United States Department of Labor
Employees' Compensation Appeals Board

F.G., Appellant	)	
and	)	**Docket No. 06-991**
	)	**Issued: August 9, 2006**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Canandaigua, NY, Employer	)	

Appearances:
Paul Kalker, 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 March 28, 2006 appellant filed a timely appeal from a February 13, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. As there is no merit decision within one year of the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction to review the February 13, 2006 nonmerit decision.

ISSUE

The issue is whether the Office abused its discretion by denying appellant's request for reconsideration.

FACTUAL HISTORY

The Office accepted that on June 28, 2002 appellant, then a 50-year-old housekeeping aide, sustained a right knee sprain and torn right medial meniscus when moving wall lockers. On February 10, 2003 appellant underwent a right medical meniscectomy and debridement,

performed by Dr. Bruce P. Klein, an attending Board-certified orthopedic surgeon. He received compensation on the daily rolls beginning February 10, 2003 and on the periodic rolls beginning May 16, 2004.

In a June 18, 2003 report, Dr. Aitezaz Ahmed, an attending Board-certified internist specializing in rheumatology, diagnosed psoriatic arthritis, osteoarthritis and fibromyalgia. He found appellant totally disabled through October 4, 2003.

In periodic progress notes through January 6, 2004, Dr. Klein related that appellant twisted his right knee in late March 2003, while doing yard work and again in late 2003 while trying "to go back to a job doing some painting." He noted permanent restrictions against kneeling, squatting, lifting more than 20 pounds, prolonged standing, sustained walking and frequent stair climbing.

The Office obtained a second opinion from Dr. Charles Jordan, a Board-certified orthopedic surgeon. In a July 17, 2003 report, he opined that appellant could perform sedentary work for less than four hours a day due to sequelae of the right knee sprain and surgery, as well as unrelated depression, psoriatic arthritis and fibromyalgia. Dr. Jordan opined that appellant could not return to his date-of-injury position, which required constant standing, walking and lifting.

Appellant was terminated from the employing establishment effective August 8, 2003 due to leave irregularities, failure to follow his supervisor's instructions and an "[i]nability to perform the essential functions of the position (due to nonwork[-]related medical condition)."

On March 15, 2004 the Office referred appellant for vocational rehabilitation services and assigned Lee Ann Mullen, a certified rehabilitation counselor, to prepare him for a return to work.[1] In a May 17, 2004 letter, Ms. Mullen instructed appellant to report for a vocational career assessment at a testing center on June 1, 2004. She explained the critical importance of this testing and appellant's obligation to attend. On May 31, 2004 appellant advised Ms. Mullen that he refused to attend the testing as his physicians had not released him to work and that his attorney was filing for disability retirement benefits for him. Appellant did not attend the scheduled testing session. He advised his counselor on June 2, 2004 that he had no intention of returning to work.[2]

In June 16, 2004 letters, the Office advised appellant that his failure to attend the scheduled June 1, 2004 testing constituted obstruction of the vocational rehabilitation process and that he had not shown good cause for his failure to cooperate. The Office afforded appellant

[1] In a June 16, 2004 memorandum, the Office noted that appellant had a claim accepted under file No. 022002129 for his right elbow. Dr. Klein noted that work restrictions related to the right elbow and requested authorization to perform arthroscopic debridement. The Office directed the rehabilitation counselor to reschedule the vocational testing while the right elbow claim was developed.

[2] Appellant submitted a June 10, 2004 affidavit of earnings and employment Form EN-1032 describing his involvement in a real estate business he partly owned.

30 days to comply or to present good cause for his failure to participate or his wage-loss compensation benefits would be reduced to zero.[3]

In a July 2, 2004 letter, the Office advised appellant that vocational testing was rescheduled for July 8, 2004 and that he must make a good faith effort to cooperate or face reduction of his wage-loss compensation to zero. Appellant did not attend the appointment or provide reasons for failing to attend.

By decision dated July 23, 2004, the Office reduced appellant's compensation to zero effective July 22, 2004 under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 on the grounds that he failed to comply with the essential preparatory effort of vocational testing. The Office assumed that if appellant had cooperated with the scheduled testing, this would have resulted in his return to work at the same or higher wages than his date-of-injury position.

In a September 27, 2004 letter, appellant, through his attorney, requested reconsideration. He asserted that he was medically incapable of participating in the vocational rehabilitation process due to chronic depression, psoriatic arthritis, cervical radiculopathy, osteoarthritis and fibromyalgia. Appellant contended that the side effects of prescribed medication prevented him from "any concentration on activity or task at hand." Also, he argued that his age, low level of formal education and lack of skilled job experience made it unreasonable for the Office to require him to participate in vocational rehabilitation. Appellant submitted additional medical reports, which he contended showed good cause for his noncompliance with vocational rehabilitation.

In a January 21, 2004 report, Dr. Ahmed noted treating appellant for fibromyalgia, osteoarthritis and psoriatic arthritis, causing mobility impairments of both hands and lower extremities. He noted appellant's impairments of attention and concentration, possibly due to side effects from prescribed medications. Dr. Ahmed opined that appellant would not "make a full or partial recovery for at least another year."

In an August 9, 2004 report, Dr. Klein diagnosed right knee pain due to the accepted injury, right hip pain possibly related to the knee pain, chronic right elbow pain due to lateral epicondylitis and a history of inflammatory polyarthritis. He opined that appellant was a "good candidate to be evaluated by the VESID [Vocational and Educational Services for Individuals with Disabilities], [a program administered by the New York State Education Department]" so that appellant could be retrained for a job within his restrictions.

By decision dated January 3, 2005, the Office found that the evidence submitted was insufficient to warrant modification of the July 23, 2004 decision. The Office found that Dr. Ahmed did not address appellant's ability to participate in vocational testing, while Dr. Klein encouraged appellant's participation. The Office explained that appellant's refusal to undergo vocational testing resulted in the reduction of his monetary compensation to zero until such time as he complied with vocational rehabilitation.

[3] In a June 16, 2004 letter, the Office requested that Dr. Klein submit work restrictions for the right knee and elbow. In response, he submitted documents previously of record.

In a November 29, 2005 letter, appellant, through his attorney, requested reconsideration. He asserted that Dr. Ahmed's report made it "obvious that [appellant] could not possibly undergo vocational testing and rehabilitation." Appellant contended that Dr. Klein's opinion was invalid as he had "no knowledge of qualifications necessary for participation in VESID" and was unaware of the extent of appellant's rheumatologic conditions. He asserted that appellant's depression, arthritis and medications made him unable to absorb and process information such that classroom learning or training were medically impossible. He contended that it was unreasonable for the Office to conclude that participation in vocational rehabilitation would have resulted in increased wage-earning capacity.[4]

By decision dated February 13, 2006, the Office denied reconsideration on the grounds that the evidence submitted was either repetitive of material previously submitted or irrelevant to the appellant's claim. The Office found that appellant's assertions regarding Dr. Ahmed's reports and that he was medically incapable of participating in vocational rehabilitation were repetitive of his arguments in support of the prior request for reconsideration. Appellant did not provide medical evidence corroborating his assertion that Dr. Klein's report was invalid. The Office found that appellant did not submit new, relevant evidence or establish that the Office erred in applying or interpreting a point of law.

LEGAL PRECEDENT

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides 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 argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[5] Section 10.608(b) provides that when an application for review of the merits of a claim 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.[6]

In support of his request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his burden of proof.[7] Appellant need only submit relevant, pertinent evidence not previously considered by the Office.[8] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the

[4] The record contains a January 4, 2006 decision approving a $4,600.00 attorney's fee for services rendered from January 14 to November 29, 2005. Appellant approved the fee on November 29, 2005. As appellant did not appeal this decision, it is not before the Board on the present appeal.

[5] 20 C.F.R. § 10.606(b)(2).

[6] 20 C.F.R. § 10.608(b).

[7] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[8] *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[9]

ANALYSIS

The Office reduced appellant's compensation to zero effective July 22, 2004, on the grounds that he failed to comply with the preliminary stages of vocational rehabilitation. Appellant requested reconsideration in a September 27, 2004 letter, asserting that he was medically unable to participate in or benefit from vocational rehabilitation. He submitted a January 21, 2004 report from Dr. Ahmed, an attending Board-certified internist specializing in rheumatology, diagnosing a variety of musculoskeletal conditions and impaired concentration. Appellant also submitted an August 9, 2004 report from Dr. Klein, an attending Board-certified orthopedic surgeon, opining that appellant was a good candidate to be evaluated by New York State's VESID program, as he needed retraining for employment within his physical restrictions. The Office denied modification by January 3, 2005 decision, finding that appellant's arguments and the medical evidence submitted were insufficient to modify the Office's finding that appellant failed to cooperate with the preliminary stages of vocational rehabilitation and did not demonstrate good cause for his refusal.

Appellant again requested reconsideration by November 29, 2005 letter. He reiterated that Dr. Ahmed's January 21, 2004 report demonstrated that he was medically unable to participate in vocational rehabilitation. Appellant also reiterated his belief that his medical conditions and prescribed medication left him unable to concentrate, making meaningful rehabilitation impossible. These arguments are repetitive of the assertions appellant made in his September 27, 2004 request for reconsideration. Evidence or argument which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.[10] Thus, the duplicative nature of appellant's arguments does not require reopening the record for further merit review.

In his November 29, 2005 letter, appellant asserted that Dr. Klein's opinion that appellant was a good candidate for vocational rehabilitation should be disregarded as the physician had no knowledge of the qualifications for VESID participants. However, VESID is a program administered by New York State, unrelated to vocational rehabilitation under the Federal Employee's Compensation Act. Therefore, any lack of knowledge of VESID requirements on the part of Dr. Klein is irrelevant to the underlying issue. This argument is insufficient to warrant further merit review.[11]

As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument or submit relevant and pertinent new evidence not previously considered by the Office, he is not entitled to a review of the merits of his claim. Therefore, the Office properly denied his request for reconsideration.

[9] *Annette Louise*, 54 ECAB 783 (2003).

[10] *Denis M. Dupor*, 51 ECAB 482 (2000).

[11] *Mark H. Dever*, *supra* note 8.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as he failed to submit relevant and pertinent new evidence or argument or establish that the Office erred in applying or interpreting a point of law.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 13, 2006 is affirmed.

Issued: August 9, 2006
Washington, DC

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

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