United States Department of Labor
Employees' Compensation Appeals Board

DARCIE CASASSA, Appellant	)	
and	)	**Docket No. 03-670**
	)	**Issued July 9, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Kansas City, MO, Employer	)	

Appearances:
David W. White, Esq., for the appellant
Mirian Ozur, Esq., for the Director

Oral Argument May 11, 2004

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On January 16, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated January 9, 2003 denying appellant reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the denial of reconsideration.

ISSUE

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

FACTUAL HISTORY

On February 9, 1998 appellant, then a 35-year-old letter carrier, filed an occupational disease claim alleging that factors of her federal employment caused the deterioration of discs in her lower spine. Appellant, whose medical history included nonwork-related back surgery in 1994, stated that in early 1997 she experienced pain in her back that worsened until December 1994 when she was admitted to the hospital. Appellant stated that on December 26,

1997 she had several severely damaged discs removed and she has not worked since. The record contains a December 21, 1997 report from Dr. Linda Johnson, an orthopedist, who stated that appellant presented in severe pain but on examination showed mild hyperethesia but no sensory loss. She noted that appellant was hospitalized and later developed sensory loss in the medial aspect of her left foot and great toe.

In a May 6, 1998 letter, the Office denied appellant's claim finding the medical evidence insufficient. Appellant requested an oral hearing and in a July 29, 1999 decision the hearing representative remanded the case for further development. In a September 8, 1999 report, Dr. Steven Simon, Board-certified in pain management and appellant's treating physician, stated that he had treated appellant with a variety of physical therapy techniques including electroceutical stimulation. He diagnosed sciatic neuritis a condition he felt was likely to be chronic and permanent. He stated that appellant was permanently and totally disabled from being a letter carrier again, but he felt she could perform "in some light type of duty including driving a mail truck."

Appellant was referred for a second opinion and in an October 15, 1999 report Dr. Frank Gael, an orthopedist, stated that appellant's employment accelerated the degeneration and fragmentation of her preexisting back condition. In a November 3, 1999 letter, the Office accepted the claim for herniated nucleus pulposus at L5-S1 with surgical repair. In a January 27, 2000 letter, appellant elected disability retirement.

In a February 17, 2000 report, Dr. Simon stated that appellant presented with pain, numbness, tingling and weakness in her foot and leg with pain radiating into her hip and the anterior of both legs with aching, numbness and pain around the left ankle. Dr. Simon, who performed a functional capacity evaluation (FCE), stated that appellant's pain was severe enough to frequently impair her concentration. He listed her medical restrictions as no lifting more than 10 pounds, no stooping for more than 1 percent of her day, no crouching for more than 5 percent of her day and she could sit and stand for up to 15 minutes at a time, but for no more than 2 hours a day.

In a March 15, 2000 report, Dr. Gael stated that results of a functional capacity evaluation he reviewed were inconsistent due to appellant's minimal effort but showed she could sit for six hours a day, stand and reach above her shoulder for two hours and walk for one hour a day. He added that appellant could lift 20 pounds or less for 3 to 4 hours a day and she needed a 15-minute break every 2 hours. In a June 28, 2000 letter, the employing establishment offered a limited-duty job as a modified clerk. The physical requirements included sitting up to 6 hours, lifting, pushing and pulling not to exceed 10 pounds 4 hours a day, standing for 2 hours a day and intermittent walking for 1 hour a day. Appellant did not respond to the offer. In a July 27, 2000 letter, the Office informed appellant that they found the job suitable and provided her 30 days to accept the job or explain why she was refusing it. In a September 12, 2000 letter, the Office notified appellant that she had 15 days to report to the job. In a September 20, 2000 letter, appellant requested more time to get a report from Dr. Simon. In an October 3, 2000 decision, the Office terminated appellant's compensation for refusing an offer of suitable work.

Appellant requested reconsideration and submitted a personal statement that she refused the job offer on the advice of Dr. Simon. Appellant also resubmitted two reports from Dr. Simon. In an October 17, 2000 report, Dr. Simon stated that appellant presented with pain in her leg and back, leg cramps and a shingles problem that ran up her back and produced headaches. On examination he found that she ambulated without device and had intact balance and weight bearing through the lower extremities. He stated that, with the exception of walking stiff and decreased bending function at her lower back, she appeared intact. Dr. Simon stated that appellant was anxious about returning to work and that he did not recommend she perform any pushing or pulling activity as her muscles were very weak. In a November 30, 2000 report, Dr. Simon stated that he reviewed the job description that the employing establishment sent and that he believed it would be very harmful to appellant to perform the job offered because she was very weak and needed a work hardening program.

In an October 9, 2001 decision, the Office denied modification finding Dr. Simon's reports insufficiently rationalized or supported by objective findings. The Office also noted that appellant was deemed to have provided a minimal effort in her FCE.

Appellant requested reconsideration and resubmitted Dr. Simon's February 17, October 17 and November 30, 2000 reports. Appellant's representative argued that appellant refused the job based on the advice of Dr. Simon, though he failed to put his opinion in writing until after the termination. He further argued that there was a conflict in the medical evidence regarding appellant's work restrictions and whether she could perform the job offered.

In a January 9, 2003 decision, the Office denied reconsideration finding that appellant did not submit new relevant evidence.

LEGAL PRECEDENT

The only decision before the Board on this appeal is the Office's January 9, 2003 decision denying appellant's request for a review on the merits of its October 9, 2001 decision. Because more than one year has elapsed between the issuance of the Office's October 9, 2001 merit decision and January 16, 2003, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the October 9, 2001 decision.[1]

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 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.[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

[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] 5 U.S.C. § 8101 *et seq.* 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).

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 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 which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[6] The Board has held that the submission of evidence 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

In the present case, the Board finds that the Office did not abuse its discretion in denying appellant merit review of the October 9, 2001 decision as appellant failed to submit relevant and new medical evidence or raise a new legal argument. The reports from Dr. Simon that appellant submitted on reconsideration were already part of the record and considered by the Office and therefore are insufficient to constitute new and relevant evidence.

Appellant's personal statement that she in good faith relied on her physician's opinion that she could not perform the offered job is insufficient as well. The question of whether appellant could perform the job is a medical one and appellant's statement is not medical evidence.

CONCLUSION

The Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.607(a).

[5] 20 C.F.R. § 10.608(b).

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

[7] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[8] *John F. Critz*, 44 ECAB 788, 794 (1993).

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2003 decision by the Office of Workers' Compensation Programs is affirmed.

Issued: July 9, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member