United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 08-1147**
	)	**Issued: October 24, 2008**
DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, Dallas, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 3, 2008 appellant filed a timely appeal of a December 18, 2007 decision of the Office of Workers' Compensation Programs, denying merit review of her claim. Since more than one year has elapsed between the last merit decision on October 26, 2006 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2) and 501.6(c) and (d).

ISSUE

The issue is whether the Office properly determined that appellant's application for reconsideration was insufficient to warrant merit review under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

FACTUAL HISTORY

On September 16, 2003 appellant, then a 43-year-old safety engineer, filed a traumatic injury claim (Form CA-1) alleging she sustained facial injuries in two incidents occurring on September 11, 2003.[1] The Office accepted forehead and nose contusions.

In a telephone call to the Office on May 10, 2004, appellant indicated that she was having headaches and the medication she was taking had caused hair loss. She filed claims for compensation (Form CA-7) for intermittent dates commencing November 10, 2003. By decision dated July 29, 2004, the Office denied the claim for compensation. It found that neither tension headaches nor other conditions such as postconcussion syndrome were employment related and therefore any consequential injury from taking medication for these conditions was not compensable.

By decisions dated August 17, 2005 and October 26, 2006, the Office reviewed the case on its merits and denied modification. On October 25, 2007 appellant requested reconsideration of her claim.[2] In a narrative statement, appellant indicated that she was submitting a new report from attending physician, Dr. Randolph Veazey. She argued that the medical evidence established that her mixed vascular tension headaches were causally related to the employment injury. No additional medical evidence was received by the Office.

By decision dated December 18, 2007, the Office found that the application for reconsideration was insufficient to warrant merit review of the claim. It noted that no medical report was received with the application for reconsideration.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under 5 U.S.C. § 8128(a),[3] the Office's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that [the Office] erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by [the Office]; or (iii) constitutes relevant and pertinent evidence not previously considered by [the Office]."[4] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[5]

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[1] Appellant alleged the trunk of a car accidentally struck her face as she was unloading items and later she struck her face on a wall after her hotel room lights went out.

[2] The application for reconsideration indicated that it was sent by facsimile transmission on October 25, 2007.

[3] 5 U.S.C. § 8128(a) provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[4] 20 C.F.R. § 10.606(b)(2).

[5] 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

ANALYSIS

The underlying merit issue in this case was a medical issue as to whether appellant had established any additional injuries other than the accepted nose and forehead contusions from the September 11, 2003 employment incident. Appellant had alleged that she sustained headaches as a result of the incident, and as a consequence of taking medication for the headaches, had suffered hair loss.

To require the Office to reopen the case for merit review, the application for reconsideration must meet one of the requirements of 20 C.F.R. § 10.606(b)(2). In this case, appellant stated her belief that the medical evidence established tension headaches as an employment-related condition. She did not show that the Office erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument. Appellant therefore did not meet the requirements of 20 C.F.R. § 10.606(b)(2)(i) or (ii).

As to 20 C.F.R. § 10.606(b)(2)(iii), while appellant discussed an October 10, 2007 report from Dr. Veazey, the record does not establish that any medical or other evidence was submitted with the application for reconsideration.[6] The last medical report of record was received on March 1, 2006. Since the Office did not receive any additional evidence, the Board must find that appellant did not submit "relevant and pertinent new evidence not previously considered" by the Office.

Appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2) in this case. In accordance with 20 C.F.R. § 10.608(b), the Office properly determined the application for reconsideration was insufficient to warrant reopening the claim for review of the merits.

CONCLUSION

The Office properly refused to reopen the case for merit review as appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2).

[6] Appellant submitted evidence on appeal, but the Board can review only evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 18, 2007 is affirmed.

Issued: October 24, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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