

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

V.S., Appellant and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Ann Arbor, MI, Employer))))))))))	Docket No. 10-2015 Issued: April 15, 2011
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<i>Appearances:</i> Alan J. Shapiro, Esq., for the appellant Office of Solicitor, for the Director	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

Before:
 RICHARD J. DASCHBACH, Chief Judge
 MICHAEL E. GROOM, Alternate Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 3, 2010 appellant, through her attorney, filed a timely appeal of a May 28, 2010 nonmerit decision of the Office of Workers Compensation Programs denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the May 28, 2010 decision. The Board does not have jurisdiction over the decision on the merits of the claim.²

ISSUE

The issue is whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² The most recent merit decision was a Board decision dated January 27, 2010. The Board has jurisdiction over final decisions of the Office. *See* 20 C.F.R. § 501.2(c). For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

This case has previously been before the Board.³ In a January 27, 2010 decision, the Board affirmed the Office's April 21, 2009 decision finding that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on June 10, 2008.⁴ The Board found that the Office properly determined that appellant had not established the occurrence of an employment incident on June 10, 2008. There were such inconsistencies in the record as to cast doubt on the validity of appellant's claim and her account of the injury was refuted by strong and persuasive evidence, including late reporting to the employing establishment and medical personnel. It was noted that she did not file her claim until more than a month and a half after the claimed June 10, 2008 injury, at which point she had received a July 3, 2008 notification of a proposed removal action for cause; that she did not seek medical attention for the claimed injury until August 27, 2008 when she saw Dr. Alexandra Theisen, an attending physical medicine and rehabilitation physician; and that she continued to work regular duty from the date of the claimed injury until she stopped work over a month later on July 19, 2008.

In a February 1, 2010 letter, appellant requested reconsideration of the denial of her claim that she sustained an injury in the performance of duty on June 10, 2008. She stated that she did not report her claimed June 10, 2008 injury due to fear of termination and asserted that her visit to Dr. Theisen was delayed due to being a "new patient." Appellant took issue with Dr. Theisen's comments that she was a poor historian and was uncertain how honest she was about her mediation intake. She claimed that she had not received a July 3, 2008 notification of a proposed removal action for cause, but rather that a patient's wife had complained about her and that she had to work in the library while the complaint was being investigated. After she began working in the library, appellant decided that she needed to submit the claim as she could not complete her work tasks without medication. She contended that coworkers entered the room immediately after the June 10, 2008 accident occurred and saw that she was bent over and unable to stand. Appellant asserted that witness statements were not provided because the coworkers feared harassment and termination. She indicated that Tisha Martin was her immediate supervisor, rather than Tracie Sockow, and asserted that Ms. Martin harassed her by falsely charging her with failing to properly care for a patient.

In a May 28, 2010 decision, the Office denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

³ Docket No. 09-1475 (issued January 27, 2010).

⁴ On July 31, 2008 appellant, then a 52-year-old practical nurse, filed a traumatic injury claim alleging that on June 10, 2008 she sustained injury to her back and legs while assisting a patient who had fallen onto one knee. She stated that she told the patient that he should stand on the count of three, but he sat on the floor when she attempted to lift him.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁵ the Office 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.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 or argument which repeats or duplicates evidence or argument already in the case record⁹ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰ 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.¹¹

ANALYSIS

In an April 21, 2009 decision, the Office found that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty because she did not establish the occurrence of the alleged June 10, 2008 employment incident. It was found that such inconsistencies in the record as to cast doubt on the validity of appellant's claim and that her account was refuted by strong and persuasive evidence, including late reporting to the employing establishment and medical personnel. In a January 27, 2010 decision, the Board affirmed the Office's April 21, 2009 decision. Appellant requested reconsideration of her claim in a February 1, 2010 letter.

As noted, the Board does not have jurisdiction over the merits of the present case. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring the Office to reopen the case for review of the merits of the claim. In her application for reconsideration, appellant did not show that the Office erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it

⁵ 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." *Id.* at § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(b).

⁹ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁰ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹¹ *John F. Critz*, 44 ECAB 788, 794 (1993).

was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument nor did she submit new and relevant documentary evidence.

Appellant presented several arguments in support of her belief that she sustained an injury in the performance of duty on June 10, 2008, but these arguments either were previously considered or were not relevant to this matter.¹² She indicated that she did not report her claimed June 10, 2008 injury due to fear of termination, but this argument had previously been presented to and considered by the Office. Appellant asserted that her visit to Dr. Theisen, an attending physical medicine and rehabilitation physician, was delayed due to being a “new patient,” but this argument is of limited relevance to the main issue of the present case due to the fact that she did not submit any documentary evidence to support this assertion. She took the issue with comments Dr. Theisen made in a medical report but she did not indicate how these comments were relevant to her claim that an employment incident occurred on June 10, 2008 when she attempted to lift a patient. Appellant claimed that she did not receive a notification of a proposed removal action for cause on July 3, 2008, but she did not explain how her belief that the disciplinary action taken against her was mischaracterized and relevant to her claim that she actually experienced an employment incident on June 10, 2008 as alleged. She asserted that, after she began working in the library during a period a complaint against her was being investigated, she decided that she needed to “submit the injury” as she could not complete her work tasks without medication. However, appellant had previously submitted a similar argument to the Office for not reporting her claimed June 10, 2008 injury at an earlier date. She asserted that coworkers who witnessed the June 10, 2008 accident immediately after it occurred did not provide witness statements due to fear of harassment and termination. Appellant did not submit documents to support this belief and, therefore, the argument is of limited relevance. She indicated that Ms. Martin, her immediate supervisor, harassed her by falsely charging her with failing to properly care for a patient, but Ms. Martin did not explain how this claimed action, even if established, would show that appellant sustained a work injury on June 10, 2008.¹³

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). 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 relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, the Office properly denied merit review.

CONCLUSION

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

¹² See *supra* notes 9 and 10.

¹³ Appellant indicated that Ms. Martin, rather than Ms. Sockow, was her immediate supervisor. She did not explain how this argument was relevant to the main issue of the present case, *i.e.*, whether she established the occurrence of an employment incident on June 10, 2008.

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 15, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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