United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 10-1083**
	)	**Issued: March 3, 2011**
DEPARTMENT OF THE ARMY, MEDICAL COMMAND, Fort Dix, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 8, 2010 appellant filed a timely appeal from an October 23, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration without a merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this decision. Because more than 180 days elapsed between the most recent Office merit decision dated August 17, 2009 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration without a merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 29, 1982 appellant, then a 49-year-old medical clerk, filed a traumatic injury claim alleging that she fell in a parking lot on that day and injured her left shoulder, right hip, ribs and spine. Initial July 21, 1982 reports from Dr. Lynn K. Cook, an osteopath, diagnosed

torn intercostal and left shoulder cartilage, chronic lumbosacral strain and fracture of the greater trochanter and found appellant to be totally disabled. The Office accepted the claim for permanent aggravation to a preexisting total right hip replacement, cervical and lumbar strains, intercostal tear and a left shoulder cartilage tear. Appellant worked intermittently until June 10, 1982 and did not return. She received compensation for total disability beginning June 11, 1982.

In a June 2, 1983 report, Dr. Robert N. Dunn, a Board-certified orthopedic surgeon, noted that appellant related that she was involved in three car accidents and sustained neck and low back injuries prior to the April 29, 1982 fall. He noted that she had Legg-Perthes disease of the right hip since childhood and underwent an initial, unsuccessful Smith-Peterson arthroplasty in 1967 or 1968 and a subsequent total hip replacement. Hip x-rays showed the prosthesis in satisfactory position with no discernable evidence of loosening while left shoulder x-rays showed no bony pathology or rib fracture. Dr. Dunn stated that appellant was "guarded" during the examination such that he was unable to record objective findings pertaining to her shoulder and hip. He diagnosed right hip Legg-Perthes disease and contusion of the left scapula and soft tissues around the posterior rhomboid area. Dr. Dunn opined that the April 29, 1982 fall aggravated appellant's underlying condition and necessitated total hip replacement. He added that he was "unable to find any objective reason why [appellant] should be experiencing pain in either her right hip or left shoulder" and she was "employable in any type of sedentary job or jobs involving no heavy labor."

In an October 14, 1988 report, Dr. William A. Taylor, a Board-certified orthopedic surgeon, opined that appellant's cup arthroplasty and August 1982 total hip replacement were "simply and strictly directly related to her Legg-Perthes disease."

An April 10, 1996 note from Dr. W. David Lindsay, an orthopedic surgeon and Office referral physician, pointed out that previous diagnostic test results did not reveal any fracture or acute evidence of trauma resulting from the April 29, 1982 incident. He noted that appellant's last orthopedic evaluation was in 1989. Dr. Lindsay examined her and observed stability of the back and right hip, commenting that she did not exhibit any significant amount of pain and was "comfortable." He opined that appellant could return to sedentary, nonlifting work.

On October 8, 1996 appellant underwent a right total hip arthroplasty revision performed by Dr. Stuart Stephenson, a Board-certified orthopedic surgeon.

The claim had no further medical development for several years. In a January 9, 2007 letter, the Office asked appellant to submit a physician's medical report regarding her current condition to determine whether she remained entitled to compensation benefits for continuing disability. It did not receive a responsive report.

On September 13, 2007 the Office referred appellant for a second opinion examination to Dr. Martin Pomphrey Jr., a Board-certified orthopedic surgeon. In Dr. Pomphrey's October 25, 2007 report, appellant stated that she had a right shoulder injury and right hip fracture due to the April 29, 1982 fall and underwent a repeat hip replacement in 1996. She complained of right toe numbness, back pain and intermittent, postsurgical left knee crepitus, pain and buckling. An x-ray did not indicate any loosening of the prosthesis or wear of the polyethylene liner. Dr. Pomphrey noted examination findings that included antalgic gait, decreased sensation along

the lateral right thigh and dorsum of the right foot, shortening of the right leg, tenderness to lumbosacral spine palpation and general decreased strength in both legs. He found excellent range of motion (ROM) of both hips without pain. Dr. Pomphrey reviewed the medical reports of Drs. Dunn, Taylor and Lindsey, noted the absence of medical treatment since 1996 and diagnosed status post Legg-Perthes disease and left knee and low back pain. He attributed appellant's leg length discrepancy to her Legg-Perthes condition and opined that she "would have required a total hip replacement prosthesis at some point in time regardless of her alleged injury." Dr. Pomphrey added that she could perform her primary employment duties and "should have been able to return to work as a medical clerk within a reasonable time after her total hip prosthesis in 1982."

In January 10, 2008 and January 2, 2009 letters, the Office again asked appellant to submit a physician's medical report regarding her current condition to determine whether she was entitled to continuing compensation benefits. It did not receive a response.

On June 3, 2009 the Office referred appellant for a second opinion examination to Dr. H. Leslie Fowler, a Board-certified orthopedic surgeon. In a June 23, 2009 report, Dr. Fowler detailed that she had preexisting Legg-Perthes disease and underwent a right hip arthroplasty in 1967, a total hip replacement in August 1982 and a revision total hip arthroplasty in August 1996. He examined appellant and observed normal to "excellent" ROM of the hips, knees and upper extremities, an antalgic gait secondary to a longstanding leg length discrepancy and palpable arthritic changes in the lower extremities. Dr. Fowler concluded that objective findings did not support the continued aggravation of Legg-Perthes disease, intercostal cartilage tear or other residuals of the April 29, 1982 injury. He advised that appellant was capable of performing the sedentary employment activities of her position.

On July 13, 2009 the Office proposed to terminate appellant's compensation benefits on the grounds that Dr. Fowler's June 23, 2009 report established that she no longer had residuals of her April 29, 1982 work injury. In a July 16, 2009 letter, appellant asserted that her accepted conditions persisted and that the opinions of Drs. Fowler and Pomphrey were inadequate, based on an inaccurate medical history and racially biased.

By decision dated August 17, 2009, the Office terminated appellant's medical and wage-loss benefits effective August 30, 2009.

Appellant requested reconsideration on October 5, 2009. She reasserted in July 20 and October 5, 2009 statements that she had residuals of her April 29, 1982 injury, which worsened over time, and that Drs. Fowler and Pomphrey were racially prejudiced against her. Appellant also provided a September 9, 2009 letter from her congressional representative stating that she was not physically able to hold a job due to an injury received in 1982, notifying the Office of her intent to request reconsideration and asking that the termination of benefits be postponed in the interim.

By decision dated October 23, 2009, the Office denied reconsideration, finding that appellant did not submit any new and relevant medical information or legal argument warranting review of the August 17, 2009 decision.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[1] the Office's regulations provide that the evidence or argument submitted by a claimant must either: (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.[2] Where the request for reconsideration 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.[3]

ANALYSIS

Appellant requested reconsideration on October 5, 2009 and argued that she had residuals of her April 29, 1982 injury and that Drs. Fowler and Pomphrey's were racially biased. She did not submit any evidence supporting her assertions of continued entitlement to benefits. The underlying issue is medical in nature but appellant submitted no new medical evidence relevant to whether she continued to have residuals of her 1982 work injury.[4] Regarding her allegations of bias, she submitted no evidence supporting her general allegations. While 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.[5]

Appellant also submitted a September 9, 2009 letter from her congressional representative asserting that she had residuals of her 1982 injury and that her benefits should continue until reconsideration proceedings concluded. While this letter was new, it is not relevant. As noted, the underlying issue is medical in nature. This letter does not otherwise 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. The representative did not provide any supporting evidence regarding the general contentions that residuals of the work injury continued or that benefits should continue pending resolution of the reconsideration process.

As appellant did not submit evidence or argument satisfying any of the three regulatory criteria for reopening a claim, the Office properly denied her application for reconsideration without reopening the claim for a review on the merits.

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[1] 5 U.S.C. § 8128(a). *See generally* 5 U.S.C. §§ 8101-8193.

[2] *E.K.*, 61 ECAB ___ (Docket No. 09-1827, issued April 21, 2010). *See* 20 C.F.R. § 10.606(b)(2).

[3] *L.D.*, 59 ECAB 648 (2008). *See* 20 C.F.R. § 10.608(b).

[4] *See David E. Newman*, 48 ECAB 305 (1997) (residual disability is a medical issue). *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (medical opinion, in general, can only be given by a qualified physician).

[5] *L.G.*, 61 ECAB ___ (Docket No. 09-1517, issued March 3, 2010); *Daniel O'Toole*, 1 ECAB 107 (1948). The Board has held that an employee may object to a physician conducting a second opinion examination if he or she has reason to believe that the selected physician would be biased; however, he or she must submit evidence to support the claim of bias. *Edward Burton Lee*, 53 ECAB 183, 187-88 (2001).

On appeal, appellant argues that the Drs. Fowler and Pomphrey opinions were biased and that she has met every requirement of disability, continues to have residuals of the April 29, 1982 injury and has the support of her congressional representative.[6] The Board only has jurisdiction to consider whether the Office properly denied reconsideration without a merit review based on the evidence of record at the time it issued its October 23, 2009 decision. As noted, appellant did not submit any pertinent evidence or relevant legal argument in support of her reconsideration request that warranted reopening of the August 17, 2009 decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 23, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 3, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[6] The Board notes that appellant submitted new medical evidence on appeal. As the Office has not considered this evidence in reaching a decision, the Board may not consider it for the first time on appeal. 20 C.F.R. § 501.2(c)(1).