United States Department of Labor
Employees' Compensation Appeals Board

T.D., Appellant	)	
and	)	**Docket No. 10-1261**
	)	**Issued: January 21, 2011**
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant
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 2, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated October 19, 2009, denying his request for further merit review of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The most recent merit decision of the Office pertaining to the underlying issue was the Office's August 25, 2008 decision which terminated appellant's compensation. Because more than one year has elapsed between the last merit decision of the Office and the filing of this appeal on April 2, 2010, 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 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 June 19, 2004 appellant, then a 60-year-old rural mail handler, injured his back while pulling a pallet off a truck with a jack. He stopped work on June 22, 2004. On August 11, 2004 the Office accepted appellant's claim for subluxation of the lumbar spine. Appellant received compensation benefits.[2]

Appellant received treatment from Dr. Thomas Scilaris, a Board-certified orthopedic surgeon; Dr. Paul Lerner, a Board-certified neurologist; Dr. Paul C. Ladopoulos, a Board-certified psychiatrist and neurologist; and Dr. Allamprabhu S. Patil, a Board-certified psychiatrist and neurologist. He also received chiropractic treatment from Dr. Peter Kalkanis. In a July 20, 2005 report, Dr. Scilaris noted treating appellant for injuries sustained in a work-related accident to his lumbar spine. He noted findings and diagnosed lumbar radiculopathy.

On February 8, 2007 the Office referred appellant to Dr. Robert Israel, a Board-certified orthopedic surgeon, for a second opinion. In a March 20, 2007 report, Dr. Israel determined that appellant no longer had a work-related condition or disability. He explained that the lordotic curve in the lumbar spine was normal and diagnosed resolved sprain of the lumbar spine. Dr. Israel noted that appellant had no objective findings of subluxation of the lumbar spine and his lumbar examination was normal. He advised that appellant reached maximum medical improvement and did not require further orthopedic treatment. Dr. Israel noted that the accepted condition had fully resolved and that he was capable of full-time, full-duty work without restrictions.

In an April 4, 2007 report, Dr. Scilaris noted that appellant was seen for follow up of his lumbar spine and still had pain. He noted that appellant's lumbar spine was symptomatic with radiation down his legs. Dr. Scilaris provided an epidural steroid injection and opined that appellant remained totally disabled. In an April 29, 2007 report, Dr. Patil diagnosed cervical radiculopathy, lumbar radiculopathy, secondary to multiple lumbar vertebral disc herniations, cluster headaches and advised that appellant's prognosis was guarded.

On June 29, 2007 the Office found that Dr. Israel's opinion created a conflict with the opinions of appellant's attending physicians regarding the nature and extent of any ongoing residuals of the work injury and appellant's ability to work. It referred appellant to Dr. Michael Katz, a Board-certified orthopedic surgeon for an impartial medical evaluation.

In a July 16, 2007 report, Dr. Katz noted appellant's history of injury and treatment and determined that appellant no longer had residuals related to his accepted employment injury. He indicated that appellant was capable of limited-duty work with lifting of not more than 20 pounds and no bending. Dr. Katz noted that the restrictions were due to appellant's preexisting condition. In a May 18, 2008 report, he clarified that the accepted condition should have been lumbosacral strain with preexisting degenerative disc disease. Dr. Katz explained that there was no specific documentation of subluxation or dislocation. He also noted that appellant was already filing for leave from his job prior to June 16, 2004, which was due to degenerative disc

[2] The Office accepted appellant August 23, 2004 claim for a recurrence. Appellant stopped work on September 15, 2005 and has not returned.

disease. Dr. Katz advised that a magnetic resonance imaging (MRI) scan of the lumbar spine of October 7, 2005 revealed preexisting disc herniations at L1-2, L3-4 and L5-S1. In a June 16, 2008 report, he opined that the accepted condition of lumbar strain had resolved and the current complaints were due to appellant's preexisting, nonwork-related medical conditions.

On July 23, 2008 the Office proposed to terminate appellant's compensation benefits. It found that the weight of the medical evidence, represented by the opinion of Dr. Katz, demonstrated that appellant's work injury had resolved.

In an August 19, 2008 report, Dr. Igor Cohen, a neurologist, diagnosed disc herniations at L1 through S1, left L5-S1 radiculopathy, lumbosacral degenerative disc disease and lumbar myofasciitis. He opined that appellant was totally disabled.

By decision dated August 25, 2008, the Office finalized the termination of benefits effective August 31, 2008, based on the opinion of Dr. Katz. It also found that the evidence did not support assertions by appellant's representative that the Office should have accepted additional conditions as being employment related.

On August 6, 2009 appellant requested reconsideration. Appellant's representative alleged that appellant sustained conditions other than those accepted by the Office. He also alleged that appellant continued to have residuals of the work injury. Counsel also submitted medical evidence and alleged that it was rationalized and sufficient to establish continuing employment-related residuals. Further, he alleged that the report of Dr. Katz was not entitled to special weight as only the accepted injuries and conditions were relied upon by the physician and Dr. Katz's report was stale.

The Office received a June 19, 2008 report from Dr. Cohen, in which he repeated his previous findings and opined that appellant was totally disabled. In an August 29, 2008 report, Dr. Cohen noted providing an epidural steroid injection. In an October 13, 2008 report, Dr. Stanley Liebowitz, a Board-certified orthopedic surgeon, advised that appellant had persistent back pain and partial disability, which included not carrying heavy objects. Dr. Patil also continued to treat appellant and submit reports in reiterating that appellant had several diagnoses other than the accepted condition, and opined that he had a total neurological disability.

In a February 23, 2009 report, Dr. Scilaris noted appellant's history and noted that appellant had complaints of continued pain in the center of his low back which radiated down his left leg. He advised that throughout the course of treatment appellant was found to have multilevel disc injury of both the cervical and lumbar spines and the thoracic spine. Additionally, Dr. Scilaris noted previous diagnoses which included acute lumbar disc herniation, stenosis and radiculopathy. He diagnosed lumbar radiculopathy and advised that this was work related. Dr. Scilaris recommended epidurals to the lumbar spine.

The Office received physical therapy reports and copies of previously submitted reports. It also received a copy of a job classification report.

In an October 19, 2009 decision, 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,[3] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 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]."[4]

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.[5]

ANALYSIS

On reconsideration, appellant disagreed with the Office's August 25, 2008 decision, which terminated his compensation benefits effective August 31, 2008. The underlying issue, whether he has a continuing employment-related lumber subluxation, is medical in nature. However, appellant has not provided sufficient evidence or argument to require a merit review of the claim pursuant to the Office's regulations.

In his August 6, 2009 request for reconsideration, appellant's representative alleged that other conditions sustained by appellant should have been accepted by the Office and that Dr. Katz should have addressed such conditions. The Board notes that the Office previously considered assertions about conditions not accepted in its August 25, 2008 decision. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.[6] Counsel also argued that the impartial medical examiner should not be entitled to special weight because the physician's examination and opinion was stale. The Board notes that, while Dr. Katz examined appellant in July 2007, the Office also obtained later supplemental reports from Dr. Katz, including one dated June 16,

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b).

[5] *Id.* at § 10.608(b).

[6] *C.N.*, 60 ECAB ___ (Docket No. 08-1569, issued December 9, 2008).

2008, just prior to issuing its July 23, 2008 proposed notice of termination.[7] While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[8] These assertions are insufficient to require a merit review of the claim as they do not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office.

Appellant also submitted additional evidence. This included reports from appellant's treating physicians who repeated their earlier diagnoses and opined that he was disabled. Dr. Patil also continued to treat appellant and submitted reports in which he reiterated that appellant had several diagnoses, other than the accepted condition, and opined that he had a total neurological disability. In a February 23, 2009 report, Dr. Scilaris noted that appellant had continued pain complaints and noted a multilevel disc injury of the cervical and lumbar spines and the thoracic spine as well as acute lumbar disc herniation, stenosis and radiculopathy. He diagnosed lumbar radiculopathy and advised that this was work related. Although Dr. Scilaris opined that appellant's condition was employment related, he had previously provided similar opinions on causal relationship in prior reports. Thus, the Board notes that these reports, while new, are repetitive of earlier reports from these physicians. These reports are repetitive of previously submitted reports and do not constitute a basis for reopening a case.[9] Likewise, other duplicative medical evidence submitted on reconsideration is insufficient to require reopening of the claim for a merit review.

Appellant also submitted other medical reports, including diagnostic reports that do not address the cause of appellant's condition. As this evidence does not address whether appellant's condition is employment related, it is not relevant. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[10] Appellant also provided physical therapy reports. However, health care providers such as physical therapists are not physicians under the Act and their opinions do not constitute medical evidence.[11] Consequently, the reports of such healthcare providers are not relevant to the underlying medical issue in this case.

[7] Appellant's counsel cited to the case of *Ruth Churchwell*, Docket No. 02-792 (issued October 17, 2002), which found that the Office improperly relied on medical evidence that was between 18 months and three years old in terminating wage-loss compensation for a refusal of suitable work under 5 U.S.C. § 8106(c). The Board notes that, unlike *Churchwell*, the medical evidence used by the Office to justify its termination of benefits in the present case was much more contemporaneous with its decision and the present case also does not involve application of the penalty provision of section 8106(c). Furthermore, *Churchwell* does not purport to set forth a particular time period in which medical evidence must be developed prior to issuance of a termination decision by the Office.

[8] *L.G.*, 61 ECAB ___ (Docket No. 09-1517, issued March 3, 2010).

[9] *Supra* note 5.

[10] *Id.*

[11] *See Jane A. White*, 34 ECAB 515, 518 (1983). *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

For these reasons, the evidence and argument submitted by appellant on reconsideration do not satisfy any of the three regulatory criteria for reopening a claim for merit review. Therefore, the Office properly denied his request for reconsideration.

On appeal appellant's representative referenced appellant's reconsideration request and repeated the arguments made in that request. As discussed above, these assertions are insufficient to warrant a merit review of the claim.

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 October 19, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 21, 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