United States Department of Labor
Employees' Compensation Appeals Board

JENNIFER JONES-BUTLER, Appellant	)	
and	)	**Docket No. 05-1503**
	)	**Issued: December 6, 2005**
DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Pensacola, FL, Employer	)	

Appearances:
Jennifer Jones-Butler, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 5, 2005 appellant filed a timely appeal of an April 7, 2005 nonmerit decision of the Office of Workers' Compensation Programs, denying her request for reconsideration. Because more than one year has elapsed between the last merit decision dated June 16, 2004 and the filing of this appeal on July 5, 2005, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(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).

FACTUAL HISTORY

On August 19, 1992 appellant, then a 43-year-old budget analyst, filed a traumatic injury claim assigned number 06-05512216 alleging that on August 18, 1992 she felt sharp pain in the middle of her back as a result of picking up a box of forms weighing approximately 40 pounds. The Office accepted her claim for cervical, thoracic and lumbar strains.

On October 25, 1993 appellant filed a traumatic injury claim assigned number 06-0583955 alleging that on October 21, 1993 she hurt her neck and shoulder as a result of moving boxes.[1] The Office accepted appellant's claim for cervical and left shoulder strain.

Appellant returned to work in a modified budget analyst position from November 4, 1993 through January 23, 1994. She missed work on intermittent dates during the period November 4 through December 29, 1993. On January 24, 1994 appellant was detailed to another assignment to accommodate a stressful work situation. This reassignment became permanent effective November 27, 1994. Appellant began intermittent leave use on June 13, 1994 and she was continuously absent beginning July 11, 1994 due to her alleged emotional condition. She stopped work on July 23, 1994.

By letter dated September 7, 1994, the Office advised appellant that it had received information indicating that she may have sustained a recurrence of disability as her attending physicians had changed her diagnosis to fibromyalgia and carpal tunnel syndrome which referred back to thoracic back pain. The Office requested that appellant submit a detailed and rationalized medical report from her treating physician addressing a causal relationship between her current conditions and her accepted employment injuries. In an October 4, 1994 letter, appellant explained her duties upon her return to work and that her condition never improved following the October 18, 1992 employment injury. She described her medication and symptoms, which included severe headaches and pain in tender points of her entire body. Appellant believed that her current symptoms were directly related to the October 18, 1992 employment injury. Appellant submitted a September 12, 1994 medical report of Dr. Ellen Winters McKnight, a Board-certified internist, in which she found that appellant had fibromyalgia which caused depression that added to appellant's incapacitation.

The Office doubled the claims assigned number 06-05512216 and 06-0583955 into a master case file assigned number 06-05512216.

By decision dated September 7, 1995, the Office found the evidence of record insufficient to establish that appellant had any residuals or disability on or after July 23, 1994 causally related to the accepted August 18, 1992 and October 21, 1993 employment injuries. In a September 5, 1996 letter, appellant requested reconsideration.

On November 13, 1996 the Office denied modification of the September 7, 1995 decision. The Office found that the evidence submitted by appellant was irrelevant to her claim. By letter dated November 12, 1997, appellant requested reconsideration of the Office's November 13, 1996 and June 30, 1995 decisions.[2]

In a June 16, 2004 decision, the Office denied modification of the June 30, 1995 and November 13, 1996 decisions. The Office found the evidence of record insufficient to establish

[1] Appellant filed an occupational disease claim assigned number 06-0613930 alleging that her fibromyalgia and stress were causally related to factors of her federal employment. By decision dated June 30, 1995, the Office denied her claim. The Office found that appellant failed to establish that she sustained an injury while in the performance of duty.

[2] A copy of the June 30, 1995 decision is not of record.

that appellant had residuals or disability causally related to her accepted August 18, 1992 and October 21, 1993 employment-related injuries. The Office further found that she failed to establish that she sustained an emotional condition while in the performance of duty.

In a letter dated December 20, 2004, appellant, through her attorney, requested reconsideration. Counsel argued that the evidence of record was sufficient to establish that appellant sustained an emotional condition while in the performance of duty and that she should be referred to a Board-certified psychiatrist for an evaluation. He further argued that the Office improperly relied on the August 17, 1994 medical report of Dr. Crampton Harris, Jr., an orthopedic surgeon, which found no disability causally related to appellant's August 18, 1992 and October 21, 1993 employment injuries. It was contended that Dr. Harris's conclusion was inconsistent with his statement that he agreed with the June 2, 1995 finding of Dr. John W. Davis, a Board-certified clinical psychologist, who opined that appellant suffered from somatization disorder.

In support of her reconsideration request, appellant submitted an unsigned July 8, 1994 report which provided general screening test results. The report found a profile significant for elevation of all clinical scales with marked elevation in somatization, anxiety, hostility and phobia. Appellant also submitted progress notes from her physical therapists and Dr. Winters covering intermittent dates during the period April 16, 1994 through January 24, 1996 which revealed a diagnosis of fibromyalgia and the treatment she received for her back, neck shoulders and hips.

Appellant submitted a July 7, 1994 medical report of Dr. Peter A. Szmurlo, a Board-certified psychiatrist, who diagnosed chronic pain syndrome related to the August 18, 1992 and October 21, 1992 employment injuries with fibromyalgic involvement. He also diagnosed a single moderate episode of major depression and panic disorder with limited agoraphobic avoidance resulting from the accepted employment injuries. Appellant experienced multiple psychosocial stresses including fatigue, harassment at work and multiple personal losses. She also had exogenous obesity resulting from a combination of her accepted employment injuries and major depression. Dr. Szmurlo explained the relationship between major depression and chronic pain and noted appellant's medical treatment plan.

In a November 2, 1994 report, Dr. Szmurlo reiterated his diagnoses. He opined that based on appellant's condition and severity of symptoms, it was unlikely that her fibromyalgia would resolve. Dr. Szmurlo further opined that appellant developed a severe and disabling condition as a consequence of multiple physical and psychological stress to which she was exposed to while working for the employing establishment.

Dr. Szmurlo's June 10, 1996 progress note revealed that appellant was substantially impaired in that she was basically dysfunctional. Dr. Szmurlo noted that appellant had hired an attorney to assist her with a social security claim and that the Social Security Administration had scheduled her for a psychological evaluation.

An April 19, 1994 prescription from a physician whose signature is illegible diagnosed fibromyalgia and referred appellant to a physical therapist for the treatment of her neck, shoulders, low back and hips.

By decision dated April 7, 2005, the Office denied appellant's request for reconsideration of the November 13, 1996 decision. The Office noted that, contrary to appellant's attorney's contention that the June 30, 1995 and November 13, 1996 decisions involved claims that were related to one another, these decisions involved separate claims and as such they would be decided upon separately. The Office also stated that all future requests for reconsideration must be filed separately under each appropriate case. The Office found that, with regard to the November 13, 1996 decision, the evidence submitted by appellant was cumulative and repetitious and, thus, insufficient to warrant a merit review of her claim.[3]

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,[4] 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) constitute relevant and pertinent new evidence not previously considered by the Office.[5] 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.[6] 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 of the merits.

ANALYSIS

In a June 16, 2004 decision, the Office denied modification of a November 13, 1996 decision finding that appellant did not have any residuals or disability causally related to the accepted August 18, 1992 and October 21, 1993 employment injuries. Appellant disagreed with this decision and requested reconsideration by letter dated December 20, 2004. Submitted were duplicate copies of a July 8, 1994 report which provided general screening test results and Dr. Szmurlo's July 7 and November 2, 1994 reports and June 10, 1996 progress note. The Board has held that the submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.[7] The medical evidence submitted by appellant in support of her request for reconsideration was previously considered by the Office and, therefore, is duplicative of evidence already of record. As such, this evidence is insufficient to warrant further merit review of her claim.

[3] As the Office has not considered appellant's request for reconsideration of the June 30, 1995 decision, the Board will not consider this issue on appeal. 20 C.F.R. §§ 501.2(c); § 501.3(d)(2).

[4] 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).

[5] 20 C.F.R. § 10.606(b)(1)-(2).

[6] *Id*. at § 10.607(a).

[7] *Edward W. Malaniak*, 51 ECAB 279 (2000).

The progress notes from appellant's physical therapists, which covered the period April 26, 1994 through January 24, 1996 are irrelevant as the underlying issue is medical in nature and a physical therapist is not a physician as defined under the Act.[8]

Dr. Winters' April 19, 1994 prescription, which ordered physical therapy treatment for appellant, failed to address the relevant issue of whether appellant had any residuals or disability causally related to the August 18, 1992 and October 21, 1993 employment injuries. The Office properly found this evidence did not warrant reopening the case for further merit review.

Appellant has not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the Office. Further, she failed to submit relevant new and pertinent evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that she was not entitled to a merit review.[9]

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).

[8] 5 U.S.C. §§ 8101-8193; 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 (2000) (a physical therapist is not a physician under the Act).

[9] *See James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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