

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

FLORA E. RUSH, Appellant)
and) Docket No. 05-15
U.S. POSTAL SERVICE, POST OFFICE,) Issued: April 25, 2005
Seattle, WA, Employer)

)

Appearances:

Brock D. Stiles, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 23, 2004 appellant filed a timely appeal from nonmerit decisions of the Office of Workers' Compensation Programs dated February 5 and August 9, 2004, denying her request for reconsideration under 5 U.S.C. § 8128. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decisions. As Office has not issued a decision on the merits of the claim within the year prior to September 23, 2004, the Board has no jurisdiction to review the merits of this claim.¹

ISSUES

The issues are: (1) whether the Office, in its February 5, 2004 decision, properly denied appellant's request for reconsideration of her claim under 5 U.S.C. § 8128; and (2) whether the Office, in its August 9, 2004 decision, properly denied appellant's request for reconsideration of her claim under section 8128.

¹ 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

This case is before the Board for the second time. In the first appeal, the Board reversed the Office decisions dated March 4, 1999 and November 20, 1998, terminating appellant's compensation benefits on the grounds that she had no further employment-related condition or disability.² The Board found that the opinion of the Office referral physician was insufficient to support that appellant had no further disability due to her accepted condition of anxiety disorder. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

The Office returned appellant to the periodic rolls effective November 22, 1998, following the Board's decision. The Office subsequently referred appellant to Dr. Robert I. Fink, a Board-certified psychiatrist, for an impartial medical examination. Based on Dr. Fink's September 17, 2001 report, the Office referred appellant for vocational rehabilitation.³

In a decision dated April 15, 2002, the Office reduced appellant's compensation to zero under 5 U.S.C. § 8113(b) for failing to participate in the initial phases of vocational rehabilitation. Appellant, through her representative, requested reconsideration. By decision dated August 15, 2002, the Office vacated its April 15, 2002 decision after finding that it had issued the decision prematurely. The Office noted that it had not considered appellant's reasons for failing to participate in vocational rehabilitation and that Dr. Fink had not specifically found that she could participate in vocational rehabilitation. The Office further noted that Dr. Kristin K. Schaaf, a licensed clinical psychologist and appellant's attending physician, opined that rehabilitation would not be helpful for her.

In an Office memorandum dated April 18, 2003, a claims examiner noted that it did not need a specific opinion from Dr. Fink that appellant could participate in vocational rehabilitation given his finding that she could perform any position outside the employing establishment.

On April 22, 2003 the Office requested that Dr. Schaaf clarify why she believed that vocational rehabilitation would not be helpful to appellant. In an April 23, 2003 response, Dr. Schaaf stated that appellant believed that the Office was trying to control her by attempting to return her to work. She indicated that she agreed with Dr. Fink that appellant would have a similar reaction if she encountered the same situation when she returned to work. Dr. Schaaf further opined that appellant would view supervision as "being controlled or harassed."

The Office referred appellant for vocational rehabilitation on May 21, 2003. In a closing report dated June 30, 2003, the rehabilitation counselor, Cathy Cottingham, informed the Office

² Docket No. 99-1460 (issued November 1, 2000).

³ Dr. Fink found that appellant could work "virtually anywhere else" outside the employing establishment but was "still potentially subject to similar reactions to similar situations if they would occur."

that appellant said that she would hurt her if she “was pushed too far.” The rehabilitation counselor stated:

“Based on the medical information in the file indicating that the claimant cannot return to work at her job of injury, the claimant’s lack of transferable skills and the preponderance of medical information indicating that the claimant’s condition will never improve until her claim is settled, this [rehabilitation counselor] is recommending that this claimant is not appropriate to participate in vocational services.”

By letter dated July 23, 2003, the Office notified appellant that it had terminated the services of Ms. Cottingham because she had “violated our directive not to seek” employment for her with the employing establishment. The Office referred appellant to another rehabilitation counselor.

By letter dated July 23, 2003, the Office noted that appellant had cancelled her meeting with the rehabilitation counselor and advised her of the provisions of section 8113(b) of the Federal Employees’ Compensation Act.⁴ The Office provided appellant 30 days within which to meet with the rehabilitation counselor or submit reasons for her refusal.

In a letter dated August 18, 2003, appellant’s attorney argued that the Office had inappropriately switched to another rehabilitation counselor because Ms. Cottingham had determined that appellant should not be vocationally rehabilitated. He further noted that the Office had not requested that Dr. Fink clarify his opinion and that Dr. Schaaf found that appellant would experience “increased distress and anxiety” from participating in vocational rehabilitation. He submitted progress reports dated June 18 and July 30, 2003 from Dr. Schaaf.

By decision dated September 10, 2003, the Office reduced appellant’s compensation to zero effective July 10, 2003 under section 8113(b) on the grounds that she failed to cooperate with vocational rehabilitation and failed to provide sufficient reasons for her failure to cooperate.⁵

In a letter dated October 8, 2003, appellant, through her attorney, requested reconsideration of her claim. The attorney argued that Dr. Fink’s opinion “did not address whether [appellant] was able to participate in a VR [vocational rehabilitation] program” and that her attending physician, Dr. Schaaf, “continues to state that [she] is unable to return to work on a permanent basis due to her anxiety disorder.” He further noted that the rehabilitation counselor opined that appellant was unable to participate in vocational rehabilitation.

In support of her request for reconsideration, appellant submitted numerous medical reports already of record. She also submitted additional progress reports from Dr. Schaaf. In a progress note dated August 21, 2003, Dr. Schaaf noted appellant’s complaints regarding her

⁴ 5 U.S.C. §§ 8101-8193.

⁵ In a letter dated September 15, 2003, the Office warned appellant against making threats toward her rehabilitation counselor.

ongoing “battle over vocational services” and found she had increased anxiety. In a progress note dated September 17, 2003, she related that appellant stated that receiving letters from the Office increased her anxiety. In a progress note dated October 27, 2003, Dr. Schaaf noted appellant’s complaints of nightmares and found her condition unchanged. In a progress note dated December 17, 2003, Dr. Schaaf related that appellant provided a history of her supervisor at the employing establishment forcing her to lift 80 pounds while laughing at her and also reported “being threatened [and] harassed by other supervisors as well....” In a progress note dated January 21, 2004, Dr. Schaaf discussed appellant’s complaints of stress due to the employing establishment and waiting on a decision from the Office. She indicated that appellant’s level of functioning was unchanged.

By decision dated February 5, 2004, the Office denied appellant’s request for reconsideration on the grounds that the evidence submitted was insufficient to warrant review of its September 10, 2003 decision.

In a letter dated June 3, 2004, appellant, through her representative, again requested reconsideration. She submitted progress reports dated February through May 2004 from Dr. Schaaf, who described her current complaints and found her condition unchanged. Appellant also submitted progress notes from Dr. Schaaf already of record.

In a report dated March 24, 2004, Dr. Schaaf stated:

“[Appellant] remains unable to return to work on a permanent basis due to her anxiety disorder. As I have stated in the past, she has become extremely defensive and distrustful of people in supervisory and management roles as a result of her experiences at the [employing establishment]. In any employment situation where her work is supervised, she will respond as she responded at the [employing establishment]. She will perceive that she is being controlled or harassed, her symptoms will increase and she will be unable to perform her job duties. Dr. Fink agreed that if she returned to work, she would be ‘subject to similar reactions to similar situations.’”

Dr. Schaaf further found that she could not participate in vocational rehabilitation because she would view it as “an ‘attempt to control’ her” and “she would not benefit due to her distrust and resistance....”

In a letter dated April 6, 2004, the rehabilitation counselor indicated that she did not feel threatened by appellant.

By decision dated August 9, 2004, the Office denied appellant’s request for reconsideration as the evidence submitted was insufficient to warrant review of the merits under section 8128.

LEGAL PRECEDENT -- ISSUE 1

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁶ the Office's regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal arguments not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.⁷ Section 10.608(b) provides that when an application for reconsideration 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.⁸

ANALYSIS -- ISSUE 1

The medical evidence submitted by appellant in support of her October 8, 2003 request for reconsideration does not constitute relevant and pertinent evidence not previously considered by the Office. Appellant submitted numerous medical reports and progress notes already of record; however, 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.⁹

Appellant also submitted progress notes from Dr. Schaaf dated August through December 2003. The progress notes, however, do not address the relevant issue of whether appellant has established that she had good reason for failing to cooperate with vocational rehabilitation. 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.¹⁰

Appellant, through her attorney, contended that the impartial medical examiner, Dr. Fink, did not address whether she could participate in vocational rehabilitation. He further argued that Dr. Schaaf found appellant disabled from all employment and that the initial rehabilitation counselor found that she was not a suitable candidate for rehabilitation. Appellant's attorney's arguments fail to show that the Office erroneously applied or interpreted a point of law and are repetitious of his arguments previously considered by the Office. Evidence which repeats or duplicates evidence already of record has no evidentiary value and does not constitute a basis for reopening a case.¹¹

As appellant has not shown that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered or submitted relevant and

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ 20 C.F.R. § 10.608(b).

⁹ *Arlesa Gibbs*, 53 ECAB 204 (2001).

¹⁰ *Ronald A. Eldridge*, 53 ECAB 218 (2001).

¹¹ *Id.*

pertinent new evidence, the Office, in its February 5, 2004 decision, properly refused to reopen appellant's claim for a review on the merits.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹² the Office's regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal arguments not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.¹³ Section 10.608(b) provides that when an application for reconsideration 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.¹⁴

ANALYSIS -- ISSUE 2

In support of her June 3, 2004 request for reconsideration, appellant submitted progress notes from Dr. Schaaf dated February 18, March 10, April 14 and May 12, 2004, who described her current symptoms and found her condition unchanged. As Dr. Schaaf did not address the relevant issue of whether appellant could participate in vocational rehabilitation, her progress notes are not relevant to the issue at hand.¹⁵

Appellant further resubmitted progress notes from Dr. Schaaf dated June 2001 through January 2004. As this evidence duplicated that already of record, it has no evidentiary value and is insufficient to warrant a reopening of appellant's claim on the merits.¹⁶

In a letter dated April 6, 2004, Ms. Cottingham, the initial rehabilitation counselor, indicated that she had not felt threatened by appellant during their meeting. Dr. Cottingham's letter does not address the relevant issue of whether appellant had good reason for failing to participate in vocational rehabilitation and thus does not constitute a basis for reopening her case.¹⁷

In a report dated March 24, 2002, Dr. Schaaf opined that appellant was disabled from work due to her anxiety disorder. She maintained that if appellant were supervised she would "perceive that she is being controlled or harassed, her symptoms will increase and she will be unable to perform her job duties." Dr. Schaaf stated that appellant could not participate in vocational rehabilitation because she would believe it was an attempt at control and "would not

¹² *Supra* note 6.

¹³ 20 C.F.R. § 10.606(b)(2).

¹⁴ *Supra* note 8.

¹⁵ *Judy L. Kahn*, 53 ECAB 321 (2002).

¹⁶ *Vincent Holmes*, 53 ECAB 468 (2002).

¹⁷ *Kevin M. Fatzer*, 51 ECAB 407 (2000).

benefit due to her distrust and resistance.” She also noted that the impartial medical examiner, Dr. Fink, found that if appellant resumed employment she might be “subject to similar reactions in similar situations.” Dr. Schaaf’s March 24, 2002 opinion, however, is cumulative in nature as she previously expressed this opinion in her prior report dated April 23, 2003, which was considered by the Office prior to its September 10, 2003 decision. Thus, her report is insufficient to warrant reopening appellant’s case for a review of the merits.¹⁸

As appellant has not shown that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered or submitted relevant and pertinent new evidence, the Office, in its August 9, 2004 decision, properly refused to reopen appellant’s claim for a review on the merits.

CONCLUSION

The Board finds that the Office, in its February 5 and August 9, 2004 decisions, properly refused to reopen appellant’s case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers’ Compensation Programs dated August 9 and February 5, 2004 are affirmed.

Issued: April 25, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁸ *Severiano Marquez*, 41 ECAB 637 (1990).