

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

D.M., Appellant

and

**DEPARTMENT OF LABOR, OCCUPATIONAL
SAFETY & HEALTH ADMINISTRATION,
Dallas, TX, Employer**

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**Docket No. 06-680
Issued: August 8, 2006**

Appearances:

*Michael C. Paul, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 31, 2006 appellant filed a timely appeal of an October 27, 2005 nonmerit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction to review the merits of appellant's case.¹

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).

¹ The Board's *Rules of Procedure* require that an appeal be filed within one year of the date of issuance of the Office's final decision. The most recent Office decision on the merits of appellant's case was issued by a hearing representative on March 19, 2004, which is more than one year from January 31, 2006, the date the Board docketed the appeal.

FACTUAL HISTORY

On April 16, 2003 appellant, then a 43-year-old safety engineer, filed a claim for compensation for an occupational disease of headaches that she attributed to using her computer. By letter dated April 16, 2003, the Office advised appellant of the evidence needed to establish her claim, including a comprehensive medical report from her treating physician describing her symptoms, results of examinations and tests, diagnosis, treatment provided, the effect of treatment and an opinion explaining how her federal employment contributed to her condition. By decision dated June 2, 2003, the Office found that the evidence was insufficient to establish that appellant sustained an injury, as the factual evidence was incomplete and there was no medical evidence that demonstrated she had a diagnosed medical condition related to her work duties.

Appellant requested a hearing, which was held on January 12, 2004. She submitted a statement describing her duties, the onset of her condition and the computer viewing defects to which she attributed her headaches. Appellant noted that she returned to full duty after she sustained a concussion with frequent unbearable headaches in 1999, and that she underwent cosmetic surgery on her eyes in 1979. She submitted statements from coworkers regarding her blurred and jumpy computer screen. In a January 9, 2004 report, Dr. Jeffrey Leinfelder, a Board-certified ophthalmologist, noted a history of strabismus surgery with residual esotropia. He stated that appellant's computer probably caused additional eye strain. In a January 5, 2004 report, Dr. J. Scott Crockett, an osteopath, diagnosed intractable daily headaches and blurred vision. He indicated that these conditions were related to appellant's history of eye strain and headaches due to working on the computer.

By decision dated March 19, 2004, an Office hearing representative found that the medical evidence was speculative and not sufficient to establish that appellant's condition was causally related to the claimed employment factors.

By letter dated March 20, 2005, appellant's attorney requested reconsideration, contending that the Office did not properly develop the evidence, as it did not prepare a statement of accepted facts, contact appellant's doctors, or notify appellant of the deficiencies in her claim before denying it. He cited specific sections of the Office's procedure manual that state that all issues requiring a medical opinion for resolution must have a statement of accepted facts,² that when medical evidence is *prima facie* sufficient but is speculative the Office must obtain additional medical evidence,³ and that the Office should always write to the claimant's doctor to request a supplemental report when his or her report lacked needed details and opinion.⁴

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.6a (June 1995).

³ *Id.* at Chapter 2.805.5 (June 1995).

⁴ *Id.* at Chapter 2.810.5b (September 1993).

By decision dated May 9, 2005, the Office found that appellant's March 20, 2005 request for reconsideration was not timely filed within the one-year limit of its regulations and did not demonstrate clear evidence of error. She appealed this decision to the Board. In an October 18, 2005 decision, the Board found that the March 20, 2005 request for reconsideration was timely filed, as it was received by the Office on Monday, March 21, 2005, the next business day following the date on which the time for requesting reconsideration would have expired. The Board remanded the case to the Office for application of the proper standard for reviewing a timely request for reconsideration.⁵

By decision dated October 27, 2005, the Office found the March 20, 2005 request for reconsideration insufficient to warrant further merit review, as no new medical evidence was presented and the arguments contained in the request for reconsideration were not relevant to the issue in the case.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.

ANALYSIS

Appellant's March 20, 2005 request for reconsideration was not accompanied by any relevant and pertinent new medical evidence, and she did not argue that the Office erroneously applied or interpreted a specific point of law. Her argument that the Office had a responsibility to develop the medical evidence and to prepare a statement of accepted facts does not point to specific evidence that was needed but not obtained to properly adjudicate her case. The Board has held that it is appellant's burden to prove the essential elements of her claim, including that she sustained an injury in the performance of duty as alleged and that any disability and/or

⁵ Docket No. 05-1637 (issued October 18, 2005).

specific condition for which compensation is claimed are causally related to the employment injury.⁶ Appellant's arguments do not show that the Office erroneously applied or interpreted a specific point of law, nor constitute relevant legal arguments not previously considered by the Office.⁷

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied her March 20, 2005 request for reconsideration.

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).

ORDER

IT IS HEREBY ORDERED THAT the October 27, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 8, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

⁶ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ To require that the Office reopen the case for a merit review, the legal contention on reconsideration must have a reasonable color of validity. *Constance G. Mills*, 40 ECAB 317 (1988). In light of appellant's burden of proof to establish the essential elements of her claim, the Board concludes that her legal contention has no reasonable color of validity.