United States Department of Labor
Employees' Compensation Appeals Board

R.W., Appellant	)	
and	)	**Docket No. 07-1322**
	)	**Issued: March 12, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Baton Rouge, LA, Employer	)	

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 March 12, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 26, 2006 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 last merit decision of record was the Office's July 14, 2004 decision concerning the termination of appellant's compensation. 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]

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).

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision on January 6, 2003 affirming the Office's termination of appellant's compensation effective June 10, 1999 because he neglected to work after suitable work was offered.[2] The Board found that the Office properly relied on the October 8, 1998 report of Dr. Randall Lea, a Board-certified orthopedic surgeon who served as an Office referral physician, in determining that the position offered by the employing establishment was suitable. 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.

On December 15, 2003 appellant requested reconsideration of his claim before the Office. In support of his request, he submitted an August 4, 2003 report in which Dr. Billy May, an attending Board-certified family practitioner, indicated that appellant was able to perform the modified distribution clerk position when it was offered in April 1999. Dr. May completed a form report in which he indicated that appellant had limited back motion and tenderness in his lower back and recommended that he only work three or four hours per day. He suggested that the termination of appellant's compensation was improper because Dr. Lea did not complete a duty status report (Form CA-17) detailing his work restrictions.

In a July 14, 2004 decision, the Office affirmed its prior decisions regarding the termination of appellant's compensation. It found that the report of Dr. May did not establish appellant's claim because the report lacked adequate medical rationale regarding appellant's ability to work in 1999. The Office stated that it was not necessary for Dr. Lea to complete a Form CA-17 because he had adequately addressed appellant's work restrictions.

On June 27, 2005 appellant again requested reconsideration of his claim. He contended that the Office violated its own procedure because Dr. May did not receive a copy of the Dr. Lea's October 8, 1998 report around the time it was produced.[3] Appellant submitted a June 8, 2005 letter in which Dr. May indicated that he did not receive Dr. Lea's report because it was sent to 11224 Boardwalk Suite C in Baton Rouge rather than to his proper address, 7386 Highland Road in Baton Rouge. He also submitted a copy of a January 4, 1999 letter in which the Office indicated that it sent Dr. Lea's report to Dr. May on that date and requested that Dr. May provide

[2] Docket No. 01-452 (issued January 6, 2003). In late 1988 the Office accepted that appellant, then a 42-year-old letter carrier, sustained a ruptured disc at L4-5 due to his repetitive work duties. The Office authorized laminectomy surgery at L4-5 which was performed on September 13, 1989. On April 22, 1999 the employing establishment offered appellant a position as a modified distribution clerk for eight hours per day.

[3] Appellant made reference to Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating the Medical Evidence*, Chapter 2.810.5(b) (September 1993). This portion of Office procedure provides that, if reports from the claimant's physician lack needed details and opinion, the claims examiner should always write back to the doctor, clearly state what is needed, and request a supplemental report. A copy of the claims examiner's request should be sent to the claimant. The Office indicated that it sent Dr. Lea's report to Dr. May on January 4, 1999 but that Dr. May did not provide any response.

a response.[4] Appellant again argued that the termination of his compensation was improper because Dr. Lea did not complete a Form CA-17 detailing his work restrictions.[5]

Appellant also submitted a June 8, 2005 report in which Dr. May reiterated that appellant was unable to perform the modified distribution clerk position when it was offered in April 1999. Dr. May asserted that appellant had limited back motion, tenderness and spasms of the paraspinous muscles, and other physical findings which showed that he could not perform the job for eight hours per day.

In a June 26, 2006 decision, the Office denied further review of the merits of appellant's claim pursuant to 5 U.S.C. § 8128(a).[6]

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[7] 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.[8] 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.[9] 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.[10] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.[11] While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[12]

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[4] The letter was sent to 11224 Boardwalk Suite C-1 in Baton Rouge.

[5] Appellant also resubmitted numerous medical reports that had previously been considered.

[6] The Office inadvertently indicated that appellant was appealing the Office's June 4, 199 decision rather than its July 14, 2004 decision. He submitted additional evidence after the Office's June 26, 2006 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[7] 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).

[8] 20 C.F.R. § 10.606(b)(2).

[9] 20 C.F.R. § 10.607(a).

[10] 20 C.F.R. § 10.608(b).

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

[12] *John F. Critz*, 44 ECAB 788, 794 (1993).

ANALYSIS

The Office terminated appellant's compensation effective June 10, 1999 because he neglected to work after suitable work was offered. The termination was based on the October 8, 1998 report of Dr. Lea, a Board-certified orthopedic surgeon, who served as an Office referral physician. On January 6, 2003 the Board affirmed the termination of appellant's compensation and on July 14, 2004 the Office again affirmed its prior termination decisions.

In support of his June 27, 2005 reconsideration request, appellant submitted a June 8, 2005 report in which Dr. May, an attending Board-certified family practitioner, indicated that appellant could not perform the modified distribution clerk position when it was offered in April 1999. Dr. May asserted that appellant had limited back motion, tenderness and spasms of the paraspinous muscles, and other physical findings which showed that he could not perform the job for eight hours per day. The submission of this report would not require reopening of appellant's claim because the Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.[13] This report is duplicative to other previously considered reports of Dr. May, including his August 4, 2003 report. Appellant argued that the termination of his compensation was improper because Dr. Lea did not complete a Form CA-17 detailing his work restrictions, but the Office has already considered and rejected this argument.[14]

Appellant argued that the Office violated its own procedure because Dr. May did not receive a copy of Dr. Lea's October 8, 1998 report around the time it was produced.[15] While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[16] The Board notes that appellant's argument does not have a reasonable color of validity in that the portion of Office procedure cited by appellant does not support his assertion that the Office had an affirmative obligation to provide Dr. May with a copy of the Office referral physician's report.[17]

Appellant has not established that the Office improperly denied his request for further review of the merits of its July 14, 2004 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

[13] *See supra* note 11 and accompanying text.

[14] Appellant also resubmitted numerous medical reports, but these already have been considered by the Office.

[15] Appellant made reference to Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating the Medical Evidence*, Chapter 2.810.5(b) (September 1993). He submitted a June 8, 2005 letter in which Dr. May indicated that he did not receive Dr. Lea's report because it was sent to the wrong address.

[16] *See supra* note 12 and accompanying text.

[17] *See supra* note 3 and accompanying text. This portion of Office procedure provides that a claims examiner's request for a supplemental report from an attending physician should be sent to the claimant.

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' June 26, 2006 decision is affirmed.

Issued: March 12, 2008
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