United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 07-2391**
	)	**Issued: March 13, 2008**
DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Portsmouth, NH, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 24, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' July 12, 2007 nonmerit decision denying his request for further review of the merits of his claim. 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 August 21, 2006 decision denying appellant's request for reimbursement for the purchase and installation of a hot tub. Because more than one year has elapsed between the last merit decision and the filing of this appeal on September 24, 2007, 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

The Office accepted that on September 11, 1973 appellant, then a 40-year-old electrician, sustained a sprain/strain of the sacroiliac region, cervicalgia and lumbago due to shifting a cable reel at work. The Office paid appropriate compensation for periods of disability. In August 2005, the Office received a request from Maurice Gilbert & Son, Inc. for payment of $6,732.45 for removal of an existing tub and purchase and installation of a whirlpool-style hot tub. Appellant paid the $6,732.45 and submitted a claim for reimbursement.

Appellant submitted medical evidence in support of his reimbursement claim. In a July 26, 2005 note, Dr. George E. Abboud, an attending Board-certified internist, prescribed a hot tub with water jets to perform hydrotherapy for personal use. In an April 22, 2005 note, Dr. Scott M. Chase, an attending osteopath, prescribed a hot tub. On January 20, 2006 an Office medical adviser determined that the use of a hot tub at home was not "medicinal" or otherwise medically necessary for the treatment of appellant's employment-related condition.

In a February 27, 2006 decision, the Office denied appellant's request for reimbursement for the purchase and installation of a hot tub. The Office discussed 5 U.S.C. § 8103 regarding the provision of services, appliances and supplies for the treatment of employment-related medical conditions and indicated that appellant had not submitted a rationalized medical report showing that the home hot tub would be likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[2]

Appellant submitted additional arguments and medical evidence in support of his claim. In an August 21, 2006 decision, the Office affirmed its February 27, 2006 decision. The Office again indicated that appellant had not submitted sufficient rationalized medical evidence in support of his claim for reimbursement.

On March 26, 2007 the Office received an undated letter which was forwarded by appellant's congressional representative. In this letter, appellant indicated that Dr. Abboud and Dr. Chase both provided prescriptions for a hot tub. He asserted that the Office had agreed to reimburse him for the hot tub but later denied his claim for reimbursement. Appellant indicated that he had filed a reconsideration request in connection with this denial. The Office determined that his letter constituted a reconsideration request.

Appellant submitted a November 17, 2006 letter, addressed to the Office, in which Ellen Murphy, an attending nurse, briefly discussed the treatment of his back and lower extremity conditions. She stated, "I do believe that the hot tub would be beneficial, helpful in the

[2] Section 8103(a) of the Federal Employees' Compensation Act states in pertinent part: "The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation." The Board has found that the Office has great discretion in determining whether a particular type of treatment is likely to cure or give relief. 5 U.S.C. § 8103; *Vicky C. Randall*, 51 ECAB 357 (2000).

management of his back pain. Having a hot tub at home would allow him to access it as he needs to and would not require traveling to an outside facility."[3]

Appellant resubmitted the July 26, 2005 note of Dr. Abboud and the April 22, 2005 note of Dr. Chase. He submitted the findings of March 2007 x-rays of his spine and October 2006 reports in which Dr. Abboud discussed his medical condition and recommended work restrictions. Appellant also submitted a copy of the Office's February 27, 2006 decision with handwritten notes in which he discussed the features of his hot tub. He resubmitted various documents, including his prior reconsideration requests.

In a July 12, 2007 decision, the Office denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).[4]

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[5] 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.[6] 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.[7] 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.[8] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[9] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[10]

[3] In a November 17, 2006 report, Ms. Murphy indicated that she intended to dictate a letter stating her belief that a hot tub would be beneficial and might be very helpful in managing appellant's lumbar back pain Appellant also submitted other reports of Ms. Murphy which did not reference his use of a hot tub.

[4] Appellant submitted additional evidence after the Office's July 12, 2007 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[5] 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).

[6] 20 C.F.R. § 10.606(b)(2).

[7] 20 C.F.R. § 10.607(a).

[8] 20 C.F.R. § 10.608(b).

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

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

ANALYSIS

The Office accepted that on September 11, 1973 appellant sustained a sprain/strain of the sacroiliac region, cervicalgia and lumbago due to shifting a cable reel at work. Appellant requested reimbursement of $6,732.45 for the purchase and installation of a whirlpool-style hot tub. In February 27 and August 21, 2006 decisions, the Office denied appellant's claim for reimbursement indicating that the medical evidence did not show that the hot tub would be likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.

In support of his request for reconsideration of the Office's merit decisions denying his claim for reimbursement, appellant resubmitted the July 26, 2005 note of Dr. Abboud and the April 22, 2005 note of Dr. Chase. The submission of these documents does not require the reopening of appellant's claim for review of the merits. 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]

Appellant submitted November 17, 2006 documents in which Ms. Murphy, an attending nurse, stated her belief that a hot tub would be beneficial and helpful in the management of his back pain. The submission of these documents does not require reopening of appellant's claim as they do not constitute probative medical evidence[12] and therefore are not relevant to the main issue of this case, *i.e.*, whether appellant submitted sufficient medical evidence to show that the hot tub for which he requested reimbursement should be approved under the standards of 5 U.S.C. § 8103.[13] The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[14]

Appellant has not established that the Office improperly denied his request for further review of the merits of its August 21, 2006 decision under section 8128(a) of the Act, because the evidence and argument he submitted did not 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.

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[11] *See supra* note 9 and accompanying text. For the same reason, appellant's resubmission of his prior reconsideration requests would not require reopening of his claim.

[12] A nurse is not a "physician" within the definitions under the Act and thus cannot render an opinion on medical matters. *See Bertha L. Arnold*, 38 ECAB 282, 285 (1986); 5 U.S.C. § 8101(2).

[13] The Board has found that the Office has great discretion in determining whether a particular type of treatment is likely to cure or give relief. *See supra* note 2.

[14] *See supra* note 10 and accompanying text. Appellant asserted that the Office approved his claim for reimbursement prior to its February 27, 2006 formal denial. He did not provide any support for this statement and therefore this unsupported assertion is not relevant to the merit issue of this case. Appellant submitted medical reports which had not previously been considered. However, these reports are not relevant to the main issue of this case as they contain no opinion on appellant's need for a hot tub. He submitted a copy of the Office's February 27, 2006 decision with handwritten notes in which he discussed the features of his hot tub, but this nonmedical evidence also lacks relevance.

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' July 12, 2007 decision is affirmed.

Issued: March 13, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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