United States Department of Labor
Employees' Compensation Appeals Board

L.H., Appellant	)	
and	)	**Docket No. 07-1191**
	)	**Issued: December 10, 2007**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Colorado Springs, CO, Employer	)	

Appearances:
H. Earl Moyer, Esq., for the appellant
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 March 29, 2007 appellant, through her attorney, filed a timely appeal from a March 5, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration of its denial of her claim for compensation for intermittent disability from January 24 to May 27, 2005. As there is no merit decision on this issue within one year of the filing date of this appeal, the Board lacks jurisdiction to review the merits of this issue.[1]

[1] 20 C.F.R. §§ 501.2(c), 501.3.

Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the March 5, 2007 nonmerit decision.[2]

ISSUE

The issue is whether the Office properly denied appellant's request for merit review of her claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

This case is before the Board for the second time. In the first appeal, the Board reversed a July 30, 2004 decision and found that appellant had established that she was disabled from employment for the period March 5 to May 28, 2004.[3]

Appellant filed claims for compensation requesting disability compensation for intermittent periods from January 24 to July 20, 2005. By letter dated August 10, 2005, the Office accepted various periods of disability and requested additional medical evidence supporting disability for certain periods from January 24 to May 27, 2005.

By decision dated February 22, 2006, the Office denied appellant's claim for compensation for 112 hours from January 24 to May 27, 2005 on the grounds that the medical evidence did not establish that she was disabled for the claimed periods. On March 21, 2006 appellant's attorney requested an oral hearing on the February 22, 2006 decision. The Office scheduled the hearing for November 7, 2006.

In a decision dated October 13, 2006, the Office reduced appellant's compensation based on its finding that her actual earnings as a modified clerk for four hours per day fairly and reasonably represented her wage-earning capacity. The Office noted that she had received compensation for intermittent disability through September 30, 2006 and was not due any "additional compensation for the periods preceding this decision."

In an undated letter received on October 23, 2006, appellant's attorney requested "immediate cancellation of the hearing" scheduled for November 7, 2006. He maintained that there were no further issues to address at the hearing in view of the Office's October 13, 2006 decision. On November 6, 2006 the Office granted the request to cancel the hearing. Appellant, on November 16, 2006, informed the Office that she still wanted a hearing on the February 22, 2006 decision. By letter dated December 6, 2006, the Office notified her that her attorney had withdrawn the hearing request and informed her that she should follow her appeal rights.

[2] The record contains an October 13, 2006 decision of the Office reducing appellant's compensation based on her actual earnings as a modified clerk. Appellant has not appealed this decision and therefore it is not before the Board at this time. *See* 20 C.F.R. § 501.2(c).

[3] Docket No. 05-198 (issued April 25, 2005). The Office accepted that appellant sustained an aggravation of cervical degenerative disc disease due to factors of her federal employment. She stopped work on July 13, 1995 and resumed part-time limited-duty employment on September 20, 1997. By decision dated March 2, 2001, the Office found that appellant's actual earnings as a full-time modified clerk fairly and reasonably represented her wage-earning capacity.

On February 19, 2007 appellant, through her attorney, requested reconsideration of the February 22, 2006 decision. He asserted that he had spoken with the claims examiner who issued the February 22, 2006 decision and she had assured him that appellant would receive compensation for the hours in question. Subsequent to reaching this agreement, the case was transferred to another claims examiner, who "was apparently not advised of the agreement" or that a hearing had been requested on the case. Counsel also indicated that he believed that appellant would receive the agreed upon compensation regardless of the statement in the October 16, 2006 decision that she was not entitled to additional compensation for periods preceding that decision. He therefore cancelled the oral hearing on the February 22, 2006 decision. Counsel summarized the medical evidence and asserted that it established disability for the periods in question. He also requested a reconsideration of the October 13, 2006 decision.[4]

By decision dated March 5, 2007, the Office denied appellant's request for reconsideration of the February 22, 2006 decision on the grounds that she did not submit relevant evidence or raise substantive legal arguments not previously considered.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[5] the Office's regulations provide 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.[6] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[7] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[8]

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.[9] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[10] While the reopening of a case may be predicated

[4] The Office has not issued a decision on appellant's request for reconsideration of the October 13, 2006 decision.

[5] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

[6] 20 C.F.R. § 10.606(b)(2).

[7] 20 C.F.R. § 10.607(a).

[8] 20 C.F.R. § 10.608(b).

[9] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[10] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

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.[11]

ANALYSIS

In its February 22, 2006 decision, the Office denied appellant's claim for compensation for 112 hours of disability from January 24 to May 27, 2005. The Office found that the medical evidence was insufficient to show that she was disabled during the time in question due to her accepted employment injury of an aggravation of cervical disc disease.

Appellant, through her attorney, initially requested an oral hearing on the claim. On October 13, 2006 the Office reduced appellant's compensation after finding that her actual earnings as a part-time modified clerk fairly and reasonably represented her wage-earning capacity. The Office noted that appellant was not due any additional compensation for dates prior to the October 13, 2006 decision. By letter received in the Office on October 23, 2006, appellant's attorney requested that the Office immediately cancel the hearing, scheduled for November 7, 2006, as there were no issues to discuss given the Office's October 13, 2006 decision. On November 6, 2006 the Office cancelled the scheduled hearing.

On February 19, 2007 appellant's attorney requested reconsideration of the February 22, 2006 decision.[12] He maintained that the claims examiner who issued the February 22, 2006 decision agreed that appellant would receive compensation for the time claimed from January 24 to May 27, 2005. Another claims examiner, who did not know about his agreement, issued the October 13, 2006 decision. Counsel believed that appellant would receive the agreed upon compensation even though the claims examiner noted in the October 13, 2006 decision that she was not entitled to compensation for periods preceding that decision. While he contended that he and a claims examiner reached an agreement that appellant would receive compensation for the 112 hours from January 24 to May 27, 2005, he did not submit any evidence supporting his contention. Thus, counsel's argument does not have a reasonable color of validity such that it would warrant reopening the case for merit review.[13]

Counsel reviewed the medical evidence and asserted that it established that she was disabled for the claimed hours. His opinion, however, is not relevant to the underlying issue of whether the medical evidence establishes that appellant was disabled for 112 hours from January 24 to May 27, 2005 due to her employment injury.[14] As the issue is medical in nature, it can only be resolved through the submission of probative medical evidence from a physician.[15]

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[11] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

[12] The attorney also requested reconsideration of the October 13, 2006 decision; however, the Office has not issued a decision regarding this reconsideration request.

[13] *Elaine M. Borghini*, 57 ECAB ___ (Docket No. 05-1102, issued May 3, 2006).

[14] *Gloria J. McPherson*, 51 ECAB 441 (2000).

[15] *Id*.

Appellant 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 pertinent new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's request for merit review of her claim under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 5, 2007 is affirmed.

Issued: December 10, 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