

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

V.S, Appellant

and

**U.S. POST SERVICE, POST OFFICE,
Pittsburgh, PA, Employer**

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**Docket No. 07-1574
Issued: May 12, 2008**

Appearances:

C. Craig Holley, Esq., for the appellant

No Appearance, for the Director

Oral Argument March 13, 2008

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge

COLLEEN DUFFY KIKO, Judge

MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 22, 2007 appellant filed a timely appeal of the February 20, 2007 decision of the Office of Workers' Compensation Programs, which denied her reconsideration request without a merit review. Because more than one year has elapsed between the most recent merit decision dated January 25, 2006 and the filing of this appeal on May 22, 2007, 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 reconsideration.

FACTUAL HISTORY

On January 22, 1997 appellant, then a 37-year-old letter carrier, filed a traumatic injury claim alleging that on January 16, 1997 she tripped on a raised cement sidewalk and fell injuring her elbow, wrist, left knee and chin. The Office accepted appellant's claim for sprained right elbow and wrist, abrasion to the left knee and contusion of the chin and her claim was expanded

to include recurrent ventral incisional hernia with surgical repair. Appellant stopped work on January 16, 1997 and returned to a limited-duty job and then stopped work on June 20, 1997. On January 23, 1998 the Office placed appellant on the periodic rolls paying compensation every 28 days at the rate of \$692.40 per week. On May 9, 2002 appellant returned to a limited-duty position and was granted disability retirement on May 24, 2003.

The Office sent appellant Form EN1032 wage and compensation disclosure form for verification of her wages and earnings during several periods of time for which she was receiving temporary total disability. On May 4, 2000 and May 16, 2001 appellant completed and signed each EN1032 form covering the preceding 15-month period and under "Part A -- Employment," appellant responded to question 2, whether she was self employed or involved in a business enterprise and indicated that she was merely an investor in a business called Treasured Friends, Inc., from March to November 2000 but had no work involvement and was not paid compensation. For the EN1032 form dated May 16, 2002, appellant responded that she was not employed, nor had she received any wages or income during this time period.

On May 9, 2002 the employing establishment offered appellant a full-time modified position as a city carrier and she began work the same date.

In an August 7, 2002 decision, the Office found that appellant had been employed as a full-time modified city carrier effective May 9, 2002, more than 60 days and that the pay in that position was equivalent to the pay rate for the position she held at the time of her injury; thus no loss of wages occurred. The Office concluded that the position of full-time modified city carrier fairly and reasonably represented appellant's wage-earning capacity.

On October 15, 2003 a federal grand jury indicted appellant on one count of making false statements to obtain compensation benefits under 18 U.S.C. § 1920. On January 13, 2004 appellant entered into a Pretrial Diversion Agreement in the U.S. District Court in the District of South Carolina admitting her guilt to one count in violation of 18 U.S.C. § 1920 for making false statements to obtain compensation benefits. Her agreement included 12 months probation. The Pretrial Diversion Agreement provided that after successfully completing the Pretrial Diversion Program and fulfilling all terms and conditions of the agreement, no prosecution for the offenses would be sought and the charges would be dismissed.

A June 28, 2004 investigative memorandum from the Office of the Inspector General advised that appellant was investigated for making false and fraudulent representations on CA-1032 forms to obtain disability benefits from the Office. The investigator noted that appellant had reported on an May 1, 2000 CA-1032 form that during the preceding 15 months she invested in a business as a shareholder but was not employed by the business. Appellant responded to the questionnaire without providing complete and accurate answers indicating that she was not actively involved in the business venture, Treasured Friends, Inc., when documents revealed that she actively participated. For the period February 4, 1999 to May 9, 2002, she was actively involved in the business, Treasured Friends, Inc. and for the same period appellant received \$92,597.86 in workers' compensation benefits.

In an August 27, 2004 decision, the Office found that appellant forfeited monetary compensation for the period February 4, 1999 to May 9, 2002 on the grounds that she knowingly

failed to report her self-employment on CA-1032 forms as required under 5 U.S.C. § 8106(b) of the Federal Employees' Compensation Act.

In an August 27, 2004 letter, the Office made a preliminary determination that an overpayment of compensation occurred in the amount of \$92,597.86. The Office determined that the overpayment occurred because appellant failed to report her self-employment on Forms CA-1032 covering the period February 4, 1999 to May 9, 2002. The Office also determined that appellant was at fault in the creation of the overpayment of \$92,597.86 as she knowingly withheld information on the CA-1032 form regarding her self-employment to ensure her compensation would not stop or change.

In a decision dated October 4, 2004, the Office finalized its preliminary determination with regard to the overpayment of \$92,597.86. The Office determined that the overpayment occurred because appellant failed to report her self-employment on Forms CA-1032 covering the period February 4, 1999 to May 9, 2002. The Office also found appellant at fault in creating the overpayment as she knowingly withheld information on the Form CA-1032 regarding her self-employment to ensure her compensation would not stop or change. The Office requested that appellant remit the entire overpayment immediately or contact the Office to make appropriate arrangements for recovery of the overpayment.

On September 20, 2004 appellant requested an oral hearing. On October 18, 2005 she withdrew her request for an oral hearing and requested a review of the written record. Appellant submitted overpayment questionnaires dated September 20, 2004 and November 12, 2005 and supporting financial documentation. In a brief dated December 29, 2005, appellant through her attorney asserted that the forfeiture should be eliminated or substantially reduced because she was never convicted of fraud in connection with a claim for compensation and the indictment against her was dismissed by the court on January 18, 2005. She submitted an order of the Court dated January 18, 2005 dismissing the October 15, 2003 indictment against her without prejudice.

By decision dated January 25, 2006, the hearing representative affirmed the August 27, 2004 decision as modified. The hearing representative noted that the period of the forfeiture should be modified to February 4, 1999 to May 16, 2001, as the evidence supported that appellant's involvement in the business Treasured Friends, Inc., ceased by the time she signed the CA-1032 form on May 16, 2001. The hearing representative noted that appellant resigned from the corporation on November 1, 2000. It was further noted that, since the period of forfeiture was modified to February 4, 1999 to May 16, 2001, the overpayment amount decreased to \$63,872.78.

On January 24, 2007 appellant through her attorney, requested reconsideration. She asserted that she submitted sufficient evidence to warrant further reduction of the financial penalty and that her financial status warranted a lower repayment amount extended over a longer period of time. Appellant asserted that since her indictment was dismissed on January 18, 2005, the previous Office decisions were in error and should be rescinded. She submitted a 2000 federal personal income tax declaration and a 2001 South Carolina business personal property return for Treasured Friends, Inc. Appellant submitted a notarized document dated September 27, 2001, which indicated that she resigned as Vice President and Director of

Treasured Friends, Inc., as of November 1, 2000. Also submitted was a letter from Carolyn Malphrus, appellant's mother, dated October 18, 2005, who indicated that she and appellant's husband made and sold candles; however, appellant was not involved in the business. Appellant submitted fee petitions from her prior attorney, Paul H. Felser, dated January 13 and May 17, 2006 and letters from him requesting supplemental file information dated February 2 and July 3, 2006. Also submitted were medical reports from Dr. Gregory W. Niemer, a Board-certified internist, dated April 17, 2006 and from Dr. Sarah H. Brown, a Board-certified family practitioner, dated January 10, 2007. Appellant submitted a financial resources questionnaire dated January 22, 2007 and bank statements from South Carolina Federal Credit Union and Navy Federal Credit Union.

By decision dated February 20, 2007, the Office denied appellant's reconsideration request on the grounds that her letter neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

LEGAL PRECEDENT

Under section 8128(a) of the Act,¹ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,² which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law;

“(ii) Advances a relevant legal argument not previously considered by the Office;
or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office.]”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.³

ANALYSIS

Appellant submitted a January 24, 2007 request for reconsideration which neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office.

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.606(b).

³ *Id.* at § 10.608(b).

Appellant's attorney asserted that she submitted sufficient evidence to warrant further reduction of the financial penalty and that her financial status warranted a lower repayment amount extended over a longer period of time. Her letter did not show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Furthermore, appellant's assertion that her financial status warranted a lower repayment amount over a longer period of time pertains to the final overpayment determination. The Board notes that the guidelines set forth in section 10.440(b) of the implementing federal regulations,⁴ provide that a claimant can only appeal an overpayment decision to the Board and specifically precludes appellant from exercising the option of reconsideration under 5 U.S.C. § 8128(a). Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted a 2000 federal personal income tax declaration and a 2001 South Carolina business personal property return for Treasured Friends, Inc. She also submitted a financial resources questionnaire dated January 22, 2007 and bank statements from South Carolina Federal Credit Union and Navy Federal Credit Union. However, the financial information is similar to evidence previously submitted including overpayment questionnaires dated September 20, 2004 and November 12, 2005 and supporting bank statements already contained in the record⁵ and were previously considered by the Office in its January 25, 2006 decision. Therefore, the Office properly found that this evidence did warrant reopening the claim for a merit review.

Appellant submitted a notarized document dated September 27, 2001, which indicated that she resigned as vice president and director of Treasured Friends, Inc., as of November 1, 2000. She also submitted a letter from her mother dated October 18, 2005, who indicated that appellant was not involved in the candle business. However, this too is duplicative of evidence previously submitted and considered by the Office in decisions dated August 27, 2004 and January 25, 2006.⁶ Therefore, this evidence is insufficient to require the Office to reopen the claim for a merit review.

Appellant submitted fee petitions from her prior attorney, Mr. Felser, dated January 13 and May 17, 2006 and letters from him requesting supplemental file information. However, these documents are not relevant because they do not specifically address the issue of the forfeiture of compensation and the forfeiture period of February 4, 1999 to May 16, 2001. Likewise, appellant submitted medical reports from Drs. Niemer and Brown; however, these reports are also not relevant because they do not pertain to the issue of the forfeiture of compensation and the forfeiture period. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

⁴ *Id.* at § 10.440(b).

⁵ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; see *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁶ *Id.*

Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did she submit relevant and pertinent evidence not previously considered by the Office.⁷

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her January 24, 2007 request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 20, 2007 is affirmed.

Issued: May 12, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁷ 20 C.F.R. § 10.606(b).