

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

L.B., Appellant	)	
	)	
and	)	<b>Docket No. 09-2183</b>
	)	<b>Issued: May 4, 2010</b>
<b>DEPARTMENT OF THE NAVY, NAVY</b>	)	
<b>PUBLIC WORKS DEPARTMENT,</b>	)	
<b>San Diego, CA, Employer</b>	)	
	)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Alan J. Shapiro, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 1, 2009 appellant filed a timely appeal from a June 29, 2009 decision of the Office of Workers' Compensation Programs denying his request for reconsideration. Because more than 180 days has elapsed from the Office's last merit decision dated January 14, 2009 to the filing of this appeal, the Board lacks jurisdiction to review 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 abused its discretion in denying appellant's request for reconsideration.

**FACTUAL HISTORY**

On January 28, 2004 appellant, then a 48-year-old painter leader, sustained an open right wrist distal radial fracture, aggravation of a herniated disc at L4-5, left-sided sciatica, internal complication of an orthopedic right wrist implant, traumatic tenosynovitis of the right wrist and left wrist osteoarthritis in the performance of duty when he was knocked off a ladder. He

underwent right wrist surgery on January 28 and December 10, 2004. Appellant underwent back surgery on September 27, 2004 and October 30, 2006.

Appellant subsequently sought authorization for treatment of neck, left shoulder, left thigh and calf, buttocks and bilateral foot conditions, alleging causal relationship to the January 28, 2004 employment injury.

By decisions dated November 28, 2007, January 9, 2008 and January 14, 2009, the Office denied appellant's claim for additional medical conditions on the grounds that the medical evidence failed to establish that they were causally related to his January 28, 2004 employment injury.

On April 7, 2009 appellant requested reconsideration. In a January 30, 2008 report, Dr. Steven R. Garfin, a Board-certified orthopedic surgeon, provided findings on physical examination and noted that appellant began experiencing left shoulder pain and numbness and tingling in his left arm and hand over the previous week and began having neck pain on July 3, 2007. He diagnosed cervical instability at C1-2 with concomitant central stenosis. Dr. Garfin noted that the only trauma appellant reported was his employment injury in January 2004. On February 10, 2009 Dr. Robert M. Maywood, a Board-certified orthopedic surgeon, reviewed the medical history and provided findings on physical examination. He provided an evaluation and impairment rating of appellant's accepted back and wrist conditions. On March 10, 2009 Dr. Maywood provided findings on physical examination and diagnosed status post lumbar surgery with bilateral hip greater trochanteric bursitis and status post bilateral wrist surgery. He did not provide an opinion as to the cause of appellant's hip condition. On April 21, 2009 Dr. Maywood diagnosed bilateral lower extremity radiculopathy but did not opine as to the cause of the condition. In reports dated January 26 to May 26, 2009, Dr. William L. Wilson, a Board-certified anesthesiologist specializing in pain medicine, provided findings on physical examination and diagnosed status post lumbar discectomy and fusion at L4-5, status post left wrist fusion, status post cervical C1-2 fusion, probable left chronic L5 radicular pain, right ankle pain and reactive depression and anxiety secondary to pain. He did not provide an opinion on the cause of the conditions. In a February 19, 2009 memorandum of a telephone call to the Office, Elizabeth Stimson, a nurse practitioner, noted that appellant sought treatment for pain in his feet. She indicated that this condition was the result of his accepted spine injury.

By decision dated June 29, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence was not sufficient to warrant further merit review.<sup>1</sup>

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against

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<sup>1</sup> Subsequent to the June 29, 2009 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

compensation.<sup>3</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>4</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>5</sup> 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.<sup>6</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>7</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>8</sup>

### ANALYSIS

With his request for reconsideration of the January 14, 2009 merit decision, appellant submitted medical reports from Dr. Garfin, Dr. Maywood and Dr. Wilson. None of the reports addresses the issue of whether appellant's neck, left shoulder, left thigh and calf, buttocks and bilateral foot conditions are causally related to the January 28, 2004 employment injury. Therefore, these reports do not constitute relevant and pertinent new evidence not previously considered by the Office. Appellant submitted a February 19, 2009 telephone memorandum from a nurse practitioner. A nurse practitioner does not qualify as a physician under the Act.<sup>9</sup> Registered nurses, licensed practical nurses, physicians' assistants and physical therapists are not physicians as defined under the Act and their opinions are of no probative value.<sup>10</sup> Consequently, the nurse practitioner's memorandum does not constitute relevant and pertinent new evidence not previously considered by the Office. Because appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by the Office, the Office properly denied her request for reconsideration.

On appeal appellant contends that the Office did not consider a January 27, 2009 electromyogram (EMG) report suggesting his lower extremity pain and numbness could be the

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<sup>3</sup> *Id.* at § 8128(a).

<sup>4</sup> *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>5</sup> Under section 8128(a) of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his or her] own motion or on application." 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.606(b)(2).

<sup>7</sup> *Id.* at § 10.607(a).

<sup>8</sup> *Id.* at § 10.608(b).

<sup>9</sup> See 5 U.S.C. § 8101(2) which provides: "'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law;" see also *Roy L. Humphrey*, 57 ECAB 238 (2005); *Jennifer L. Sharp*, 48 ECAB 209 (1996).

<sup>10</sup> *Id.*

result of chronic bilateral L4-5 radiculopathies. There is no January 27, 2009 EMG report of record. Appellant contends that the January 28, 2004 employment injury aggravated a preexisting left hip injury sustained at work on December 9, 2003. He contends that the fact that he reported neck pain to physicians at the time of the January 28, 2004 employment injury establishes that his neck condition was work related. Lay individuals such as appellant are not competent to render a medical opinion.<sup>11</sup> Therefore, his opinion that his January 28, 2004 employment injury aggravated a left hip condition and caused a neck condition is of no probative value. The issue on appeal is whether the Office abused its discretion in denying his request for reconsideration of its January 14, 2009 merit decision. As noted, he failed to provide evidence or argument meeting any of the three requirements for reopening a case for further merit review. Therefore, the Office did not abuse its discretion in denying his request for reconsideration.

### **CONCLUSION**

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 29, 2009 is affirmed.

Issued: May 4, 2010  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>11</sup> See *Robert J. Krstyen*, 44 ECAB 227 (1992).