United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 06-1318**
	)	**Issued: December 18, 2006**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Albany, NY, Employer	)	

Appearances:
Appellant, pro se
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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 24, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated October 31, 2005 which denied her request for reconsideration. Because more than one year has elapsed between the August 6, 2004 merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

On December 7, 1995 appellant, then a 40-year-old clerk, filed an occupational disease claim alleging that she developed tendinitis due to pushing bundles of mail onto utility carts and into sacks. On March 23, 1996 the Office accepted appellant's claim for bilateral fibromyocytis.

By decision dated November 5, 1998, the Office found that appellant's actual earnings as a modified general clerk fairly and reasonably represented her wage-earning capacity. The Office reduced appellant's compensation benefits to zero as her actual wages met or exceeded the wages of the job held when injured.

Appellant's attending physician, Dr. Jonathan E. Cooper, a Board-certified physiatrist, diagnosed fibromyalgia and noted her limited ability to work. The Office referred appellant to Dr. Patrick J. Hughes, a Board-certified neurologist, for a second opinion evaluation. Dr. Hughes found that appellant had only subjective complaints of pain and no objective evidence of disability. Based on a conflict in medical opinion between Drs. Cooper and Hughes regarding appellant's continuing employment-related condition and disability, the Office referred appellant for an impartial medical evaluation. Dr. Kevin Barron, a Board-certified neurologist, examined appellant on October 30, 2001 and found that she had no continuing employment-related condition or disability.

The Office terminated appellant's compensation benefits effective January 23, 2002 on the basis that appellant had no continuing disability due to her accepted employment injury. Appellant requested a review by the Branch of Hearings and Review and, by decision dated June 27, 2002, the hearing representative affirmed the Office's January 23, 2002 decision.

Appellant requested reconsideration on May 10, 2003 and alleged that the second opinion and impartial physicians should have been specialists in rheumatology. She also noted defects in the statement of accepted facts. Appellant submitted additional reports from Dr. Cooper. In a report dated January 13, 2003, Dr. Don L. Goldenburg, a rheumatologist of professorial rank, noted examining appellant and diagnosed fibromyalgia. He disagreed with Dr. Barron's conclusions.

By decision dated July 28, 2003, the Office reviewed appellant's claim on the merits and denied modification of its June 27, 2002 decision.

On April 14, 2004 appellant requested reconsideration alleging that her medical condition continued, and that the qualifications of the examining physicians was not considered. Appellant stated, "Fibromyalgia will never be diagnosed unless a doctor considers it to be a diagnostic possibility." She submitted additional medical evidence and medical publications addressing fibromyalgia. In a report dated June 14, 2004, Dr. Cooper described fibromyalgia and stated that it was a well-accepted disorder by the American College of Rheumatology. He repeated his opinion that appellant was disabled due to fibromyalgia due to her August 1995 employment injury. Dr. Cooper stated that fibromyalgia was not a neurological diagnosis but a rheumatological one.

By decision dated July 29, 2004, the Office reviewed appellant's claim on the merits and denied modification of its July 28, 2003 decision. The appeal rights accompanying this decision included the right to an oral hearing. On August 20, 2004 the Office reopened appellant's claim on its own motion and vacated the July 29, 2004 decision. The Office found that appellant was not entitled to an oral hearing as she had previously had and also previously requested reconsideration on this claim. In the August 20, 2004 decision, the Office again denied modification of its prior decisions and included the appropriate appeal rights.

On July 26, 2005 appellant requested reconsideration of the August 20, 2004 decision. She alleged that her claim had been mishandled since she filed a recurrence on November 30, 1999 due to her fibromyalgia which resulted in a new claim number. Appellant again argued that she should not have been examined by neurologists and alleged that the Office had ignored her questions about Dr. Barron. She alleged that she developed depression as a result of her fibromyalgia. Appellant submitted additional medical evidence from Dr. Cooper, noting her continuing symptoms of fibromyalgia and his disagreement with Dr. Barron's report.

In a letter dated June 11, 2004, the president of the arthritis foundation noted that his organization disagreed with Dr. Barron's assessment. Appellant also submitted Office communications regarding claim number 02-0769050.[1] She resubmitted Dr. Cooper's June 14, 2004 report as well as treatment notes previously considered. In notes dated April 27, July 9 and November 23, 2004, Dr. Dorota Hauser-Sypek diagnosed severe fibromyalgia and myofascial pain as well as depression. On July 9, 2004 she stated that appellant's fibromyalgia clearly started in 1995 after the employment injury. Dr. Hauser-Sypek stated that appellant was disabled from August 1995 due to her employment injury.

Dr. Cooper completed reports on December 15, 2004 and February 16, 2005 and stated that appellant's fibromyalgia and myofascial pain was aggravated by stress.

In a report dated July 5, 2004, Dr. Richard Wilmot, a Board-certified internist, noted appellant's history of injury and diagnosed fibromyalgia and other soft tissue pain. He opined that appellant's conditions were due to her employment.

By decision dated October 31, 2005, the Office declined to reopen appellant's claim for consideration of the merits. The Office concluded that the medical evidence submitted was not relevant as it was not based on a complete factual background.[2]

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] 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.[4] When a claimant fails to meet one of the above standards, the Office

[1] The claim number appeal to the Board is 02-0706696. As appellant did not appeal any decisions of the Office addressing an alleged recurrence of disability, the Board will not address this issue in the present appeal. 20 C.F.R. § 501.2(c).

[2] Following the Office's October 31, 2005 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[3] 5 U.S.C. §§ 8101-8193, § 8128(a).

[4] 20 C.F.R. § 10.606(b)(2).

will deny the application for reconsideration without reopening the case for review on the merits.[5]

The requirement for reopening a claim for merit review does not include the requirement that a claimant shall submit all evidence necessary to discharge his or her burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.[6]

ANALYSIS

Appellant requested reconsideration on July 26, 2005 and submitted additional new medical evidence that the Office had not previously considered in her claim. The reports of Drs. Hauser-Sypek and Wilmot diagnosed fibromyalgia, opined that this condition was due to appellant's employment injury and indicated that this condition was ongoing requiring medical treatment. These reports constitute relevant new evidence on the relevant issue of appellant's claim, whether she has any ongoing medical residuals or disability due to her accepted employment injury. While the reports may not be sufficient to meet appellant's burden of proof of establishing continuing disability or medical residuals, this is not an impediment to further merit review. The evidence is only required to be new and relevant. The Board finds that the new medical evidence submitted by appellant is not repetitious as it consists of reports of physicians not previously of record and therefore is sufficient to require the Office to reopen appellant's claim for review of the merits. On remand, the Office should review the evidence submitted in support of appellant's July 26, 2005 request for reconsideration on the merits and, after such development, as it deems necessary issue a *de novo* decision.

CONCLUSION

The Board finds that appellant submitted relevant new evidence in support of her July 26, 2005 request for reconsideration requiring further review of the merits of her claim.

[5] 20 C.F.R. § 10.608(b).

[6] *See Billy B. Scoles*, 57 ECAB ___ (issued December 7, 2005); *Sydney W. Anderson*, 53 ECAB 347 (2002).

ORDER

IT IS HEREBY ORDERED THAT the October 31, 2005 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: December 18, 2006
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board