may be irritating the nerve roots, scar tissue, etc."³

Appellant submitted reports from Dr. Robert Maywood, a Board-certified orthopedic surgeon, dated February 10 through May 19, 2009. Dr. Maywood provided a history of injury and treatment and examination findings. He diagnosed: right distal radius fracture; status post

² The January 14, 2009 decision did not address a December 15, 2008 report from Dr. William Curran, a Board-certified orthopedic surgeon and Office referral physician. It was received by the Office on December 22, 2008.

³ The February 19, 2009 letter reflects that the provider was Elizabeth Stimson, nurse practitioner. However, the letter was signed by Dr. Garfin.

open reduction and internal fixation, right distal radius fracture, with subsequent removal of hardware; status post left wrist four corner fusion secondary to aggravation of underlying osteoarthritis; status post multiple lumbar surgeries, including lumbar discectomy with L4-5 fusion, anterior and posterior, and iliac crest bone graft; bilateral left greater than right chronic L5 radiculopathy; status post cervical C1-2 fusion, nonindustrial; continued pain with need for ongoing pain management and narcotic use. Dr. Maywood identified objective factors of disability, including loss of motion, bilateral wrists and lumbar spine, and chronic weakness of the left lower extremity, with confirmatory x-ray, electromyogram and nerve conduction studies.

On March 10, 2009 Dr. Maywood found low back tenderness and tenderness over the greater trochanteric bursae bilaterally. He diagnosed status post lumbar surgery with bilateral hip greater trochanteric bursitis, and status post bilateral wrist surgery. On April 21, 2009 Dr. Maywood diagnosed bilateral lower extremity radiculopathy. In a May 19, 2009 report, he related appellant's continued complaints of pain due to his January 28, 2004 injury, including tenderness over the left hip extending back toward the buttock area and bilateral paraspinal tenderness in the lumbar spine.

Appellant submitted an October 27, 2007 cervical spine radiological report, an October 6, 2008 wrist radiology report and a May 6, 2009 report of a urine test.

The record also reflects that the Office conducted further development of the medical evidence by referring appellant on January 9, 2009 to Dr. Daniel Cullen, II, a Board-certified orthopedic surgeon. He provided a February 2, 2009 report that addressed the Office's inquiries regarding the extent of appellant's disability and residuals relating to his bilateral wrist injuries.

By decision dated June 29, 2009, the Office denied appellant's reconsideration request. It found that the evidence submitted was duplicative or irrelevant and, therefore, insufficient to warrant further merit review. The Office found that the February 19, 2009 letter from Elizabeth Stimson, a nurse practitioner, had "no value."

LEGAL PRECEDENT

The Federal Employees' Compensation Act⁴ provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁵

The application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁶

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 20 C.F.R. § 10.605.

⁶ *Id.* at § 10.606.

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits.⁷ Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS

Appellant submitted a timely request for reconsideration of the Office's January 14, 2009 decision. On June 29, 2009 the Office found that his request was insufficient to warrant further merit review as it neither raised substantive legal questions nor included new and relevant evidence. The Board finds, however, that the evidence submitted constitutes relevant and pertinent new evidence not previously considered.⁹ Therefore, the Office abused its discretion by denying further review of the merits.

Appellant submitted numerous reports from Drs. Wilson, Garfin and Maywood. Dr. Wilson related appellant's complaints of low back and lower extremity pain and diagnosed: status post lumbar discectomy and fusion, L4-5; probable left chronic L5 radicular pain; status post cervical C1-2 fusion due to instability with concomitant and central stenosis; right ankle pain -- stable; status post left wrist fusion; and symptoms consistent with reactive depression and anxiety, secondary to chronic pain. Dr. Garfin provided examination findings and opined that appellant's ongoing bilateral foot pain was a result of his spine-related injury.¹⁰ Dr. Maywood related appellant's continued complaints of pain due to his January 2, 2004 injury, including tenderness over the left hip extending back toward the buttock area and bilateral paraspinal tenderness in the lumbar spine. Among other conditions, he diagnosed status post lumbar surgery with bilateral hip trochanteric bursitis and bilateral lower extremity radiculopathy.

The Board finds that the medical reports submitted in support of appellant's request for reconsideration constitute pertinent new evidence relevant to the underlying issue in this case, namely, whether appellant has identified additional medical conditions that are causally related to the accepted employment injury. This new evidence was not previously considered by the Office; therefore, it is sufficient to require further review of the case on its merits.¹¹ Moreover, the record reveals that the Office conducted further development of the claim by referring appellant to Dr. Cullen.

To obtain merit review, however, appellant is not required to submit all the evidence necessary to establish his claim. He need only provide evidence that is relevant and pertinent,

⁷ *Donna L. Shahin*, 55 ECAB 192 (2003).

⁸ 20 C.F.R. § 10.608.

⁹ *Id.* at § 10.606(b)(2).

¹⁰ The Board notes that the Office found that the February 19, 2009 letter had no value because it was from a nurse practitioner. It was, however, signed by Dr. Garfin, a qualified physician under the Act. Section 8101(2) of the Act provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2).

¹¹ *Id.* See *Donald T. Pippin*, 54 ECAB 631 (2003).

and not previously considered by the Office.¹² The reports submitted by appellant meet these requirements. The case will therefore be remanded for consideration of the newly submitted medical evidence, together with evidence previously of record, and a decision on the merits.¹³

CONCLUSION

The Board finds that the Office abused its decision in denying appellant's claim for further review of the merits pursuant to section 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 29, 2009 is set aside and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: April 9, 2010
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

¹² *Billy B. Scoles*, 57 ECAB 258 (2005).

¹³ On appeal, appellant presented arguments addressing the merits of her claim. As the Board does not have jurisdiction over the merits, those arguments will not be addressed in this decision.