United States Department of Labor
Employees' Compensation Appeals Board

L.L., Appellant	)	
and	)	**Docket No. 07-1817**
	)	**Issued: January 22, 2008**
DEPARTMENT OF VETERANS AFFAIRS, JAMES A. HALEY VETERANS ADMINISTRATION MEDICAL CENTER, Tampa, FL, Employer	)	

Appearances:
Capp P. Taylor, 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 June 28, 2007 appellant, through counsel, filed a timely appeal of a June 1, 2007 nonmerit decision of the Office of Workers' Compensation Programs, denying her request for reconsideration. Because more than one year has elapsed between the last merit decision dated May 30, 2006 and the filing of the appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

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

FACTUAL HISTORY

On July 31, 1995 appellant, then a 52-year-old registered nurse, filed a traumatic injury claim alleging that on July 26, 1995 she experienced pain in both buttocks while bending down at a patient's bedside. She stopped work on July 28, 1995. The Office accepted the claim for a

bulging disc at L4-5. By decision dated March 18, 1998, the Office found that appellant's actual earnings as a limited-duty registered nurse fairly and reasonably represented her wage-earning capacity.

On June 29, 2004 appellant filed a claim alleging that she sustained a recurrence of disability on June 4, 2004. She stopped work on June 4, 2004. Appellant indicated that on December 29, 2003 she hurt her right arm when she fell while trying to sit in a rolling chair. She received a tetanus shot at the employee health unit.[1] On the claim form, appellant's supervisor stated that, following treatment, appellant returned to duty with no loss time from work or medical expenses.

By decision dated October 14, 2004, the Office denied appellant's claim. It found the evidence of record insufficient to establish that she sustained a recurrence of disability causally related to her July 26, 1995 employment injury. On October 27, 2004 appellant requested an oral hearing before an Office hearing representative.

By decision dated May 30, 2006, an Office hearing representative affirmed the October 14, 2004 decision, as modified. The hearing representative determined that the issue in the case was not whether appellant sustained a recurrence of disability on June 4, 2004. Instead, the issue was whether the March 18, 1998 loss of wage-earning capacity determination should be modified. The hearing representative found that appellant failed to submit rationalized medical evidence establishing that she sustained a material worsening of her accepted employment-related injury and that the evidence of record was not sufficient to warrant modification of the loss of wage-earning capacity determination.

In a letter dated May 1, 2007, appellant, through counsel, requested reconsideration of the October 14, 2004 and May 30, 2006 decisions. Counsel contended that, in denying appellant's recurrence of disability claim, the Office failed to establish an affirmative defense that appellant's current condition and resultant surgery were caused by an intervening cause. He contended that the evidence of record did not establish that appellant sustained a new injury or significantly aggravated her accepted employment injury due to the December 29, 2003 incident. Counsel stated that appellant's hearing testimony and the medical evidence of record established that her condition would wax and wane over the years. He noted that he had enclosed an April 13, 2007 medical report of Dr. Paul Zak, a Board-certified orthopedic surgeon, which established that appellant's continuing back problems and resultant surgery were causally related to the accepted July 26, 1995 employment injury.

By decision dated June 1, 2007, the Office denied appellant's request for reconsideration. It found that appellant's legal argument had been previously addressed and that she did not submit any new medical evidence. The Office determined that appellant's reconsideration

[1] The record reveals that on July 26, 2004, appellant underwent bilateral decompression lumbar laminectomies at L3-4, L4-5 and L5 sacrum, a right discectomy at L5 and repair of the L4 Durotomy which were performed by Dr. Ralph E. Rydell, a Board-certified neurosurgeon. In an August 31, 2004 report, Dr. Rydell opined that appellant's recent back pains and lumbar spine disease and resultant surgery were caused by the July 26, 1995 employment injury.

request neither raised substantive legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant a merit review of its prior decision.[2]

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,[3] the Office's regulation 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.[4] 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.[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 of the merits.

ANALYSIS

By letter dated May 1, 2007, appellant, through counsel, disagreed with the Office's May 30, 2006 decision, denying modification of its March 18, 1998 loss of wage-earning capacity determination. The relevant issue is whether appellant met her burden of proof to establish that modification of the wage-earning capacity decision was warranted due to a material worsening of her July 26, 1995 employment-related bulging disc at L4-5. The Board notes that this issue is medical in nature.

In the request for reconsideration, appellant's counsel contended that she sustained a recurrence of disability causally related to her accepted employment injury. He contended that the Office failed to establish that an affirmative defense that appellant experienced an intervening cause of her current disability. Counsel alleged that appellant's hearing testimony and the medical evidence of record established that her back condition would wax and wane over the years. He related that he was including Dr. Zak's April 13, 2007 report which established that appellant's continuing back problems and resultant surgery were causally related to the accepted July 26, 1995 employment injury. However, no report accompanied appellant's

[2] The Board notes that the Office issued a decision on June 28, 2007, denying appellant's June 8, 2007 request for reconsideration of its May 30, 2006 decision denying modification of its March 18, 1998 loss of wage-earning capacity determination, after appellant's filing of an appeal with the Board in this case. It is well established that the Board and the Office may not have concurrent jurisdiction over the same issue on appeal. 5 U.S.C. § 8101(2). Therefore, the Board finds that the Office's June 28, 2007 decision is null and void. *Cathy B. Millin*, 51 ECAB 331 (2000); *Douglas E. Billings*, 41 ECAB 880, 895 (1990); *Oren E. Beck*, 33 ECAB 1551 (1982).

[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)(1)-(2).

[5] *Id.* at § 10.607(a).

request.[6] As the issue whether appellant had a material worsening of an employment-related condition is medical in nature, counsel's arguments are not relevant. 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.[7]

Appellant did not submit any relevant and pertinent new evidence not previously considered by the Office in support of her request for reconsideration. Further, she did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that the Office properly denied merit review.[8]

CONCLUSION

The Board finds that the Office properly denied appellant's request for a merit review of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 22, 2008
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

[6] The Board notes that Dr. Zak's April 13, 2007 report was received by the Office on June 21, 2007, after the issuance of its June 1, 2007 decision. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

[7] *Patricia G. Aiken*, 57 ECAB __ (Docket No. 06-75, issued February 17, 2006).

[8] *See James E. Norris*, 52 ECAB 93 (2000).