United States Department of Labor
Employees' Compensation Appeals Board

G.R., Appellant	)	
and	)	**Docket No. 09-561**
	)	**Issued: December 11, 2009**
DEPARTMENT OF AGRICULTURE, RURAL HOUSING SERVICE, St. Louis, MO, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 23, 2008 appellant, through her attorney, filed a timely appeal from a November 5, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. As there is no merit decision within one year of the filing date of this appeal, the Board lacks jurisdiction to review the merits of this case 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 further merit review of her claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

On June 12, 2007 appellant, then a 51-year-old payment assistant processor, filed an occupational disease claim alleging that she sustained pain radiating from her upper body and neck into her lower back and left leg due to factors of her federal employment. She related that she experienced the pain after prolonged sitting.

By decision dated September 19, 2007, the Office denied appellant's claim on the grounds that she did not establish a medical condition due to the accepted work factors. It noted that the medical evidence did not address the issue of whether she sustained a diagnosed condition causally related to her federal employment duties.

On October 14, 2007 appellant requested reconsideration. She argued that her nonergonomic workstation caused pain and physical stress and described the problems with her workstation.

By decision dated November 28, 2007, the Office denied modification of its September 19, 2007 decision. It noted that the issue was medical in nature and concluded that the medical evidence did not show that she sustained a condition due to her work duties.

On October 10, 2008 appellant again requested reconsideration.[1] She described the medical evidence that she submitted with her request for reconsideration. Appellant argued that sitting, answering the telephone, data entry and twisting aggravated her preexisting condition as her workstation was not ergonomic. She submitted January 24, 2005 and August 8, 2008 magnetic resonance imaging (MRI) scan studies of her cervical spine and August 5, 2008 x-rays of her thoracic and lumbar spine. Appellant also submitted reports dated June 25 and September 28, 2007 from Dr. Michael Butler, a chiropractor. On June 25, 2007 Dr. Butler diagnosed disc degeneration. On September 28, 2007 he diagnosed fasciitis and facet syndrome. In a report dated October 6, 2008, Dr. Nadim T. Masrallah, a chiropractor, diagnosed cervical disc displacement, lumbar disc syndrome, carpal tunnel syndrome and brachial neuritis/radiculitis.

In a statement dated June 24, 2008, appellant described a work injury on May 14, 2008. In a form report dated May 28, 2008, Dr. Michael J. Spezia, an osteopath, listed the date of injury as May 15, 2008. He diagnosed neck sprain and checked "yes" that the condition was caused or aggravated by employment.[2]

Appellant further submitted the results of a September 27, 2007 workstation evaluation. In progress reports dated March 7 and April 11, 2005, Dr. Daniel J. Scodary, a Board-certified neurosurgeon, discussed her L5-S1 discectomy.

By decision dated November 5, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant reopening her case under section 8128 for further merit review.

[1] The record indicates that on May 20, 2008 appellant filed a claim for a traumatic injury to her neck and back occurring on May 14, 2008.

[2] Dr. Spezia's form report is largely illegible.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that 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) submit relevant and pertinent new evidence not previously considered by the Office.[4] 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.[5] 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.[6]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[7] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[8] While the 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.[9]

ANALYSIS

Appellant filed a claim alleging that prolonged sitting at work caused pain from her neck and upper body radiating into her back and leg. The Office accepted as factual the identified work factor but denied her claim after finding that the medical evidence was insufficient to establish that she sustained a diagnosed condition causally related to her employment duties.

On October 10, 2008 appellant requested reconsideration. She submitted the results of diagnostic studies including x-rays of her lumbar and thoracic spine and cervical MRI scan studies. Appellant also submitted progress reports dated March 7 and April 11, 2005 from Dr. Scodary relevant to her L5-S1 discectomy. The progress reports and diagnostic studies, however, are not relevant to the pertinent issue of whether she sustained a diagnosed condition

[3] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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."

[4] 20 C.F.R. § 10.606(b)(2).

[5] *Id*. at § 10.607(a).

[6] *Id*. at § 10.608(b).

[7] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[8] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[9] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

causally related to the performance of her work duties. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.[10]

Appellant further submitted reports from two chiropractors, Dr. Butler and Dr. Masrallah. Section 8101(2) of the Act provides that the "term 'physician'" includes chiropractors only to the extent that their reimbursable services are limited "to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist…."[11] A chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray evidence.[12] Neither, Dr. Butler nor Dr. Masrallah diagnosed a subluxation as demonstrated by x-ray and thus are not considered "physicians" under the Act. Their reports, consequently, are insufficient to warrant reopening appellant's case for merit review.

In a form report dated May 28, 2008, Dr. Spezia diagnosed neck sprain and checked "yes" that the condition was caused or aggravated by work. He referred to the date of injury, however, as May 15, 2008 and thus his opinion is not relevant to the question of whether appellant sustained an occupational disease.

Appellant submitted a statement dated June 24, 2008 regarding an alleged traumatic injury on May 14, 2008 and the results of a September 27, 2007 workstation evaluation. The question of whether she sustained a diagnosed condition due to factors of her federal employment, however, is medical in nature. As discussed, evidence that does not address the particular issue involved does not warrant reopening a case for merit review.[13]

In her October 10, 2008 request for reconsideration, appellant argued that sitting and performing her job duties at a workstation that was not ergonomic aggravated her condition. Her lay opinion, however, is not relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.[14]

Appellant 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 submit new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

[10] *Johnnie B. Causey*, 57 ECAB 359 (2006).

[11] 5 U.S.C. § 8101(2); *see also Michelle Salazar*, 54 ECAB 523 (2003).

[12] The Office's regulations, at 20 C.F.R. § 10.5(bb), defines subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See Mary A. Ceglia*, 55 ECAB 626 (2004).

[13] *Freddie Mosley*, 54 ECAB 255 (2002).

[14] *Gloria J. McPherson*, 51 ECAB 441 (2000).

CONCLUSION

The Board finds that the Office properly denied appellant's request for further merit review of her claim under 5 U.S.C. § 8128.

ORDER

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

Issued: December 11, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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