United States Department of Labor
Employees' Compensation Appeals Board

LESLIE J. NEWBERRY, Appellant	)	
and	)	**Docket No. 04-1696**
	)	**Issued: January 13, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Bend, OR, Employer	)	

Appearances:
Leslie J. Newberry, pro se,
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 23, 2004 appellant filed a timely appeal from the March 29, 2004 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision by the Office. Because the Office did not issue a decision on the merits of the claim within the year prior to June 23, 2004, the Board does not have jurisdiction to review the merits of the claim.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

FACTUAL HISTORY

On July 6, 2000 appellant, then a 53-year-old clerk, filed a claim for compensation, which the Office accepted for cervical and thoracic back strains. She was off work July through October 2000. Appellant returned to work in a limited-duty capacity and was off work from December 10 to 18, 2000.[1] She received appropriate compensation benefits.

Dr. David Fredstrom, a Board-certified family practitioner and appellant's attending physician, treated her on a periodic basis and indicated ongoing work-related disability.

In an October 25, 2002 report, Dr. Christopher V. Horn, a Board-certified orthopedic surgeon and second opinion physician, noted examination findings, diagnosed cervical spondylosis, which was preexisting and opined that there was no evidence of an ongoing cervical strain. He opined that appellant had residuals which were not related to a musculoskeletal problem of more than a mild disability and that her limitations were based on a combination of perceived discomfort (nonorganic) and the known findings of cervical spondylosis with a history of strain. Dr. Horn did not indicate that appellant had an ongoing employment related condition.

By letter dated November 15, 2002, the Office provided Dr. Fredstrom with a copy of Dr. Horn's report and requested an opinion with respect to whether he agreed with the findings.

In a December 13, 2002 treatment note, Dr. Fredstrom indicated that appellant had major exacerbations involving the neck and upper back, although appellant indicated that her knees were causing some problems. The physician noted that she was quiet and sat stiffly, had decreased range of motion and stiffness in the neck and upper torso. Dr. Fredstrom opined that appellant was unable to work. He did not indicate that he had reviewed Dr. Horn's report or that he was responding to the Office's November 15, 2002 request for additional information.

By letter dated December 27, 2002, the Office proposed to terminate appellant's compensation and medical benefits. The Office determined that the second opinion physician, Dr. Horn, had opined that appellant's disability could only be attributed to preexisting cervical spondylosis and subjective complaints. The Office also noted that, while appellant's treating physician, Dr. Fredstrom, followed her for a long period of time and continued to treat her, he failed to provide any objective findings related to the accepted employment injury.

By decision dated February 3, 2003, the Office terminated appellant's compensation and medical benefits effective February 4, 2003, on the grounds that the evidence did not support the continued injury-related disability.

Subsequent to the decision, the Office received numerous chart notes, disability certificates and treatment notes from Dr. Fredstrom, who continued to treat appellant and opine that she was unable to work.[2] These reports were repetitive with the physician's prior reports.

[1] The record reflects that appellant had a concurrent disability of bells palsy on the left, a hip injury, acute depression, scoliosis and degenerative disc disease.

[2] Some of the reports predated the Office's February 3, 2003 termination decision.

On April 24, 2003 the Office authorized payment of compensation pursuant to a Form CA-7 filed by appellant for disability prior to February 4, 2003, in which she received medical treatment for her accepted conditions.

In a November 10, 2003 operative report, Dr. Donna M. Morgan, a Board-certified anesthesiologist, performed a C5-6 epidural with contrast. In a November 24, 2003 report, she noted that appellant came in for neck and upper back pain. Dr. Morgan diagnosed degeneration in the cervical disc, cervical spondylosis, facet syndrome, muscle contraction headaches and myalgia/myositis.

By letter dated January 23, 2004, appellant requested reconsideration of the termination decision. She alleged that she was found to be totally disabled by senior services, social security and her physicians. In support of her claim, she submitted a copy of a letter from the Social Security Administration (SSA) describing her social security benefits, time analysis forms and a letter of the same date to the Office disagreeing with the denial of her payment of compensation and advising that she was found to be totally disabled by the SSA as of February 12, 2001. Appellant indicated that, because she was found to be totally disabled, she should be receiving full compensation from that date. She also indicated that the Office did not pay her the proper compensation for intermittent periods of time from November 2001 to June 2002.

In a decision dated March 29, 2004, the Office denied appellant's request for reconsideration. The Office found that the evidence submitted in support of her request for reconsideration was insufficient to warrant a review of its prior decision.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.[3] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[4]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[5]

[3] 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.605 (1999).

[5] *Id*. at § 10.606.

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case will be reopened and reviewed on its merits. Where the request is timely but 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.[6]

ANALYSIS

Appellant's January 23, 2004 application for reconsideration did not show that the Office erroneously applied or interpreted a specific point of law, nor did it advance a relevant legal argument not previously considered by the Office. Rather, she contended that she was found to be totally disabled by the SSA and should receive full compensation.

The Board notes, however, that the fact that she is entitled to social security benefits does not establish that she is disabled as defined under the Act. The findings of other administrative agencies are not dispositive on proceedings under the Act, which is administered by the Office and the Board.[7] A determination made for disability retirement purposes is not determinative of the extent of physical disability or impairment for compensation purposes. The two relevant statutes (Social Security Act[8] and the Federal Employees' Compensation Act) have different standards of medical proof and the question of disability found under one statute does not prove disability under the other. For a disability determination under the Federal Employees' Compensation Act, a claimant's injury must be shown to have arisen out of the course of employment due to compensable factors of federal employment. Under the Social Security Act, conditions which are not work related may be considered in determining disability.[9]

The record also contains numerous disability certificates and treatment notes from Dr. Fredstrom, subsequent to February 4, 2003. However, these reports were duplicative of previous reports in while the physician found appellant to be disabled. The reports are repetitive and in none of the reports did Dr. Fredstrom address causal relation in a manner different from his prior reports. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[10] Dr. Fredstrom did not provide any relevant or pertinent new evidence which had not previously been considered.

Appellant also provided reports dated November 10 and 24, 2003 from Dr. Morgan, who performed a spinal epidural and treated her for neck and upper back pain. However, these

[6] *Id*. at § 10.608.

[7] *James E. Norris*, 52 ECAB 93 (2000).

[8] 42 U.S.C. § 401 *et seq*.

[9] *Daniel Deparini*, 44 ECAB 657 660 (1993).

[10] *David J. McDonald*, 50 ECAB 185 (1998); *John Polito*, 50 ECAB 347 (1999).

reports are not relevant as they do not contain any opinion by the physician that would support that appellant's condition is due to her employment.[11] For example, Dr. Morgan did not provide any opinion to show that she was treating appellant for her accepted condition as opposed to her preexisting scoliosis or degenerative disc disease. Furthermore, she did not indicate that appellant was disabled or unable to work. The Board finds that this evidence is not relevant to the underlying issue in the case and does not constitute a basis for reopening a case.[12]

Appellant has failed to show that the Office erred in interpreting the law and regulation and has not advanced any relevant legal argument not previously considered by the Office. She did not submit relevant and pertinent new medical evidence. As appellant failed to meet any of the three requirements for reopening her claim for merit review, the Office properly denied her reconsideration request.[13]

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's claim for merit review.[14]

[11] Part of a claimant's burden of proof is the submission of rationalized medical evidence based on a complete and accurate factual and medical background showing causal relationship. *Kenneth R. Love*, 50 ECAB 193 (1998); *Michael E. Smith*, 50 ECAB 313 (1999).

[12] *James R. Bell*, 52 ECAB 414 (2001).

[13] *Id*.

[14] On appeal appellant submitted additional evidence to support her claim. The Board's jurisdiction, however, is limited to reviewing the evidence that was before the Office at the time of its final decision. The Board therefore, has no jurisdiction to review any evidence submitted to the record after the Office's March 29, 2004 decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 29, 2004 is affirmed.

Issued: January 13, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member