United States Department of Labor
Employees' Compensation Appeals Board

S.J., Appellant	)	
and	)	**Docket No. 10-1318**
	)	**Issued: February 3, 2011**
DEPARTMENT OF THE TREASURY, U.S. MINT, Philadelphia, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 5, 2010 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated October 7, 2009. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision. The last merit decision was issued by the Office on December 23, 2008. Because more than 180 days elapsed from issuance of that decision to the filing of this appeal, the Board does not have jurisdiction over that decision.[1]

ISSUE

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

[1] For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On May 14, 2005 appellant, then a 46-year-old packaging machine operator, filed a traumatic injury claim alleging that on May 10, 2005 he was lifting counting machines and sustained an injury to his low back in the performance of duty. He stopped work on May 19, 2005.[2] The Office accepted the claim for sprain/strain of the lumbar region and aggravation of preexisting herniated lumbar disc at L4-5.

In support of his claim, appellant submitted several reports from his treating physicians. They included a July 13, 2005 report, Dr. Bruce Williams, an osteopath and Board-certified family practitioner, who advised that appellant could return to full-time light duty on July 14, 2005 with restrictions on lifting. Dr. Williams noted that the herniated nucleus pulposus could be unpredictable, therefore his prognosis was guarded. In a July 25, 2006 report, he advised that appellant had a neurologic deficit and severe weakness in his hip flexor, tibialis anterior and extensor hallucis longus on the right side.

In an August 15, 2006 report, Dr. Eric Williams, a Board-certified orthopedic surgeon, determined that appellant had severe critical high-grade stenosis at both L3-4 and L4-5; at L3-4, which was secondary to spinal stenosis, and at L4-5 which was secondary to a combination of spinal stenosis and a disc herniation. He noted that his right hip flexor weakness was secondary to hip osteoarthritis. Dr. Williams recommended lumbar spine surgery. On August 31, 2006 he performed an L3-5 laminectomy/fusion, partial facetectomies and foraminotomies bilaterally. Dr. Williams noted that appellant had a long history of severe low back and right buttock pain. He returned to limited duty for eight hours per day on December 4, 2006. Appellant subsequently requested authorization for the August 31, 2006 back surgery.

On October 24, 2006 the Office referred appellant for a second opinion, along with a statement of accepted facts and the medical record to Dr. Steven Valentino, a Board-certified orthopedic surgeon. In a November 9, 2006 report, Dr. Valentino concluded that appellant had recovered from the accepted condition. He also explained that, while the surgery was reasonable and justified, it was not related to the work injury of May 10, 2005.

On May 11, 2007 the Office referred appellant to Dr. Gregory Maslow, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between Dr. Bruce Williams, appellant's treating physician, and Dr. Valentino regarding the need for the surgery.

In a June 1, 2007 report, Dr. Maslow noted appellant's history of injury and treatment and found the surgery was not work related as the condition for which surgery was warranted, lumbar stenosis, preexisted the work injury. He opined that appellant had recovered from the work injury.

In a decision dated August 28, 2007, the Office determined that the back surgery, while reasonable and necessary for the preexisting condition of lumbar stenosis was not related to the injury of May 10, 2005.

[2] Appellant returned to light duty on July 18, 2005 and full duty on August 29, 2005.

On September 24, 2007 appellant requested a hearing, which was held on January 18, 2008. A hearing representative set aside this decision on March 25, 2008 and remanded the case for the Office to update the record and the statement of accepted facts to include appropriate reference to a prior 1994 employment injury[3] to be followed by a supplemental report from Dr. Maslow.

In an October 2, 2008 supplemental report, Dr. Maslow referenced documents regarding the 1994 injury and noted that the 2005 claim was accepted for lumbar sprain and aggravation of the preexisting herniated disc at L4-5 level. He opined that the accepted conditions had resolved with no evidence of a worsening of the L4-5 disc herniation. Dr. Maslow noted that Dr. Eric Williams' August 31, 2006 surgical report noted "minimal disc bulging" at L4-5 and did not describe this as a herniated disc. He opined that the need for surgery was causally related to a degenerative condition of the spine, with spinal stenosis and with radiculopathy caused by that degenerative condition. Dr. Maslow opined that the fact that Dr. Williams did not note a herniated disc at the time of the surgery clearly indicated that a worsening of a preexistent herniated disc did not occur. He concluded that the need for surgery on August 31, 2006 was not causally related to either the injury in 1994 or to the injury of May 10, 2005 but was performed due to degenerative disc disease and stenosis.

In a decision dated December 23, 2008, the Office denied authorization for the requested back surgery based on the opinion of Dr. Maslow.

Appellant requested a hearing on February 2, 2009. In a decision dated March 17, 2009, the Office denied his request for a hearing as the request was not made within 30 days of the December 23, 2008 decision. It noted that appellant could further pursue the matter by requesting reconsideration.

On July 24, 2009 appellant requested reconsideration. He indicated that the Office should have interviewed his supervisor, Marecella Shubrick, at the time of the injury instead of Dennis Martell, who was not his supervisor. Appellant also indicated that the employing establishment should have checked his medical history. He alleged that he was reassigned to the same department where he sustained his previous injury and he should not have been reassigned to it. The Office also received duplicate copies of Dr. Maslow's June 1, 2007 and October 20, 2008 reports.

In a decision dated October 7, 2009, the Office denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,[4] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section

[3] The prior claim, which the Office reconstructed following the hearing representative's remand, was accepted for a herniated disc at L4-5. The condition was treated conservatively.

[4] 5 U.S.C. § 8128(a).

10.606(b)(2) of the implementing federal regulations, which provide 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
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> "(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]."[5]

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.[6]

ANALYSIS

Appellant disagreed with the denial of his claim for back surgery and requested reconsideration.

In support of his request, appellant argued that the Office should have interviewed his supervisor, Ms. Shubrick instead of Mr. Martell, who was not his supervisor. He also argued that the employing establishment should have checked his medical history as he was reassigned to the same department where he sustained his previous injury. The Board finds that these arguments would not be relevant to the issue of the present case, *i.e.*, whether appellant's back surgery was related to his accepted conditions or caused or aggravated by factors of his federal employment. This underlying issue is medical in nature and should be resolved by the submission of medical evidence. Thus, these assertions do not show that the Office erroneously applied or interpreted a specific point of law, or advanced a relevant new argument not previously submitted.

Appellant submitted duplicate copies of Dr. Maslow's reports dated June 1, 2007 and October 20, 2008. The Board has held that the submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.[7] The Board further notes that the reports of Dr. Maslow did not support the need for surgery due to an accepted condition.

Consequently, the evidence submitted by appellant on reconsideration does not satisfy any of the regulatory criteria for reopening a claim for a merit review. Therefore, the Office properly denied his request for reconsideration.

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[5] 20 C.F.R. § 10.606(b).

[6] *Id.* at § 10.608(b).

[7] *Edward W. Malaniak*, 51 ECAB 279 (2000).

On appeal, appellant reiterated his arguments on reconsideration. He also alleged that Dr. Maslow's report was unclear while his doctor indicated the surgery was needed. Additionally, appellant alleged that the report of his physician, Dr. Bruce Williams, was not considered. However, the Board only has jurisdiction to consider whether the Office properly denied his reconsideration request without conducting a merit review of the claim. As discussed, appellant did not submit sufficient evidence to require the Office to reopen the claim for a merit review.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 7, 2009 is affirmed.

Issued: February 3, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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