

**United States Department of Labor
Employees' Compensation Appeals Board**

K.C., Appellant)

and)

DEPARTMENT OF THE INTERIOR,)
NATIONAL PARK SERVICE, YOSEMITE)
NATIONAL PARK, Yosemite, AC, Employer)

Docket No. 07-1330
Issued: October 9, 2007

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 18, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated January 16, 2007 which denied her request for further merit review. Because more than one year has elapsed between the last merit decision dated January 3, 2006 and 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.

ISSUE

The issue is whether the Office properly denied appellant's request for merit review in accordance with section 8128(a) of the Federal Employees' Compensation Act.

FACTUAL HISTORY

On February 15, 2000 appellant, then a 25-year-old seasonal biological science technician, filed an occupational disease claim alleging that she developed extreme back pain due to repetitive bending, stooping, squatting and carrying of up to 20 pounds in a backpack for

distance up to one half mile. She first became aware of her condition on July 15, 1999 and first attributed this condition to her employment on that date. Appellant noted that she had a preexisting back injury accepted by the Office.

In a report dated November 11, 1999, Dr. Malcolm E. Ghazal, an orthopedic surgeon, diagnosed L5-S1 disc protrusion on the left with no radicular pain and only occasional left-sided low back pain. He indicated that appellant could perform her usual and customary duties.

By decision dated August 29, 2000, the Office denied appellant's claim. Appellant requested an oral hearing on September 25, 2000. In a report dated September 13, 2000, Dr. Ghazal provided work restrictions. In an April 26, 2001 decision, the hearing representative accepted appellant's claim for aggravation of preexisting disc protrusion. The Office authorized compensation benefits from November 22, 1999 to February 3, 2000.

The Office authorized a microsurgical discectomy on August 25, 2003. The Office authorized wage-loss compensation beginning May 28, 2003 and entered appellant on the periodic rolls on November 4, 2004.

On September 9, 2003 appellant filed a claim requesting wage-loss compensation from September 16, 2000 to May 27, 2003. She submitted information regarding the periods that she worked from September 16, 2000 to May 27, 2003 and those during which she was unemployed. On November 12, 2001 Dr. Ghazal noted that appellant was working in an office position and that she could continue to work. In a report dated July 13, 2003, Dr. Thomas H. Jones, a Board-certified neurosurgeon, opined that appellant had an employment-related L5-S1 disc herniation. He indicated that appellant was disabled for her date-of-injury position. Dr. Jones further opined that appellant was totally disabled due to this condition since March 2003.

By decision dated September 25, 2003, the Office noted that appellant had claimed periods of disability which she attributed to her employment-related work restrictions. The Office denied appellant's claim for compensation noting that she was capable of working during the period claimed even though she was unemployed.

Appellant requested an oral hearing on October 22, 2003. She testified at a telephonic hearing on August 30, 2004.

By decision dated November 24, 2004, the hearing representative denied appellant's claim for disability from September 16, 2000 to May 27, 2003. He noted that appellant's seasonal position ended November 10, 1999 and that she was not disabled at that time. The hearing representative found that appellant had not submitted medical evidence to support her periods of disability during September 16, 2000 to May 23, 2003.

Appellant requested reconsideration on November 22, 2005 and submitted medical evidence from Dr. Jones dated March 10, 2004 and November 11, 2005. Dr. Jones provided appellant's work restrictions on March 10, 2004. On November 11, 2005 he further addressed her work restrictions as set forth in the March 10, 2004 report.

By decision dated January 3, 2006, the Office reviewed appellant's claim on the merits and denied medication of the November 24, 2004 decision.

On January 2, 2007 appellant requested reconsideration on the January 3, 2006 decision denying her claim for compensation from September 16, 2000 to May 27, 2003. She stated that she planned to submit additional medical evidence in support of her claim from Dr. Jones and Dr. Ghazal. On December 12, 2005 Dr. Jones indicated that appellant could work in the field of computer graphics or graphic design. In a note dated April 5, 2006, he indicated that appellant was currently experiencing recurrent discogenic pain. Appellant resubmitted the March 10, 2004 report from Dr. Jones on September 11, 2006. On August 30, 2006 Dr. Jones completed a work restriction evaluation.

By decision dated January 16, 2007, the Office declined to reopen appellant's claim for consideration of the merits. The Office found that appellant had failed to submit any relevant new evidence.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹ the Office's regulation 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.² 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.³

ANALYSIS

Appellant claimed that she had intermittent periods of disability from September 16, 2000 to May 27, 2003. In its merit decisions dated September 25, 2003, November 24, 2004 and March 3, 2006, the Office denied appellant's claim on the basis that she had not submitted sufficient medical evidence to support her claim for disability for the periods in question. In support of appellant's request for reconsideration, she attempted to submit relevant and pertinent new medical evidence in support of her claim for periods of total disability.

Appellant submitted a report dated December 12, 2005 from Dr. Jones, a Board-certified neurosurgeon, indicating that he believed that she could perform the duties of graphic designer. In a note dated April 5, 2006, Dr. Jones indicated that appellant was currently experiencing recurrent discogenic pain. On August 30, 2006 he completed a work restriction evaluation. These reports do not address the issue of appellant's disability during September 16, 2000 to May 27, 2003, but instead relate to appellant's ongoing condition and work abilities. As these reports do not address the central issue in the case, whether appellant was totally disabled during the period from September 16, 2000 to May 27, 2003, they are not relevant to her claim in this appeal. As the reports do not constitute relevant and pertinent new evidence, the reports are not

¹ 5 U.S.C. §§ 8101-8193, § 8128(a).

² 20 C.F.R. § 10.606(b)(2).

³ 20 C.F.R. § 10.608(b).

sufficient to require the Office to reopen appellant's claim for consideration of the merits in accordance with 20 C.F.R. § 10.606(b)(2).

Appellant resubmitted the March 10, 2004 report from Dr. Jones on September 11, 2006. The Office previously reviewed this report in reaching its January 3, 2006 decision. As the Office considered this report in reaching a final decision, the March 10, 2004 report is not new evidence. Section 10.606(b)(2) of the Office's regulations requires that a claimant submit relevant and pertinent new evidence in order to mandate a review of the merits of the claim.⁴ Appellant has failed to submit the necessary relevant and pertinent new evidence which would require the Office to reopen her claim for review of the merits. Therefore, the Office properly declined to reopen her claim for merit review.

CONCLUSION

The Board finds that appellant failed to submit the necessary relevant and pertinent new evidence to require the Office to reopen her claim for consideration of the merits.

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 9, 2007

Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

⁴ *Id.*