United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 08-2467**
	)	**Issued: August 5, 2009**
DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Clayton, GA, Employer	)	

Appearances:
Cathy S. McKay, 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 September 15, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated January 15, July 8 and August 6, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant was not entitled to augmented compensation based on claiming his daughter as a dependent under section 8110 of the Federal Employees' Compensation Act; and (2) whether the Office properly refused to reopen appellant's case for reconsideration of his claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

On April 9, 1984 appellant, a 40-year-old forest technician, felt something catch in his lower back when he stepped out of a truck. He filed a claim for benefits, which the Office accepted for ruptured disc at L4-5 and L5-S1. Appellant underwent lower back surgery on April 30, 1984 to ameliorate the condition. He has not returned to work since that time. The

Office paid appellant compensation for total disability at the 3/4 rate based on him claiming his wife, son and two daughters as dependents.

In a Form EN1032 dated October 4, 2004, appellant advised the Office that his wife had died on July 24, 2004, and his three children had all attained the age of 18. In EN1032 forms dated December 14, 2005 and September 20, 2006, he advised the Office that he was claiming one of his adult daughters as a dependent. Appellant continued to receive compensation at the 3/4 rate throughout this period.

By letter dated September 21, 2007, the Office informed appellant that it was reducing his total disability compensation to the 66 and 2/3 rate because the daughter he claimed as a dependent had attained the age of 18 years on October 3, 2005.[1] It stated that appellant was eligible for compensation at the 75 percent rate only if the child he claimed was unmarried and incapable of self-support. The Office advised appellant that in order to maintain his daughter's dependent status he was required to prove that she was incapable of self-support by submitting a medical report from the attending physician which fully described the mental or physical disability which caused the incapacity for self-support.

In an Office worksheet dated November 13, 2007, the Office indicated that it was reducing appellant's compensation check for the period October 28 to November 24, 2007 to the 66 2/3 rate because he had no dependents as of October 3, 2005.[2]

By letter dated December 13, 2007, appellant informed the Office that his unmarried, 26-year-old daughter living with him had a mental disability, bipolar disorder, and was incapable of self-support. He stated that he was submitting a statement from Carol Orr, his daughter's attending nurse at the mental health clinic where she was being treated for her disorder on a regular basis.[3]

By decision dated January 15, 2008, the Office denied appellant's claim for augmented compensation, finding that the medical evidence he submitted failed to demonstrate that his daughter was incapable of self-support.

On January 31, 2008 appellant requested an oral hearing, which was held on April 30, 2008. He submitted a one-sentence statement dated January 31, 2008 from Dr. Albert Vernon Dixon, Board-certified in psychiatry and neurology, who stated that appellant resided with her father and was not able to work to support herself due to the severity of her mental illness.

[1] The Office mistakenly stated appellant's daughter's birth date as October 3, 1987. It subsequently amended appellant's birth date to the correct date, October 3, 1981, which appellant listed on his December 14, 2005 and September 20, 2006 EN1032 forms.

[2] *Id.*

[3] The Board notes that the only statement in the record from Ms. Orr was dated October 7, 2004, in which she stated that appellant's daughter had been diagnosed with a bipolar disorder condition, with psychotic features. Ms. Orr indicated that appellant's daughter was receiving regular treatment at a medical clinic and lived with her father and her sister.

In a letter to the Office dated June 2, 2008, appellant stated that his daughter was treated by Dr. Larry Bennett, a specialist in internal medicine, on November 1, 2001, because she had become delusional, talking to God and the devil, was pacing the floor, and was experiencing involuntary jerking movements. Appellant's daughter was hospitalized from November 2 to 19, 2001 at Laurelwood Mental Health Hospital where she was diagnosed with bipolar disorder and schizophrenia. She received treatment and her condition stabilized. However, appellant stated that his daughter requires constant supervision and accompaniment, is incapable of handling her personal affairs and receives regular treatment from Ms. Orr and Dr. Dixon. He stated that his daughter is totally dependent on him, physically and financially.

By decision dated July 8, 2008, an Office hearing representative affirmed the June 2, 2008 decision.

By letter dated July 18, 2008, appellant requested reconsideration. He essentially reiterated the arguments he stated in his June 2, 2008 letter and advised that he was submitting all of his daughter's medical records. The Office did not receive any additional medical evidence pertaining to appellant's daughter.

By decision dated August 6, 2008, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

The basic rate of compensation under the Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined by the Act, he or she is entitled to have the basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.[4] An unmarried child living with the employee is a dependent if he or she is under 18 years of age or if he or she is under 23 years of age and is a full-time student.[5] A husband is considered the employee's dependent if he is a member of the same household; or if she is receiving regular contributions from the employee for his support; or if the employee has been ordered by a court to contribute to his support.[6] In determining dependency under the Act, the decisive test is whether the person for whom benefits are claimed as a dependent of the employee, in fact, looked to and relied, in whole or in part, upon the contributions given by the employee as a means of maintaining or helping to maintain a customary standard of living.[7]

Section 8110(a)(3)(b) of the Act[8] which provides for augmented compensation defines a dependent, in pertinent part, as an unmarried child, while living with the employee or receiving

[4] 5 U.S.C. §§ 8105(a), 8110(b).

[5] *Id*. at §§ 8110(a)(3), 8101(17).

[6] *Id*. at § 8110(a)(2).

[7] *Nancy J. Masterson*, 52 ECAB 507 (2001); *Helyn E. Girmann*, 11 ECAB 557 (1960).

[8] 5 U.S.C. §§ 8101-8193.

regular contributions from the employee, who is over 18 years of age and incapable of self-support because of physical or mental disability.[9] The employee may establish that his or her child, who has turned 18 years of age, is incapable of self-support by submitting a medical report from the child's physician describing the mental or physical disability which caused the child's incapacity for self-support.[10]

Section 10.537 of the implementing regulations provides that at least twice each year, the Office will ask an employee who receives compensation based on a child's physical or mental inability to support himself or herself to submit a medical report verifying that the child's medical condition persists and that it continues to preclude self-support.[11]

ANALYSIS -- ISSUE 1

Appellant received compensation at the augmented rate for employees with dependents through July 24, 2004, the date his wife died. He continued to receive compensation at the augmented, 3/4 rate based on claiming his unmarried daughter, who was living with him, as a dependent until November 24, 2007. The Office adjusted appellant's compensation to the 66 and 2/3 rate after being informed that his daughter was 18 years old and finding that he had failed to submit medical evidence sufficient to establish that she was incapable of self-support due to her bipolar medical condition. Appellant submitted an October 2004 report from Ms. Orr; however, this report merely stated that his daughter was being treated for bipolar disorder with psychotic features and that she lived with her father. Further, this report does not constitute medical evidence under section 8101(2) because Ms. Orr is a nurse and is not a physician. The Office properly found that appellant was not entitled to augmented compensation in its January 15, 2008 decision.

Appellant requested a hearing and submitted a letter asserting that his daughter's bipolar condition had rendered her incapable of self-support since she was hospitalized in 2001. The only medical evidence he submitted; however, was Dr. Dixon's January 31, 2008 summary report which noted that appellant's daughter resided with her father and was not capable of supporting herself due to the severity of her mental illness. This report did not indicate that appellant's daughter relied in whole or in part, upon the contributions given by appellant as a means of maintaining or helping to maintain a customary standard of living. Dr. Dixon's report is conclusory in nature and does not provide sufficient factual information to buttress his conclusion. He did not provide a diagnosis of appellant's condition and most importantly did not explain how she was disabled such that she was incapable of self-support as of November 1, 2001. Thus, the Board finds that appellant did not submit medical evidence sufficient to meet the criteria for his daughter to be considered a dependent.

[9] 5 U.S.C. § 8110(a)(3)(B).

[10] *Teresa B. Tencati*, 21 ECAB 398, 402 (1970).

[11] 20 C.F.R. § 10.537.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[12] 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.[13]

ANALYSIS -- ISSUE 2

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law, he has not advanced a relevant legal argument not previously considered by it and he has not submitted relevant and pertinent evidence not previously considered by the Office. His reconsideration request failed to show that it erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. It did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.[14]

CONCLUSION

The Office properly determined that appellant was not entitled to augmented compensation. The Board finds that the Office properly refused to reopen appellant's case for reconsideration on the merits of her claim under 5 U.S.C. § 8128(a).

[12] 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

[13] *Howard A. Williams,* 45 ECAB 853 (1994).

[14] On appeal, appellant has submitted new evidence. However, the Board cannot consider new evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy,* 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 501(c).

ORDER

IT IS HEREBY ORDERED THAT the August 6, July 8 and January 15, 2008 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: August 5, 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