United States Department of Labor
Employees' Compensation Appeals Board

MIGUEL B. RODRIGUEZ, Appellant	)	
and	)	**Docket No. 05-254**
	)	**Issued: May 12, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Forth Worth, TX, Employer	)	

Appearances:
Deborah S. Land, 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 November 4, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated March 18, 2004, denying his request for further merit review of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's February 20, 2003 decision denying his recurrence of disability claim. Because more than one year has elapsed between the last merit decision and the filing of this appeal on November 4, 2004 the Board lacks jurisdiction to review the merits of this claim.[1]

ISSUE

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

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On October 16, 1998 appellant, then a 25-year-old distribution clerk, filed a traumatic injury claim alleging that he sustained a right shoulder injury while lifting a sack of mail at work on October 14, 1998.[2] The Office accepted that appellant sustained a strain of the right shoulder. He did not stop work but began working in a limited-duty position. On March 10, 2000 appellant underwent a decompressive acromioplasty and limited debridement procedures of his right shoulder, which were authorized by the Office.

Appellant stopped work for the period March 10 to May 14, 2000 and the Office paid appropriate compensation. Dr. Robert V. Carr, an attending Board-certified orthopedic surgeon, released him to limited-duty work effective May 15, 2000 and he returned to limited-duty work for the employing establishment on May 27, 2000.[3] By award of compensation dated August 3, 2001, the Office granted appellant a schedule award for a nine percent permanent impairment of his right arm.

In a report dated February 2, 2002, Dr. Dmitry Golovko, a Board-certified occupational medicine physician, to whom the Office referred appellant, indicated that examination revealed that appellant had crepitus and pain in his right shoulder. Dr. Golovko indicated that appellant could perform a position which allowed lifting up to 40 pounds from floor to waist level, 20 pounds from waist to shoulder level and 10 pounds from shoulder to overhead level. He stated that appellant could push or pull 50 pounds.

In late 2002, appellant was working in a limited-duty position, which restricted him from lifting more than 10 pounds and pushing or pulling more than 20 pounds. On October 11, 2002 the employing establishment offered appellant a limited-duty position, which would require him to lift 40 pounds. Appellant refused the position.

Appellant stopped work on December 10, 2002 and claimed that he sustained a recurrence of total disability on December 10, 2002 due to his October 14, 1998 employment injury.[4]

By decision dated February 20, 2003, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained a recurrence of total disability on or after December 10, 2002 due to his October 14, 1998 employment injury.[5]

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[2] Appellant's job required him to lift up to 70 pounds.

[3] Appellant took scheduled annual leave between May 15 and 26, 2000. The limited-duty position restricted appellant from lifting more than 10 pounds and pushing or pulling more than 50 pounds.

[4] Appellant listed the date of the recurrence as May 15, 2000, but he did not actually stop work until December 10, 2002.

[5] Appellant requested a review of the written record and, by decision dated August 1, 2003, the Office denied his request as untimely.

By letter dated January 20, 2004, appellant requested reconsideration of his claim. He alleged that he had not been offered any "permanent rehabilitation assignment" and claimed that he erroneously had to apply to the employing establishment's accommodation committee for a limited-duty assignment. Appellant indicated that he was currently subjected to a proposed letter of removal because the employing establishment indicated it had no work for him.

Appellant submitted a January 13, 2004 letter to the Department of Labor in which he asserted that he was ordered "off the clock" by supervisors on December 10, 2002 and argued that he was not able to perform the position offered on that date by the employing establishment. The record contains a December 22, 2003 letter in which appellant's representative argued that the employing establishment should provide him with an appropriate limited-duty position. Appellant also submitted numerous medical documents which described the treatment of his right shoulder condition between 1998 and 2001.[6]

By decision dated March 18, 2004, the Office denied appellant's request for further merit review of his claim.[7]

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[8] the Office's 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.[9] 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.[10] 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.[11]

[6] An undated letter, signed by appellant and his representative, also alleged that appellant was placed "off the clock" by supervisors on December 10, 2002.

[7] Appellant submitted additional evidence after the Office's March 18, 2004 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[8] 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).

[9] 20 C.F.R. §§ 10.606(b)(2).

[10] 20 C.F.R. § 10.607(a).

[11] 20 C.F.R. § 10.608(b).

ANALYSIS

Appellant stopped work on December 10, 2002 and claimed that he sustained a recurrence of total disability on December 10, 2002 due to his October 14, 1998 employment injury. At the time, he was working in a limited-duty position which restricted him from lifting more than 10 pounds and pushing or pulling more than 20 pounds. By decision dated February 20, 2003, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish he sustained a recurrence of total disability as alleged.

In connection with his January 2004 reconsideration request, appellant submitted numerous medical documents which described the treatment of his right shoulder condition between 1998 and 2001. However, these documents would not require reopening of appellant's claim as they are not relevant to the main issue of the present case.[12] The documents do not contain any opinion regarding appellant's condition in late 2002, *i.e.*, the period appellant alleged that he sustained an employment-related recurrence of total disability.[13]

Appellant argued that he was ordered "off the clock" by supervisors on December 10, 2002 and suggested that this circumstance resulted in him sustaining total disability as of that date.[14] However, this apparent legal argument does not have a reasonable color of validity and therefore does not require reopening of appellant's claim.[15] A cursory review of the record does not provide any evidence that appellant was ordered off the clock or that his position was terminated on December 10, 2002 as alleged.

Appellant also alleged that a position offered by the employing establishment in October 2002 was not suitable, that he had not been offered any "permanent rehabilitation assignment," that he erroneously had to apply to the employing establishment's accommodation committee for a limited-duty assignment and that he was wrongly subjected to a proposed letter of removal. However, these arguments are not relevant as appellant did not articulate how they were pertinent to the main issue of the present case, *i.e.*, whether he had met his burden of proof to establish he sustained a recurrence of total disability on December 10, 2002 due to his October 14, 1998 employment injury.

In the present case, appellant has not established that the Office improperly denied his request for further review of the merits of its February 20, 2003 decision under section 8128(a)

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

[13] When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to establish that he cannot perform such limited duty due to a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements. *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[14] A recurrence of disability includes an inability to work that takes place when a limited-duty assignment made specifically to accommodate an employee's physical limitations due to his work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force). 20 C.F.R. § 10.5(x).

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

of the Act, because the evidence and argument he submitted 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 constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 18, 2004 decision is affirmed.

Issued: May 12, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member