United States Department of Labor
Employees' Compensation Appeals Board

KELVIN L. DAVIS, Appellant	)	
and	)	**Docket No. 06-466**
	)	**Issued: May 4, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Clearfield, UT, Employer	)	

Appearances:
Kelvin L. Davis, pro se
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 December 27, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 19, 2005 nonmerit decision denying her request for merit review. 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 the Office was its June 15, 2004 decision concerning appellant's election between receiving benefits under the Federal Employees' Compensation Act or from the Department of Veterans Affairs (DVA). Because more than one year has elapsed between the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.[1]

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). The record also contains a March 22, 2005 decision of the Board. In the absence of further review by the Office on the issue addressed by the decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). Appellant sought reconsideration of the Board's decision pursuant to 20 C.F.R. § 501.7(a) and, by order dated July 18, 2005, the Office denied appellant's petition for reconsideration.

ISSUE

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

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision on March 22, 2005 in which it determined that appellant had a choice of making an election of benefits between his temporary total disability compensation under the Act[2] plus 70 percent of his DVA benefits on the one hand and 100 percent of his DVA benefits.[3] The Board found that the DVA had made a determination that its increase of appellant's service-connected disability rating from 70 to 100 percent was necessitated by the aggravating effects of his civilian employment injury.[4] The Board noted that after the DVA increased its benefits from a 70 percent disability rating to a 100 percent disability rating, an election was required because the 30 percent increase in benefits was payable due to the same employment injury which formed the basis of entitlement to benefits under the Act.[5] The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

By letter dated November 27, 2005, appellant requested reconsideration of his claim. He argued that he actually filed his compensation claim on April 10, 2002 rather than on March 19, 2002 and posited that the fact that his service-connected rating of 100 percent was retroactively

[2] 5 U.S.C. §§ 8101-8193.

[3] Docket No. 04-1706 (issued March 22, 2005). On March 19, 2002 appellant signed an occupational disease claim form alleging that he sustained an emotional condition due to incidents and conditions at work, which occurred primarily between 1998 and 2002. When he filed his claim, appellant was receiving benefits from the DVA for a 70 percent disability due to a service-connected emotional condition, schizophrenia of a chronic undifferentiated type. The Office later accepted that appellant sustained an employment-related permanent aggravation of chronic undifferentiated schizophrenia with paranoia. In an August 29, 2002 decision, the DVA determined that the disability rating for appellant's schizophrenia should be increased from 70 to 100 percent retroactive to March 26, 2002.

[4] The Board indicated that the DVA relied on some of the same medical evidence that the Office reviewed in accepting that appellant sustained an employment-related permanent aggravation of chronic undifferentiated schizophrenia with paranoia due to his civilian employment. In statements dated March 18, 2004, appellant argued that he actually filed his compensation claim in April 2002 and, therefore, the fact that his service-connected rating of 100 percent was retroactively deemed effective beginning March 26, 2002 showed that the increase in his rating from 70 to 100 percent could not have been related to his civilian-connected emotional condition. He also argued that the medical evidence showed that his service-connected emotional condition and his civilian-connected emotional condition were entirely different conditions.

[5] *See* 5 U.S.C. § 8116(a) concerning the prohibition against dual payments of compensation for the same injury. *See also Louis Teplitsky*, 29 ECAB 826 (1978), 22 ECAB 142 (1971); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8b(1), (2) (February 1995).

deemed effective beginning March 26, 2002 showed that the increase in his rating from 70 to 100 percent could not have been related to his civilian-connected emotional condition.[6] Appellant alleged that the Office did not present sufficient medical evidence as a basis for its determination that the increase of his service-connected disability rating from 70 to 100 percent was necessitated by the aggravating effects of his civilian employment injury.[7]

By decision dated December 19, 2005, the Office denied appellant's request for merit review of his claim.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the 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]

ANALYSIS

Appellant was receiving benefits from the DVA for a 70 percent disability due to a service-connected emotional condition (schizophrenia of a chronic undifferentiated type) when he filed an occupational disease claim for a civilian-based emotional condition. The Office later accepted that appellant sustained a permanent aggravation of chronic undifferentiated schizophrenia with paranoia due to employment factors he experienced at the employing establishment. It was later determined that appellant had a choice of making an election of benefits between his temporary total disability compensation under the Act plus 70 percent of his DVA benefits on the one hand and 100 percent of his DVA benefits.

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[6] Appellant also asserted that the Office improperly identified his last day of work as March 21, 2002 rather than May 21, 2002 and submitted a document in which a supervisor indicated that he last worked on May 21, 2002. He also submitted a portion of his occupational disease claim form which was already in the record.

[7] Appellant asserted that the Office impermissibly relied on the opinion of a nurse rather than a physician. The record also contains an April 18, 2005 letter in which appellant's attorney presented similar arguments.

[8] 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).

In support of his November 2005 reconsideration request, appellant argued that he actually filed his compensation claim on April 10, 2002 rather than on March 19, 2002 and posited that the fact that his service-connected rating of 100 percent was retroactively deemed effective beginning March 26, 2002 showed that the increase in his rating from 70 to 100 percent could not have been related to his civilian-connected emotional condition. He also alleged that the Office did not present sufficient medical evidence as a basis for its determination that the increase of his service-connected disability rating from 70 to 100 percent was necessitated by the aggravating effects of his civilian employment injury. However, the Board notes that appellant made similar arguments in two statements dated March 18, 2004 and both the Office and Board have already considered and rejected these arguments. The Board has held that the submission of evidence or argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[12]

In the present case, appellant has not established that the Office improperly denied his request for further review of the merits of its prior decisions under section 8128(a) of the Act, because the evidence and argument he submitted did not to 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 her claim pursuant to 5 U.S.C. § 8128(a).

[12] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980). Appellant also asserted that the Office improperly identified his last day of work as March 21, 2002 rather than May 21, 2002 and submitted a document in which a supervisor indicated that he last worked on May 21, 2002. However, he did not adequately articulate the relevance of this evidence and argument to his claim. He also submitted a portion of his occupational disease claim form, but this document was already in the record.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 19, 2005 decision is affirmed.

Issued: May 4, 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