United States Department of Labor
Employees' Compensation Appeals Board

LON O. NANKE, Appellant	)	
and	)	**Docket No. 06-309**
	)	**Issued: May 22, 2006**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Milwaukee, WI, Employer	)	

Appearances:
Elaine G. Nanke, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 21, 2005 appellant filed a timely appeal from an April 18, 2005 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration under 5 U.S.C. § 8128. As more than one year has elapsed between the filing of appellant's claim and the last merit decision dated February 17, 2004, the Board lacks jurisdiction to review the merits of the case.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the April 18, 2005 nonmerit decision.

ISSUE

The issue is whether the Office properly denied appellant's request for review of the merits of his claim under section 8128.

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

FACTUAL HISTORY

On November 21, 1983 appellant, then a 57-year-old retired air traffic controller, filed an occupational disease claim alleging that he sustained hearing loss due to factors of his federal employment. The Office accepted the claim for binaural hearing loss and placed him on the periodic rolls effective November 27, 1985.

The Office referred appellant for vocational rehabilitation in 1994.[2] The rehabilitation counselor submitted a final report and updated labor market survey on December 11, 2002 identifying the positions of janitor/cleaner and laundry operator as within appellant's physical and vocational capabilities and reasonably available within his commuting area.

On July 17, 2003 the Office informed appellant that it proposed to reduce his compensation on the grounds that he had the capacity to earn wages as a janitor. The Office noted that he had declined vocational rehabilitation services in the past and indicated that it was reducing his compensation based on what his earnings would have been if he had completed rehabilitation services.

In a response dated August 11, 2003, appellant maintained that he had not refused vocational rehabilitation and also asserted that the Office had told him that he would receive a position comparable to that he formerly held with the employing establishment.

By decision dated September 24, 2003, the Office reduced appellant's compensation effective that date based on its finding that he had the capacity to earn wages as a cleaner/janitor. The Office noted that Dr. Douglas J. Wermuth, a Board-certified otolaryngologist, found in a report dated November 8, 2000, that appellant's hearing loss would not preclude him from performing the position of cleaner.

On October 23, 2003 appellant requested a review of the written record by an Office hearing representative. He argued that he was unable to perform the duties of the position due to problems with his legs and feet related to diabetes.

In a decision dated February 17, 2004, the hearing representative affirmed the September 24, 2003 decision.

By letter dated February 16, 2005, appellant requested reconsideration "based on numerous erroneous items in the record upon which [the Office's] decision rests." He argued that, contrary to the Office's finding, he did not decline rehabilitative services. Appellant also noted that he did not receive any job referrals. He further asserted that the November 8, 2000 report of Dr. Wermuth was insufficient to establish that he could perform the position of janitor because the physician stated that there may be reasons he could not work at the age of 74, which were unrelated to his hearing loss. Appellant additionally argued that the Office erred in its September 23, 2003 decision, in stating that his belief that the Office would help him find a job equivalent in salary to his previous position was incorrect. He cited to an Office letter informing

[2] The Office had previously referred appellant for vocational rehabilitation in 1985.

him that a loss of wage-earning capacity meant that his injury prevented him from earning wages comparable to the job held when injured.

Appellant submitted a rehabilitation status report form dated February 7, 1986 in which an Office rehabilitation specialist noted that he agreed to cooperate with the rehabilitation counselor and a letter dated March 15, 1986 he sent the rehabilitation counselor explaining some earned income.[3]

By decision dated April 18, 2005, the Office denied appellant's request for reconsideration on the grounds that he had not raised any argument sufficient to warrant merit review of the prior decision.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) 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) submit 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 on the merits.[7]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[8] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[9] While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[10]

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[3] The record also contains reports from an audiologist regarding refitting appellant's hearing aids.

[4] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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] 20 C.F.R. § 10.606(b)(2).

[6] 20 C.F.R. § 10.607(a).

[7] 20 C.F.R. § 10.608(b).

[8] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[9] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[10] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

ANALYSIS

In his February 16, 2005 request for reconsideration, appellant argued the Office based its finding that he had the capacity to work as a janitor on errors in the record.[11] He asserted that contrary to the Office's finding, he did not decline rehabilitative services. Appellant also maintained that the Office told him that he would be assisted in obtaining a job comparable to his position with the employing establishment. The Office, however, previously considered these arguments in its September 24, 2003 decision. The submission of evidence or argument that repeats or duplicates that already in the case record does not constitute a basis for reopening a case.[12]

Appellant resubmitted a report dated February 7, 1986, from an Office rehabilitation specialist. As noted above, the Board has held that evidence duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[13]

Appellant further submitted a March 15, 1986 letter he wrote to his rehabilitation counselor clarifying a business loss. The relevant issue, however, is whether appellant had the capacity to perform the position of janitor effective September 24, 2003. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[14]

Appellant further asserted that the medical evidence, in particular the report of Dr. Wermuth, was insufficient to support that he could perform the position. Appellant's lay opinion, however, is not relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.[15]

Appellant 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 submit new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's request for review of the merits of his claim under section 8128.

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[11] It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination. *Tamra McCauley*, 51 ECAB 375, 377 (2000); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2,814.11(a) (June 1996). In this case, however, appellant is requesting that the Office reconsider its wage-earning capacity determination rather than seeking modification.

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

[13] *Freddie Mosley*, 54 ECAB 255 (2002).

[14] *See Arlesa Gibbs*, *supra* note 8.

[15] *Gloria J. McPherson*, 51 ECAB 441 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 18, 2005 is affirmed.

Issued: May 22, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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