United States Department of Labor
Employees' Compensation Appeals Board

T.M., Appellant	)	
and	)	**Docket No. 08-1957**
	)	**Issued: December 16, 2008**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
John E. Goodwin, Esq., for the appellant
No appearance, for the Director

Oral Argument November 12, 2008

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 7, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 16, 2007 nonmerit decision denying his 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 Office's last merit decision dated May 17, 2005 affirmed the termination of appellant's compensation for refusing an offer of suitable work. 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.

ISSUE

The issue is whether the Office properly denied appellant's request for further review of the merits of his 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 January 30, 2007 affirming the termination of appellant's compensation effective July 12, 2004 on the grounds that

he refused an offer of suitable work.[1] In 1996 the Office accepted that appellant, then a 39-year-old engineering technician, sustained bilateral carpal and cubital tunnel syndromes and authorized surgeries related to these conditions. The Board found that the Office properly determined that he was capable of performing the data clerk position offered by the employing establishment in January 2004 and determined to be suitable by the Office in April 2004. The position was sedentary in nature and involved greeting visitors, answering telephones, taking down telephone messages and sending and receiving fax messages. The Office properly relied on the April 28, 2003 report of two Office referral physicians, Dr. Scott Van Linder, a Board-certified orthopedic surgeon, and Dr. Mark Fishel, a Board-certified neurologist.[2] The facts and the circumstances of the case are set forth in the Board's prior decision and are incorporated herein by reference.

In a May 15, 2007 letter, appellant requested reconsideration of his claim, submitting an April 16, 2007 report of Dr. Hillyer to establish that he could not drive to and from the site of the position offered by the employing establishment. Dr. Hillyer stated that appellant presented for "a routine follow-up at his request for a 40-minute face to face counseling session." He noted that the majority of the visit was spent reviewing the Board's January 30, 2007 decision. Dr. Hillyer indicated that a minimal examination was performed and provided several diagnoses. He stated:

> "At this point I do not believe that [appellant] could safely drive on a regular basis. He certainly could not drive five miles into town and he states that he does not drive at current…. I think for him to be able to be considered for driving safely he would then need to undergo a full sleep study and have a driving simulator study to determine reaction times and judgment safety.... At this point I have restricted him from driving and he certainly could not drive the five miles that he describes to get to work in Bremerton safely.
>
> "On a separate issue, the medications that he is taking on a more probable than not basis are required to maintain functional level as well as quality of life given the pain complaints that he has placed and the extensive improvement that he states he has had while undergoing the current therapy."

In an August 16, 2007 decision, the Office denied further review of the merits of appellant's claim pursuant to 5 U.S.C. § 8128(a).

[1] Docket No. 06-1764 (issued January 30, 2007).

[2] These reports included September 8, 2003 and April 1, 2005 reports of Dr. Jon F. Hillyer, an attending Board-certified anesthesiologist, who stated, "[A]ppellant reported that his methadone medication made him drowsy and prevented him from driving safely." The Board found that Dr. Hillyer did not provide a clear opinion that appellant's medications prevented him from driving such that he could not travel to and from the location of the data clerk position, did not explain why his extremely limited symptoms justified his medication regimen, and did not clearly explain why his medication regimen would render him sufficiently impaired to be unable to drive the five miles from his home to work. In a June 14, 2004 report, Dr. Robert L. Caulkins, an attending osteopath, stated that appellant should not drive while on his present medical regimen. The Board found that Dr. Caulkins' opinion was of limited probative value because he did not provide any explanation for this opinion.

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] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.[5] 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.[6] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[7] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[8]

ANALYSIS

The Office terminated appellant's compensation effective July 12, 2004 on the grounds that he refused an offer of suitable work. In connection with his May 15, 2007 reconsideration request, appellant enclosed an April 16, 2007 report of Dr. Hillyer, an attending Board-certified anesthesiologist. He contended that Dr. Hillyer's report established that he could not drive to and from the site of the data clerk position offered by the employing establishment. Dr. Hillyer stated, "At this point I do not believe that [appellant] could safely drive on a regular basis…. He certainly could not drive five miles into town and he states that he does not drive at current…." Dr. Hiller noted that he was restricting appellant from driving.

The Board finds that the submission of this report does not require reopening of appellant's claim for further review on the merits as it is not relevant to the underlying issue of the present case, *i.e.*, whether the medical evidence showed that he could perform the offered data clerk position at the time it was offered in early 2004.[9] Dr. Hillyer provided an opinion that appellant could not drive at the time the report was produced. It does not provide any opinion that appellant was disabled and could not drive at the time the data clerk position was offered in early 2004. Moreover, Dr. Hillyer's April 16, 2007 report is essentially duplicative of his other reports

[3] 5 U.S.C. §§ 8101-8193. 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).

[4] 20 C.F.R. § 10.606(b)(2).

[5] 20 C.F.R. § 10.607(a).

[6] 20 C.F.R. § 10.608(b).

[7] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[8] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[9] *See supra* note 9 and accompanying text.

touching on appellant's ability to drive, including his September 8, 2003 and April 1, 2005 reports in that it does not contain a rationalized medical opinion that appellant was unable to drive.[10]

Appellant has not established that the Office improperly denied his request for further review of the merits of its May 17, 2005 decision 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 his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

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

Issued: December 16, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[10] *See supra* note 8 and accompanying text.