United States Department of Labor
Employees' Compensation Appeals Board

C.H., Appellant	)	
and	)	**Docket No. 07-293**
	)	**Issued: May 17, 2007**
U.S. POSTAL SERVICE, WESTCHESTER PROCESSING & DISTRIBUTION CENTER, White Plains, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 13, 2006 appellant filed a timely appeal from a June 29, 2006 nonmerit decision of the Office of Workers' Compensation Programs that denied his reconsideration request without conducting further merit review. Because more than one year has elapsed between the most recent merit decision dated March 23, 2005 and 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 properly denied appellant's request for reconsideration without conducting further merit review.

FACTUAL HISTORY

On October 14, 2003 appellant, then a 48-year-old mail handler, filed a traumatic injury claim alleging that he was injured in a motor vehicle accident at work on November 16, 2000. He stopped work on November 17, 2000 and returned on November 20, 2000.

In a November 20, 2000 treatment note, Dr. Richard E. Peress[1] diagnosed whiplash, cervical instability and noted that appellant was disabled from November 17 to 20, 2000. In a September 8, 2003 report, Dr. William J. Joye[2] diagnosed cervical disc pathology, thoracic disc pathology, lumbar disc pathology, cervical radiculopathy, lumbar radiculopathy, left knee internal derangement and myofascial pain syndrome. On a September 26, 2003 form report Dr. Joye supported appellant's condition as employment related. He also submitted factual information concerning the motor vehicle accident.

By decision dated May 13, 2004, the Office denied appellant's traumatic injury claim on the grounds that fact of injury was not established. The Office found that the medical evidence was insufficient to establish that the employment incident caused an injury.

On May 31, 2004 appellant requested an oral hearing which was later changed to a request for a review of the written record. In an October 4, 2001 report, Dr. Peress noted that appellant had a preexisting cervical spine condition and that his motor vehicle accident occurred two days after he received a steroid injection treatment. He diagnosed derangement of the lumbar back, thoracic disc herniation at T7-8 and lumbar radiculopathy. In a January 20, 2004 follow-up report, Dr. Peress noted appellant's status and diagnoses. Appellant submitted a May 28, 2004 statement asserting that the employing establishment obstructed his right to file a workers' compensation claim.

A report from Dr. Surinder P. Jindal, a Board-certified psychiatrist and neurologist, advised that an electromyogram (EMG) showed "evidence of left L5 and S1 radiculopathy, no evidence of entrapment neuropathy." Appellant submitted several treatment notes from Dr. Jindal, ranging from July 17 to November 28, 2001. He also provided follow-up reports detailing his treatments with Dr. Peress and Dr. Joye, a July 17, 2001 magnetic resonance imaging (MRI) scan report of the lumbar spine and a November 30, 2000 report from the office of Dr. Steven Bruno, a chiropractor. Appellant submitted additional factual information concerning the motor vehicle accident.

By decision dated March 23, 2005, the hearing representative affirmed the May 13, 2004 decision. The hearing representative found that the medical evidence was not sufficient to establish that the employment incident caused an injury. He also found that any impropriety by the employing establishment with regard to the filing of appellant's claim did not alter the fact that appellant had to submit probative medical evidence supporting that the November 16, 2000 accident caused an injury.

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[1] Dr. Peress' specialty could not be ascertained from the record.

[2] Dr. Joye's specialty could not be ascertained from the record.

On March 22, 2006 appellant requested reconsideration. He repeated his assertion that the employing establishment obstructed his right to file a workers' compensation claim and provided a copy of a September 16, 2003 decision of the Equal Employment Opportunity (EEO) Commission involving the employing establishment. Appellant submitted copies of several reports from Dr. Peress dated October 4, 2001 to January 20, 2004. He submitted and copies of Dr. Joye's January 23, 2002 and September 8, 2003 reports.

In a March 23, 2006 report, Dr. Steven Bruno, a chiropractor, stated that he had been out of the office at the time appellant was treated in his practice. Therefore, "it is impossible for me to comment on the causal relationship of your existing condition/symptoms as they relate to a [motor vehicle accident] that occurred on November 16, 2000, especially since I have not seen you. The proof and substantiation of your case if you have one, remains with the doctors that have regularly treated and followed with you from the date of the accident to the present time." Appellant submitted a November 9, 2000 report from Dr. Peress indicating that he received epidural treatment there for cervical pain with radiculopathy on that date.

By decision dated June 29, 2006, the Office denied appellant's reconsideration request without conducting further merit review.

LEGAL PRECEDENT

Under section 8128 of the Federal Employees' Compensation Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing federal regulation provides guidance for the Office in using this discretion.[3] The regulation provides that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(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 Office]."[4]

Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[5] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section

[3] 20 C.F.R. § 10.606(b)(2) (1999).

[4] *Id.*

[5] 20 C.F.R. § 10.608(b) (1999).

10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[6]

ANALYSIS

The Board finds that the Office properly denied appellant's reconsideration request without conducting a merit review of the claim. Appellant failed to meet any of the criteria warranting further merit review. He neither asserted nor established that the Office erroneously applied or interpreted a specific point of law. Appellant's legal argument that the employing establishment improperly sought to obstruct his claim was previously considered by an Office hearing representative and is repetitious. The Board finds that appellant's efforts to raise his obstruction argument again are repetitious of arguments already of record.[7]

Similarly, the Board finds that appellant's evidentiary submissions are cumulative and repetitious in nature or irrelevant to the underlying issue in this case. Appellant submitted several reports and treatment notes from Drs. Peress and Joye. The record reflects that these reports were previously of record and considered by the Office. Accordingly, they were cumulative in nature and thus are insufficient to require the Office to reopen the claim for a merit review.[8]

Appellant submitted two new medical reports. Dr. Bruno's March 23, 2006 report is not relevant as the underlying issue, whether the employment incident caused or aggravated an injury is medical in nature. He is a chiropractor and the contents of his report do not establish that he diagnosed a spinal subluxation based on x-ray.[9] Consequently, Dr. Bruno is not considered a "physician" as defined under the Act. In any event, he specifically declined to address the issue of causal relationship. The Board finds that Dr. Bruno's report is insufficient to require the Office to reopen appellant's claim for further merit review. Appellant also provided a November 9, 2000 report from Dr. Peress, but this report is not relevant. Dr. Bruno addressed treatment of appellant that occurred prior to the claimed November 16, 2000 employment incident and did not address whether the November 16, 2000 employment incident caused an injury. Appellant also submitted a copy of an EEO decision involving the employing establishment. However, this is not relevant as the underlying issue is medical in nature. The Board has held that findings of other administrative agencies are not dispositive of proceedings under the Act.[10]

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[6] *Annette Louise*, 54 ECAB 783 (2003).

[7] *See Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

[8] *See id.*

[9] *See* 5 U.S.C. § 8101(2). Under section 8101(2) of the Act, chiropractors are only considered physicians and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist. *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).

[10] *Michael A. Deas*, 53 ECAB 208 (2001); *see Daniel Deparini*, 44 ECAB 657 (1993).

Consequently, the evidence and argument submitted by appellant on reconsideration is insufficient to warrant a merit review of the claim.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration without conducting a merit review, as appellant failed to meet any of the above listed three criteria warranting reconsideration on the merits.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 17, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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