United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 10-1250**
	)	**Issued: December 3, 2010**
DEPARTMENT OF VETERANS AFFAIRS, LEXINGTON VETERANS ADMINISTRATION MEDICAL CENTER, Lexington, KY, 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 26, 2010 appellant filed a timely appeal from the September 30, 2009 nonmerit decision of the Office of Workers' Compensation Programs. As over 180 days passed since the last merit decision of December 17, 2008 to the filing of this appeal, the Board lacks jurisdiction over the merits of appellant's case.[1]

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 5, 2008 appellant, a 46-year-old diagnostic radiology technologist, filed a traumatic injury claim alleging that on October 24, 2008 she injured her low back while moving

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(e).

a patient from a procedure table to a bed. The employing establishment controverted the claim, noting that appellant returned to work on October 29, 2008 with no medical documentation.

In a November 20, 2008 note, Dr. E. Clark Standiford, Board-certified in family medicine, diagnosed back pain. He noted that appellant was required to transfer patients three to four times a day.

In a December 17, 2008 decision, the Office denied appellant's claim. It accepted that the October 24, 2008 incident took place as alleged, but found that the medical evidence was insufficient to establish a firm medical diagnosis related to moving a patient at work.

On September 16, 2009 appellant requested reconsideration. She described her back condition and reviewed her history of injury. Appellant resubmitted Dr. Standiford's note.

By report dated January 2, 2009, Dr. Greg R. Wheeler, a Board-certified neurologist, noted that he first treated appellant that day and that she brought a magnetic resonance imaging (MRI) scan from 2007 for his review; however, the computer did not allow him to do so. He noted that he would order a new lumbar MRI scan. Dr. Wheeler obtained a history that appellant had obtained prior chiropractic treatment and recommended physical therapy. He noted that he would follow up with her after obtaining the diagnostic studies.

In January 2, 2009 report, Dr. Charles M. Kenney, III, a Board-certified diagnostic radiologist, related that an MRI scan of appellant's lumbar spine revealed disc bulging with facet arthropathy at multiple levels.

In notes dated January 8 and March 5, 2009, Dr. Wheeler diagnosed lumbago, lumbosacral pain, lumbar spondylothesis, synovial cyst and lower leg pain. He did not address appellant's employment history or history of injury.

By decision dated September 30, 2009, the Office denied appellant's request for reconsideration finding that the evidence did not address the issue of causal relation.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's regulations provide that the evidence or argument submitted by 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.[3] 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.[4] When a claimant fails to meet one of the above standards, the

[2] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[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." 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b)(2).

[4] *Id*. at § 10.607(a).

Office will deny the application for reconsideration without reopening the case for review on the merits.[5]

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not warrant opening a claim for further merit review.[6] The submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[7] While a reopening of a case may be predicated 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.[8]

ANALYSIS

On December 17, 2008 the Office denied appellant's claim for traumatic injury on October 24, 2008 while moving a patient at work. It accepted the incident happened as alleged, but denied the claim as the medical evidence was not sufficient to establish causal relation. Appellant requested reconsideration on September 16, 2009 and submitted additional evidence in support of her claim. The Board finds that the Office did not abuse its discretion in denying her request for further merit review.

Appellant's reconsideration request did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office.[9] Therefore, she is not entitled to a review of the merits of her claim based upon the first and second requirements under section 10.606(b)(2).[10]

Appellant submitted several reports from Dr. Wheeler, who noted that he first examined her on January 2, 2009. His office note of that date addressed her prior chiropractic treatment but did not relate any history of the October 24, 2008 incident in which she transferred a patient at work. Dr. Wheeler noted that he was unable to review a prior MRI scan of 2007 and recommended additional diagnostic studies, which he obtained that day through Dr. Kenney. His subsequent treatment notes failed to obtain or relate any history of the October 24, 2008 incident accepted in this case. Dr. Wheeler's medical reports, while new to the record, are not relevant on the issue of causal relationship. He did not provide any opinion relating that the treatment of appellant was related to her work as a diagnostic radiologist or, specifically, to the accepted incident. Appellant's claim was denied by the Office based on the inadequacy of the medical

[5] *Id*. at § 10.608(b).

[6] *D.I.*, 59 ECAB 158 (2007); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

[7] *D.K.*, 59 ECAB 141 (2007); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[8] *M.E.*, 58 ECAB 694 (2007); *John F. Critz*, 44 ECAB 788, 794 (1993).

[9] On appeal appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision. 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB 293 (2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision).

[10] 20 C.F.R. § 10.606(b)(2)(i) and (ii).

evidence to address causal relation. The Board has held that the submission of evidence that does not address the particular issue involved in a claim does not constitute a basis for reopening a case for further merit review.[11] The reports of Dr. Wheeler are not pertinent to the issue on which the Office denied appellant's claim as he did not address causal relationship or provide any opinion addressing how the October 24, 2008 incident contributed to appellant's claimed low back condition.

Appellant also submitted a copy of Dr. Standiford's October 20, 2008 note, which was previously of record and reviewed by the Office in its prior decision. It is well established that the submission of evidence that repeats or duplicates that already of record does not constitute a basis for reopening a claim for merit review.[12]

The evidence submitted by appellant did not establish that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered. As appellant did not meet any of the regulatory requirements, the Board finds that the Office properly denied her request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

[11] *Mary Lou Barragy*, 46 ECAB 781 (1995).

[12] *James W. Scott*, 55 ECAB 606, 608 n.4 (2004); *Freddie Mosley*, 54 ECAB 255 (2002).

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 3, 2010
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