United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
	)	**Docket No. 08-1549**
and	)	**Issued: August 21, 2009**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Indianapolis, IN, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 1, 2008 appellant filed a timely appeal from a February 5, 2008 decision of the Office of Workers' Compensation Programs which denied her reconsideration request. Because more than one year has elapsed between the Office's most recent merit decision dated January 16, 2007 and the filing of this appeal on May 1, 2008, the Board lacks jurisdiction to review the merits of her 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 September 29, 1989 appellant, then a 33-year-old mark-up clerk, filed an occupational disease claim alleging that she developed plantar fasciitis as a result of prolonged standing and walking at work. She became aware of her condition on November 28, 1987 and she stopped work on December 10, 1987. The Office accepted appellant's claim for aggravation of preexisting plantar fasciitis of the right foot and mild bilateral reflex sympathetic dystrophy of

the legs. It authorized a plantar fasciotomy performed on April 29, 1989 and bilateral decompression of the tibial tarsal tunnels performed on June 2, 1990.

After the claim was filed and accepted, appellant was treated for reflex sympathetic dystrophy of the bilateral lower extremities and fasciitis of the right foot. The Office also developed the medical evidence. On March 22, 1996 appellant was placed on the periodic rolls.

Appellant came under the treatment of Dr. John Tzucker, a Board-certified family practitioner, on February 18, 2003, for plantar fasciitis and reflex sympathetic dystrophy. Dr. Tzucker noted a history of her condition and subsequent treatment and opined that she was totally disabled and could not work for more than 15 minutes to an hour. On October 8, 2003 he treated appellant for seizures or pseudo seizures caused by pain, anger and depression related to previous work-related nerve damage.

Thereafter, in the course of developing the claim, the Office referred appellant to several second opinion physicians and also to an impartial medical examiner.

On December 1, 2006 the Office issued a notice of proposed termination of compensation and medical benefits on the grounds that the second opinion orthopedist determined that appellant had no residuals of her accepted aggravation of preexisting plantar fasciitis and the impartial medical examiner established that she had no residuals of the work-related mild bilateral reflex sympathetic dystrophy of the legs.[1]

On April 5, 2006 appellant requested reconsideration and noted that her condition had worsened and she developed eye problems, dry and clenched mouth and dental issues as a result of the reflex sympathetic dystrophy syndrome. She submitted a report from Dr. Tzucker dated December 25, 2006 who disagreed with Dr. French, the referee physician, as to whether she had reflex sympathetic dystrophy. Dr. Tzucker opined that appellant's examination revealed differences in skin temperatures, thinning hair and hypersensitivity to touch in the lower extremities, which were symptoms of reflex sympathetic dystrophy. He concurred with the Office physicians that appellant no longer had plantar fasciitis. Dr. Tzucker opined that appellant was totally disabled and could not return to work as a mark-up clerk because it would exacerbate her pain and disrupt the work environment if she had pseudo seizures.

In a January 16, 2007 decision, the Office terminated appellant's compensation benefits effective that day.

On January 14, 2008 appellant requested reconsideration and noted that her life was devastated by her work injuries including plantar fasciitis, tarsal tunnel syndrome and reflex sympathetic dystrophy. She indicated that she developed baldness, lost teeth, was unable to

[1] Appellant was referred to a referee physician, Dr. Richard French, a Board-certified neurologist, to resolve the conflict in opinion between her physician, Dr. Tzucker and the second opinion physician, Dr. Arthur Rosen, a neurologist, as to whether she has reflux sympathetic dystrophy of the lower extremities and whether it caused disability. At this time, Dr. Tzucker did not indicate that she had plantar fasciitis. On April 18, 2006 Dr. French opined that appellant did not have reflex sympathetic dystrophy nor was it active. He did not believe further diagnostic testing was necessary. Dr. French indicated that appellant could not return to work as a mark-up clerk due to nonwork-related psychological restrictions not physical restrictions.

urinate and had arthritis and a seizure disorder. Appellant noted she has been homeless since 2007 and was hospitalized and fell into a diabetic coma with renal failure. She believed that Office doctors lied about her condition. Appellant submitted a January 12, 2008 report from Dr. Tzucker who treated her on January 11, 2008 and found her symptoms compatible with reflex sympathetic dystrophy specifically noting that she had continuing pain, hyperesthesia, cold lower legs despite socks, allodynia to the light and to moderate touch, weakness of gait and decreased leg hair. Dr. Tzucker found no signs of addiction to pain medicine and advised her mental distress increased over time. He opined that as appellant's treating physician he was better able to understand her history and the evolution of her condition than Office referral physicians who only saw her briefly.

In a February 5, 2008 decision, 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 Federal Employees' Compensation Act,[2] 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,[3] 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 that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(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.[4]

ANALYSIS

Appellant's January 14, 2008 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law.

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b).

[4] *Id*. at § 10.608(b).

Additionally, she did not advance a relevant legal argument not previously considered by the Office.

On reconsideration, appellant contended that she was devastated by work injuries that caused plantar fasciitis, tarsal tunnel syndrome and reflex sympathetic dystrophy. She noted also developing ailments as a result of her work injuries including baldness, loss of teeth, urinary incontinence, severe arthritis and a seizure disorder. Appellant believed the Office doctors lied about her visits and condition. However, her letter did not show how the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by it. It had previously considered appellant's assertions about the cause of her condition and she did not set forth a particular point of law or fact that the Office had not considered or establish that it had erroneously interpreted a point of law. 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 medical report from Dr. Tzucker dated January 12, 2008. Dr. Tzucker disagreed with the Office referral physician's and opined that appellant's symptoms including pain, hyperesthesia, cold legs, allodynia to light and moderate touch, weakness of gait and decreased leg hair, were compatible with reflex sympathetic dystrophy and not diabetic peripheral neuropathy. He opined that as appellant's treating physician he was better able to understand her history and the evolution of her condition than Office referral physicians who saw her only briefly. This report is insufficient to require a merit review as it is similar and essentially repetitive of Dr. Tzucker's prior reports of record that were previously considered by the Office in its decisions dated December 1, 2006 and January 16, 2007.[5] Additionally, his report is also not relevant because it has been held that reports from a physician who was on one side of a medical conflict, that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.[6] Therefore, the Office properly determined that this evidence, while new, was not relevant and did not constitute a basis for reopening the case for a merit review.

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 14, 2008 request for reconsideration.[7]

On appeal, appellant through her attorney asserted that Dr. Tzucker's January 12, 2008 report constituted relevant and pertinent evidence not previously considered by the Office and,

[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] *See, e.g., Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990).

[7] With her request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

therefore, she was entitled to a merit review. However, as noted, Dr. Tzucker's January 12, 2008 report is similar to his other reports, specifically reports dated June 8, 2004 and December 25, 2006, which were previously considered by the Office and found insufficient.[8] For this reason his January 12, 2008 report is not considered relevant and pertinent new evidence.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 21, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[8] Appellant's attorney cites to *R.B.*, Docket No. 08-1027 (issued September 12, 2008), to support that a new report from a physician who previously provided opinions to the Office is sufficient to require it to reopen the claim for a merit review. However, in *R.B.* the Board noted that the medical report in question offered additional reasoning for the physician's opinion on causal relationship such that it was not considered to be repetitive. As noted in the text of this decision, Dr. Tzucker's January 12, 2008 report was found to be similar to his prior reports.