

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

L.N., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION, MEDICAL
CENTER, San Juan, PR, Employer)

Docket No. 09-879
Issued: November 6, 2009

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 February 17, 2009 appellant filed a timely appeal from a November 7, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying her reconsideration request. There is no merit decision within one year of the filing of this appeal. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On July 24, 2007 appellant, then a 40-year-old supply clerk, filed a claim for a recurrence of disability commencing June 15, 2007 related to an accepted June 16, 2006 thoracic sprain

sustained when she lifted a heavy box at work.¹ She noted that working on a computer for approximately six hours a week caused back pain. After experiencing increased neck pain at work on July 5, 2007, appellant stopped work on July 6, 2007 and did not return.

Dr. Margarita Correa-Perez, a Board-certified physiatrist, held appellant off work from June 18 to 20, 2007 and from July 6 to October 8, 2007. In a July 16, 2007 report, she noted a June 8, 2006 injury and a June 15, 2007 recurrence of disability, noting that appellant experienced back pain after heavy lifting at work. Dr. Correa-Perez diagnosed a herniated T8-9 disc.² On August 29, 2007 she noted that appellant presented on May 21 and August 8, 2007 with paraspinal muscle spasms, complaining of “increasing dorsal pain when performing her regular duties at work.” Dr. Correa-Perez held appellant off work due to objective evidence of spinal cord compression.

In an October 3, 2007 letter, the Office advised appellant of the additional evidence needed to establish her claim, including a detailed description of the identified work factors. Appellant submitted additional evidence.³

In undated slips, Dr. Daisy Vasquez Dubeau, an attending obstetrician and gynecologist, placed appellant on bed rest from December 19, 2005 to March 13, 2006 due to premature contractions.

Effective May 21, 2007, the employing establishment approved an alternate work schedule, with every other Monday off. On July 12, 2007 the employing establishment relocated appellant to a different room, with no change in her working conditions or schedule.

By decision dated November 5, 2007, the Office denied appellant’s claim on the grounds that fact of injury was not established. It found that appellant did not provide a sufficient description of the events of June 15, 2007. The Office further found that appellant submitted insufficient rationalized medical evidence establishing a causal relationship between the accepted thoracic sprain and the claimed recurrence of disability.

In a December 7, 2007 letter, appellant requested reconsideration. She asserted that the claimed recurrence of disability was a spontaneous worsening of the accepted June 2006 thoracic sprain, unrelated to using the computer at work. Appellant submitted additional evidence.

In a November 2, 2007 letter, appellant stated that prolonged sitting while working at the computer worsened her condition. She noted a history of lumbar radiculopathy since 2002.

¹ The Office processed the accepted June 16, 2006 traumatic injury under a separate claim number. In an October 19, 2007 letter, the employing establishment contended that appellant did not perform heavy lifting as a box of purchase orders only contained 26 sheets of paper.

² A March 29, 2007 magnetic resonance imaging (MRI) scan showed a herniated T8-9 disc. A July 2, 2007 MRI scan showed focal disc herniations at T4-5, T7-8, T8-9 and T9-10, the largest at T8-9, with mild spondylosis and degenerative disc disease.

³ Appellant also submitted documents regarding her Equal Employment Opportunity (EEO) grievance alleging discrimination due to pregnancy as she was not selected for a promotion in late 2005. She also submitted a March 20, 2006 transfer request.

In a November 1, 2007 report, Dr. Correa-Perez opined that lifting heavy boxes at work on June 8, 2007 caused a dorsal sprain. She held appellant off work from July 6 to November 6, 2007. Dr. Correa-Perez opined that a “heavy weight-lifting episode” at work could have caused “increased intradiscal pressure provoking the disc herniation.” She noted work restrictions.

By decision dated January 23, 2008, the Office denied modification on the grounds that the evidence submitted did not establish that appellant’s condition worsened on June 15, 2007. It further found that appellant did not submit a consistent history of injury.

In an August 11, 2008 letter, appellant requested reconsideration. She submitted additional evidence.

In a January 18, 2007 letter, the employing establishment advised appellant that, effective February 4, 2007, her workstation would be relocated. Appellant’s work conditions and schedule would remain the same. On January 24, 2008 the employing establishment granted appellant a temporary schedule change from eight hours to six hours a day.

By decision dated November 7, 2008, the Office denied appellant’s request for reconsideration on the grounds that her August 11, 2008 letter and accompanying evidence did not contain relevant evidence sufficient to warrant a merit review of the prior decision.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act,⁴ 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) submit relevant and pertinent new evidence not previously considered by the Office.⁵ 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.⁶

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.⁷ Appellant need only submit relevant, pertinent evidence not previously considered by the Office.⁸ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.608(b). See also *T.E.*, 59 ECAB ____ (Docket No. 07-2227, issued March 19, 2008).

⁷ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁸ See 20 C.F.R. § 10.606(b)(3). See also *Mark H. Dever*, 53 ECAB 710 (2002).

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.⁹

ANALYSIS

The Office denied appellant's claim for recurrence of disability by November 5, 2007 and January 23, 2008 decisions. Pursuant to the January 23, 2008 decision, appellant requested reconsideration by letter dated August 11, 2008. The issue at the time of the last merit decision was the causal relationship of the claimed recurrence of disability to the accepted June 16, 2006 thoracic sprain. To be relevant, the evidence submitted in support of the August 11, 2008 request for reconsideration must address that issue.

In support of her reconsideration request, appellant submitted two letters regarding implementation of an alternate work schedule and the relocation of her workstation. These documents are not relevant evidence regarding the claimed recurrence of disability. Therefore, this evidence is not relevant and pertinent or insufficient to require the Office to reopen appellant's claim for consideration of the merits.¹⁰

Appellant has not established that the Office improperly refused to reopen her claim for a review of the merits under section 8128(a) of the Act because she 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.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a merit review.¹¹

⁹ *Annette Louise*, 54 ECAB 783 (2003).

¹⁰ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹¹ On appeal, appellant asserts that the Office should have accepted her claim for recurrence of disability because the OPM approved her disability retirement application based on the reports from Dr. Correa. As noted, the Board does not have jurisdiction over the denial of the claim for recurrence of disability on the present appeal. However, the determinations of other administrative agencies regarding disability are not relevant to claims under the Act, as different standards of proof are applied and the relationship to factors of federal employment is often not at issue. *Daniel Deparini*, 44 ECAB 657 (1993); *see also Ray B. Thackurdeen*, 54 ECAB 396 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 7, 2008 is affirmed.

Issued: November 6, 2009
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