U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA M. MUCKER and DEPARTMENT OF THE ARMY, NUTRITION CARE DIVISION, Landstuhl, Germany

Docket No. 01-698; Submitted on the Record;
Issued May 21, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On June 9, 1993 appellant, then a 42-year-old food service provider, filed a claim alleging that she developed carpal tunnel syndrome as a result of her employment duties. The Office accepted her claim for aggravation of bilateral carpal tunnel syndrome and the Office authorized right carpal tunnel release in 1993 and left carpal tunnel release in 1995.

On October 18, 1995 appellant underwent a functional capacity evaluation (FCE). The FCE noted she was able to return to some form of employment. Appellant's performance revealed decreased bilateral upper extremity strength and endurance; with most difficulty gripping, carrying or lifting. The evaluation noted that appellant was also being treated for an unrelated condition of temporomandibular joint pain.

On October 27, 1995 appellant filed claim for a schedule award.[1] Her case record was referred to the Office's medical adviser who determined that appellant sustained a 10 percent impairment of both upper extremities.[2]

Thereafter, appellant was referred for vocational rehabilitation. A vocational training, placement, plan and agreement were entered into with job goals of office manager or financial aid counselor. Appellant was scheduled to attend a technical institute in furtherance of her rehabilitation from October 1996 through December 1997.

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[1] Appellant submitted treatment notes from Dr. Paul Papierski, a Board-certified orthopedic surgeon, and Dr. Thomas P. Gangan, a family practitioner, indicating that they were treating appellant for carpal tunnel syndrome.

[2] The record reflects appellant underwent a left carpal tunnel release on May 11, 1995.

In a memorandum dated June 24, 1997, the Office noted that appellant's vocational rehabilitation case was placed in interrupted status due to appellant's contention that she was unable to undergo rehabilitation due to her continuing medical condition and that her rehabilitation counselor no longer worked with federal employees. The Office determined that appellant should be sent out for a second opinion to determine the current status of her condition and her work capacity.

In a letter dated September 1, 1998, appellant was referred for a second opinion to Dr. Graham Howorth, a Board-certified orthopedic surgeon, who in a report dated September 14, 1998, determined that appellant had objective findings secondary to her work-related condition of carpal tunnel syndrome including mild left scar pain and diminished grip strength. He determined that appellant was not totally disabled and could perform light duty. Dr. Howorth submitted a work restriction and evaluation form indicating that appellant could work eight hours a day with restrictions, that repetitive wrist movements be limited to two hours per day.

The vocational counselor report dated November 11, 1998 indicated that appellant was not cooperating and had missed several scheduled appointments. He noted appellant became verbally abusive toward him and indicated that appellant had no intention of returning to employment. The rehabilitation counselor further indicated that the probability of success was nonexistent without the cooperation of appellant which he believed was not forthcoming.

By letter dated May 18, 1999, the Office notified appellant that it proposed to reduce her compensation based on her capacity to earn wages as a rater/coder. The Office noted appellant's noncooperation in vocational rehabilitation and provided her 30 days within which she must "undergo the approved training program" or "show good cause for not undergoing the training program" or the rehabilitation effort would be terminated and action would be initiated to reduce appellant's compensation to reflect the probable wage-earning capacity had she completed the training program.

In a letter dated June 3, 1999, appellant noted that the rehabilitation counselor was untruthful and that she attempted to cooperate. She noted that she received little assistance in her rehabilitation and believed there were fabrications and misuse of government rules and funds.

By decision dated June 23, 1999, the Office reduced appellant's compensation based on her capacity to earn wages as a rater/coder effective July 18, 1999. The Office advised appellant that it would reduce her compensation for wage loss because the evidence established that the constructed position of rater/coder represented her wage-earning capacity.

In a letter dated August 17, 1999, appellant requested reconsideration of the Office's June 23, 1999 decision and submitted additional evidence. She indicated that the Office referral physician opinion was invalid as he provided information and observations which were inaccurate. Appellant further noted that she received no help or job offers as a result of the rehabilitation services provided to her. She also submitted duplicative medical records from Drs. Toon, Gangan and Papierski from 1994 to 1996; several witness statements from family members regarding her problems with the vocational rehabilitation counselor; and notes from her occupational therapist.

By decision dated October 15, 1999, the Office denied appellant's application for review on the grounds that the evidence submitted was cumulative in nature and insufficient to warrant review of its prior decision.

The only decision before the Board on this appeal is the Office's decision dated October 15, 1999. Since more than one year elapsed from the date of issuance of the Office's June 23, 1999 merit decision to the date of the filing of appellant's appeal, September 23, 2000, the Board lacks jurisdiction to review this decision.[3]

The Board finds that the Office properly denied appellant's request for reconsideration.

Under section 8128(a) of the Federal Employees' Compensation Act,[4] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulation,[5] which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> (ii) Advances a relevant legal argument not previously considered by [the Office]; or
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> (iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

Section 10.608(b) of the Act provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[6]

In the present case, the Office denied appellant's claim without conducting a merit review on the grounds that the evidence submitted was cumulative. In support of her request for reconsideration, appellant submitted various medical records from Drs. Toon, Gangan and Papierski. This evidence was duplicative of evidence already contained in the record[7] and was previously considered by the Office. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review. Appellant also

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[3] *See* 20 C.F.R. § 501.3(d).

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b) (1999).

[6] 20 C.F.R. § 10.608(b).

[7] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; *see Daniel Deparini,* 44 ECAB 657 (1993); *Eugene F. Butler,* 36 ECAB 393, 398 (1984); *Bruce E. Martin,* 35 ECAB 1090, 1093-94 (1984).

submitted several witness statements from friends and family noting the difficulty she had with the vocational counselor; however, these statements are not relevant to the issue of her wage-earning capacity. Similarly, the occupational therapy notes are not considered medical evidence as a occupational therapist is not considered a physician under the Act.[8] Therefore, these reports are insufficient on the aspect of appellant's disability for work. Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did she submit relevant and pertinent evidence not previously considered by the Office."[9] Therefore, appellant did not submit relevant evidence not previously considered by the Office.

The decision of the Office of Workers' Compensation Programs dated October 15, 1999 is hereby affirmed.

Dated, Washington, DC
May 21, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] *See* 5 U.S.C. § 8101(2) (this subsection defines a ''physician'' as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. The term ''physician'' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary); *see also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

[9] 20 C.F.R. § 10.606(b).