

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

C.S., Appellant)

and)

DEPARTMENT OF THE NAVY,)
MARINE CORPS LOGISTICS BASE,)
Barstow, CA, Employer)

**Docket No. 10-1988
Issued: June 10, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 22, 2010 appellant filed a timely appeal from a nonmerit January 29, 2010 decision of the Office of Workers' Compensation Programs denying his request for reconsideration. The final merit decision of record is dated October 7, 2009. There is no merit decision within 180 days of July 22, 2010, the date appellant filed his appeal with the Board. Therefore, pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² Accompanying his request for appeal, appellant submitted additional evidence. The Board may not consider new evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant may submit such evidence to the Office accompanying a valid request for reconsideration.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration pursuant to section 8128(a).

On appeal, appellant asserts that the Office erred in denying his request for reconsideration as he submitted relevant, pertinent new evidence supporting his request. He also contends that the Office wrongfully failed to expand the claim to include a herniated lumbar disc, lumbar surgery and right great toe injuries.

FACTUAL HISTORY

The Office accepted that on June 16, 2007 appellant, then a 61-year-old heavy mobile equipment mechanic leader, sustained a lumbosacral sprain and right shoulder impingement syndrome³ when he became caught in the inverted track of an amphibious assault vehicle and grabbed a pole to brace himself. Appellant also claimed that the June 16, 2007 incident caused injuries to his right leg, right hand and wrist and right great toe.

Appellant sought treatment immediately after the injury at the employing establishment dispensary. In June 16 and 18, 2007 reports, Dr. Bernhard Stepke, a Board-certified family practitioner, diagnosed a low back strain, lumbar radiculopathy and a right toe injury. Lumbar x-rays showed an L4-5 disc herniation and L5-S1 degenerative disc disease. X-rays of the right foot were negative.⁴

Dr. Gail Hopkins, an attending Board-certified orthopedic surgeon, submitted reports from July 2007 to March 2008 noting the June 16, 2007 incident and appellant's complaints of right-sided radiculopathy and lumbar pain due to degenerative disc disease. Appellant underwent caudal epidural steroid injections on January 14, 28 and February 11, 2008. As the injections did not relieve his symptoms, Dr. Hopkins recommended an anterior lumbar fusion and requested that the Office approve the procedure.

By decision dated April 9, 2008, the Office denied approval of the proposed lumbar fusion on the grounds that the medical evidence did not establish a causal relationship between the accepted lumbosacral sprain and the requested surgery.

³ The Office initially denied the claim for a right shoulder injury by decision dated May 8, 2008. Following additional development, it obtained a second opinion from Dr. Bunsri Sophon, a Board-certified orthopedic surgeon, who submitted an October 3, 2008 report supporting causal relationship. The Office accepted right shoulder impingement syndrome on October 16, 2008.

⁴ A July 31, 2007 magnetic resonance imaging (MRI) scan showed L4-5 and L5-S1 disc herniations with degenerative changes from L1 through S1 and compromised L5 and S1 nerve roots.

In an April 14, 2008 letter, appellant requested an oral hearing.⁵ He submitted documents related to December 9, 1974 and July 20, 1976 occupational lumbar injuries and a subsequent L5-S1 laminectomy.

On May 14, 2008 Dr. Hopkins performed an anterior L5-S1 fusion with iliac crest bone graft and cage fixation. Appellant retired from the employing establishment on June 3, 2008. Dr. Hopkins submitted progress reports through September 2008.

By decision dated and finalized November 18, 2008, an Office hearing representative affirmed the April 9, 2008 decision denying an L5-S1 fusion on the grounds that the medical evidence was insufficient to establish causal relationship.

In a January 26, 2009 report, Dr. Mary Ann Shannon, an attending Board-certified orthopedic surgeon, diagnosed right shoulder impingement syndrome with rotator cuff and labral tears. On April 16, 2009 she performed an open biceps tendonesis of the rights shoulder and complete rotator cuff repair, authorized by the Office. Appellant participated in physical therapy through August 2009.

In an undated letter, Audrey Lloyd-Davies, a physical therapist, noted administering therapy for right carpal tunnel syndrome beginning on May 26, 2009.⁶ She submitted therapy notes through September 2009.

By decision dated October 7, 2009, the Office denied appellant's claim for right hand and arm conditions on the grounds that causal relationship was not established.

In an October 25, 2009 letter, appellant requested reconsideration from the October 7, 2009 decision. He submitted new evidence and a duplicate copy of a report previously of record.

On November 10, 2009 Dr. Shannon prescribed physical therapy for the right upper extremity to address carpal tunnel syndrome, a wrist strain, bicipital tenosynovitis and a labral tear. Appellant provided physical therapy notes from November 2009 sessions.

In a November 16, 2009 report, Dr. Shannon opined that appellant needed to stabilize his diabetes before undergoing further orthopedic treatment. She noted that the June 16, 2007 injury may have caused a traumatic aggravation of the cervical spine with subsequent foraminal narrowing. Dr. Shannon diagnosed a wrist strain and carpal tunnel syndrome.

By decision dated January 29, 2010, the Office denied appellant's October 25, 2009 request for reconsideration on the grounds that his request did not raise substantive legal questions or include new, relevant evidence. It found that, as physical therapists were not physicians for purposes of the Act, the physical therapy notes were of no probative value.

⁵ The Office apparently treated appellant's request as one for a review of the written record. This issue is not before the Board on the present appeal.

⁶ June 2, 2009 electromyogram and nerve conduction velocity studies of the right upper extremity were negative for radiculopathy.

Dr. Shannon's reports were not relevant as they did not contain medical rationale addressing the crucial issue of causal relationship.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁷ section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that 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.⁸ 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.⁹

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.¹⁰ He or she need only submit relevant, pertinent evidence not previously considered by the Office.¹¹ 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 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹²

ANALYSIS

The Office denied appellant's claim for a right carpal tunnel syndrome by October 7, 2009 decision as the medical evidence was insufficient to establish causal relationship. Accompanying his October 25, 2009 request for reconsideration, appellant submitted November 10 and 16, 2009 reports from Dr. Shannon, an attending Board-certified orthopedic surgeon, physical therapy notes and a duplicate medical report. On appeal, he asserts that these documents were sufficiently relevant to require the Office to perform a merit review.

To be considered relevant evidence, these documents must address the causal relationship of the claimed right carpal tunnel syndrome to the accepted June 16, 2007 injuries. This was the critical issue in the case at the time the final merit decision was issued.

Appellant's October 25, 2009 request for reconsideration does not contain relevant evidence or argument. In her November 10 and 16, 2009 reports, Dr. Shannon diagnosed right carpal tunnel syndrome and a right wrist strain. She prescribed physical therapy. However,

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(2).

⁹ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

¹⁰ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹¹ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

¹² *Annette Louise*, 54 ECAB 783 (2003).

Dr. Shannon did not address the critical issue of causal relationship. Therefore, her reports are irrelevant to the claim.¹³ The physical therapy notes are not considered medical evidence as physical therapists are not physicians for the purposes of the Act.¹⁴ The duplicate medical report is cumulative or previously considered evidence. The Board has held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁵

Appellant has not established that the Office improperly refused to reopen his claim for a review of the merits under section 8128(a) of the Act. He did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office. As set forth above, the evidence appellant submitted on reconsideration was not relevant to the critical issue in the case at the time of the final merit decision. Therefore, the Office's January 29, 2010 decision was proper under the law and facts of the case.

On appeal, appellant asserts that the Office erred in denying his request for reconsideration as he submitted relevant, pertinent new evidence supporting his request. As set forth above, the evidence submitted in support of his October 25, 2009 request for reconsideration was not relevant to the critical issue of causal relationship. Appellant also contends that the Office wrongfully failed to expand the claim to include a herniated lumbar disc, lumbar surgery and a right great toe injury. However, the Board does not have jurisdiction over the merits of the claim on the present appeal.¹⁶

¹³ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹⁴ *James Robinson, Jr.*, 53 ECAB 417 (2002); *Vickey C. Randall*, 51 ECAB 357 (2000); *R.C.*, Docket No. 09-2095 (issued August 4, 2010).

¹⁵ *Shirley Rhynes*, 55 ECAB 703 (2004).

¹⁶ Appellant may submit new evidence or argument with a written request for reconsideration to the Office within one year of this merit decision, pursuant to 5 U.S.C. § 8128 (a) and 20 C.F.R. §§ 10.605 through 10.607.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 29, 2010 is affirmed.

Issued: June 10, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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