United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 06-1788**
	)	**Issued: April 5, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Urbana, OH, Employer	)	

Appearances:
Alan J. Shapiro, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 31, 2006 appellant, through her attorney, filed an appeal from November 17, 2005 and July 11, 2006 nonmerit decisions of the Office of Workers' Compensation Programs denying her request for reconsideration.[1] As the last merit decision was dated July 20, 2005, more than one year from the filing date of the appeal, the Board lacks jurisdiction to review the merits of the case.[2] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the November 17, 2005 and July 11, 2006 nonmerit decisions.

ISSUES

The issues are: (1) whether the Office, in its November 17, 2005 decision, properly refused to reopen appellant's case for further merit review of her claim pursuant to 5 U.S.C. § 8128; and (2) whether the Office, in its July 11, 2006 decision, properly denied appellant's request for further merit review of her claim under section 8128.

[1] The appeal was postmarked July 24, 2006.

[2] 20 C.F.R. §§ 501.2(c), 501.3.

FACTUAL HISTORY

On May 10, 2005 appellant, then a 60-year-old rural mail carrier, filed an occupational disease claim alleging that she sustained a protrusion of a cervical disc due to lifting trays of mail.[3] The Office accepted her claim, assigned file number 092059956, for an aggravation of cervical radiculitis. Appellant stopped work on February 2, 2005 and did not return. She requested compensation for total disability beginning February 2, 2005.

In a progress report dated February 11, 2005, Dr. Ephraim K. Brenman, an osteopath, diagnosed "[p]robable cervical nerve root irritation, corresponding to the neck and left arm symptoms with positive findings on the MRI [magnetic resonance imaging] scan."[4] He recommended physical therapy and epidural injections.

In a progress report dated April 14, 2005, Dr. Paul A. Cook, a Board-certified orthopedic surgeon, indicated that appellant was not working because of radiating neck pain "aggravated by the constant flexion and extension of her neck necessary to place mail into the mailboxes." He stated: "It is my opinion that this injury is directly related to her activities at work."

On May 20, 2005 Dr. Brenman opined that performing repetitive work activities caused "stress and strain to [appellant's] neck, resulting in neck pain and discomfort in her upper extremity." He diagnosed a left disc protrusion "at least abutting the C6 nerve root" which corresponded to her complaints. Dr. Brenman concluded: "In my opinion, this does all seem to stem from her work and from her reported date of injury." On June 20, 2005 he diagnosed C5-6 disc protrusion, C6 nerve root abutment, cervical myofascial pain and a butterfly rash. Dr. Brenman noted that he needed to rule out an underlying rhematological problem.

On July 6, 2005 the Office combined appellant's claim assigned file number 092059956 into master file number 090461034.[5] By letter dated July 14, 2005, the Office informed appellant that Dr. Brenman had not explained why she was unable to work beginning February 2, 2005. The Office noted that it had accepted her claim only for cervical radiculitis and requested medical evidence supporting total disability for employment beginning February 2, 2005.

On July 18, 2005 Dr. Cook indicated that appellant was off work due to cervical radiculopathy and asserted that his office had supplied all evidence necessary in support of her claim.

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[3] Appellant initially filed a claim alleging that she sustained a traumatic injury on January 10, 2005. The Office denied appellant's claim in a decision dated May 11, 2005.

[4] A February 7, 2005 MRI scan study showed a disc protrusion at C5-6 minimally indenting the spinal cord and the left C6 nerve root. The study also showed a disc protrusion at C3-4 minimally indenting the spinal cord with minimal spinal stenosis.

[5] The Office accepted appellant's claim, assigned file number 090461034, for bilateral carpal tunnel syndrome, left medial epicondylitis, a ganglion of the left wrist, left radial neuritis and left hand tendinitis. By decision dated May 9, 2005, the Office denied appellant's claim for total disability beginning February 2, 2005 on the grounds that the medical evidence did not show that she was unable to perform her limited-duty employment.

By decision dated July 20, 2005, the Office denied appellant's claim for disability compensation beginning February 2, 2005 on the grounds that the medical evidence was insufficient to establish that she was unable to work due to her employment injury. The Office found that there was no medical evidence providing a rationale as to why she was unable to perform work due to her cervical radiculopathy.

In a report dated July 20, 2005, Dr. Michael J. Meagher, a Board-certified neurosurgeon, noted that appellant developed neck pain and numbness along the left side beginning on January 10, 2005 while working as a rural carrier. He recommended an electromyogram to confirm C6 radiculopathy.

In a progress report dated July 26, 2005, Dr. Brenman listed findings on physical examination and diagnosed a C5-6 disc protrusion, possible C6 radiculitis, possible myofascial pain and possible lumbar radiculitis. In a narrative report of the same date, he diagnosed a disc protrusion at C5-6 and foraminal narrowing at the C6 nerve root. Dr. Brenman stated:

> "It is my medical opinion that she was really unable to work from February 2 until August 22, 2005, when I placed her on light duty. The reason is that she is having severe pain and, because of her medical conditions, is unable to fulfill her job duties with the [employing establishment], including repetitive lifting and twisting, as well as movements of her neck and head repetitively. She had a legitimate medical reason for not being able to perform her job duties and work at that point in time, due to her significant pain."

In a certificate to return to work dated August 10, 2005, Dr. Cook opined that appellant was totally disabled from February 2 to August 21, 2005, due to cervical radiculopathy. In a letter of the same date, he indicated that appellant was disabled since February 2, 2005 due to an employment injury. Dr. Cook stated: "[She] has been totally and temporarily disabled during this period due to weakness and numbness in her bilateral arms, hands, legs and upper and lower back. This is related to her cervical radiculopathy and lumbar protrusion."

On August 10, 2005 Dr. Brenman found that appellant was totally disabled from July 20 to August 20, 2005 from a herniated nucleus pulposus at C5 and lumbar radiculitis. He opined that she could resume work on August 21, 2005. In a form report of the same date, Dr. Brenman diagnosed cervical nerve root irritation and checked "yes" that the condition was caused or aggravated by employment. He indicated that she was totally disabled from February 2 to August 21, 2005 and could resume light work on August 21, 2005.[6] In a letter dated August 10, 2005, Dr. Brenman asserted that appellant was unable to work from February 2, 2005 to the present due to her employment injury. He stated: "She has been off work due to a cervical nerve root irritation at C5-6, due to pain in her neck and left arm, as well as low back pain." Dr. Brenman attributed appellant's temporary total disability to "weakness and numbness in her left arm, as well as pain in her neck, pain in her low back and also left leg discomfort."

[6] By letter dated August 31, 2005, Dr. Brenman informed the employing establishment that appellant was able to perform only restricted duty.

On September 9, 2005 appellant requested reconsideration of her claim.[7] By decision dated November 17, 2005, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and thus insufficient to warrant merit review of her claim. The Office found that only disability slips addressed her time off work and that no medical evidence addressed the cause of her inability to perform her employment duties.

On May 17, 2006 appellant, through her attorney, again requested reconsideration. She submitted 2005 and 2006 progress reports and form reports from Dr. Brenman. By decision dated July 11, 2006, the Office denied merit review of its July 20, 2005 decision.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[8] 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) 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]

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his or her burden of proof.[12] The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[13] If the Office should determine that the new evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[14]

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[7] In progress reports dated August 31 and October 7, 2005, Dr. Brenman discussed his continuing treatment of appellant for cervical and lumbar pain.

[8] 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."

[9] 20 C.F.R. § 10.606(b)(2).

[10] *Id*. at § 10.607(a).

[11] *Id*. at § 10.608(b).

[12] *Donald T. Pippin*, 53 ECAB 631 (2003).

[13] *Id*.

[14] *See Annette Louise*, 53 ECAB 783 (2003).

ANALYSIS

In its last merit decision dated July 20, 2005, the Office denied appellant's claim for compensation beginning February 2, 2005 on the grounds that the medical evidence was insufficient to establish that she was totally disabled due to her accepted employment injury. The Office found that the medical evidence did not explain why she was unable to work due to her accepted condition of cervical radiculitis.

On July 26, 2005 Dr. Brenman diagnosed a C5-6 disc protrusion and foraminal narrowing of the C6 nerve root. He opined that she was unable to work from February 2 to August 22, 2005 because severe pain prevented her from performing her employment duties. Dr. Brenman further asserted, in a report dated August 10, 2005, that appellant was totally disabled beginning February 2, 2005 because of "weakness and numbness in her left arm, as well as pain in her neck."

On August 10, 2005 Dr. Cook opined that appellant was totally disabled beginning February 2, 2005 due to her employment injury. He attributed her disability to "weakness and numbness" in her arms, hands, legs and back due to her cervical radiculopathy and lumbar protrusion.

In its November 17, 2005 decision denying appellant's request for reconsideration, the Office determined that the evidence submitted was irrelevant and thus insufficient to warrant a merit review of her claim. The Office indicated that the only medical evidence addressing appellant's disability were disability slips which contained no explanation of why she was unable to work beginning February 2, 2005. The record, however, did not contain a previous report from Dr. Brenman explaining why he found her disabled from her employment beginning February 2, 2005. The Board finds that Dr. Brenman's July 26 and August 10, 2005 reports constitute relevant new medical evidence on the issue of whether appellant established employment-related disability beginning February 2, 2005. As this evidence was not previously of record and pertains directly to the relevant issue, it is sufficient to reopen his case for further review of the merits.

In order to require merit review, it is not necessary that the new evidence be sufficient to discharge appellant's burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[15] As Dr. Brenman's July 25 and August 10, 2005 reports constituted new and relevant medical evidence, the Board finds that the Office improperly denied appellant's request for review of the merits of the claim. The case will be remanded to the Office to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, the Office shall issue a merit decision on the claim.

[15] *See Donald T. Pippin*, *supra* note 12.

CONCLUSION

The Board finds that the Office improperly properly refused to reopen appellant's case for further merit review of her claim pursuant to 5 U.S.C. § 8128.[16]

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 11, 2006 and November 17, 2005 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 5, 2007
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

[16] In view of the Board's disposition of the first issue, the issue of whether the Office properly denied appellant's request for reconsideration in its July 11, 2006 decision is moot.