United States Department of Labor
Employees' Compensation Appeals Board

B.S., Appellant	)	
and	)	**Docket No. 08-2168**
	)	**Issued: February 13, 2009**
U.S. POSTAL SERVICE, AIRMAIL CENTER, Seattle, WA, Employer	)	

Appearances:
Norman R. McNulty, Jr., 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 4, 2008 appellant filed a timely appeal from a May 8, 2008 decision of the Office of Workers' Compensation Programs denying her request for reconsideration. Because more than one year has elapsed from the last merit decision dated March 29, 2007 to the filing of this appeal, 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 abused its discretion in denying appellant's request for reconsideration.

FACTUAL HISTORY

This is the second appeal in this case.[1] By decision dated August 4, 2006, the Board affirmed a November 17, 2005 Office decision which upheld the termination of appellant's compensation and medical benefits.[2] The facts of the previous Board decision are incorporated herein by reference.

By decision dated March 29, 2007, the Office denied modification of its termination of appellant's compensation and medical benefits on the grounds that the evidence did not establish any continuing disability or medical condition after October 6, 2003 causally related to her December 10, 2002 employment-related thoracic strain.[3]

On March 25, 2008 appellant requested reconsideration and submitted new medical evidence from Dr. William J. Morris, a Board-certified neurosurgeon. She asserted that, "By not obtaining Dr. Morris' report before referring [her] to Dr. Smith and Dr. Hubbard, the Office breached its duty to develop the record in an adequate manner." In a February 14, 2005 report, Dr. Morris reviewed the medical history and provided findings on physical examination. He diagnosed shoulder, neck, thoracic and low back pain and cervical spinal stenosis. Dr. Morris stated that much of appellant's low back, thoracic and neck pain was related to deconditioning and musculoskeletal discomfort. He stated that appellant had a congenitally narrow spinal canal in the upper to mid cervical region with a herniated disc at C3-4. Dr. Morris noted that appellant returned to light-duty work following her December 2002 thoracic strain but stopped work in August 2003 and did not return to work.

By decision dated May 8, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence was not sufficient to warrant further merit review of her claim.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[4] does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against

[1] *See* Docket No. 06-729 (issued August 4, 2006). On December 22, 2002 appellant, then a 45-year-old mail handler dock technician, filed a traumatic injury claim alleging that on December 10, 2002 she sustained a back injury while pushing a mail hamper. The Office accepted her claim for a thoracic spine strain.

[2] The Office terminated appellant's compensation and medical benefits by decision dated October 6, 2003. It upheld its termination decision in subsequent decisions dated July 19 and October 14, 2004, November 17, 2005 and March 29, 2007.

[3] On March 13, 2007 appellant was evaluated by an impartial medical specialist, Dr. Ronald Hubbard, in order to resolve a conflict in the medical opinion evidence between Dr. David Judish, her attending physician, and Dr. David Smith, an Office referral physician. Dr. Hubbard determined that she had no continuing disability or medical condition causally related to her December 10, 2002 work-related thoracic strain.

[4] 5 U.S.C. §§ 8101-8193.

compensation.[5] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[6]

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[7] 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.[8] 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.[9] 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.[10]

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[11] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[12]

ANALYSIS

In a February 14, 2005 report, Dr. Morris diagnosed shoulder, neck, thoracic and low back pain and cervical spinal stenosis. As noted, only a thoracic strain was accepted by the Office as related to the December 10, 2002 work incident when appellant pushed a mail hamper. Dr. Morris stated that appellant had a congenitally narrow spinal canal in the upper to mid cervical region with a herniated disc at C3-4. However, he did not provide medical rationale explaining the cause of the herniated disc. Dr. Morris stated that much of appellant's low back, thoracic and neck pain were related to deconditioning and musculoskeletal discomfort but did not explain how the deconditioning and musculoskeletal problems were related to her accepted thoracic strain. Lacking a well-reasoned opinion on the relationship of appellant's cervical, low back and shoulder conditions to her December 10, 2002 employment-related thoracic strain, the

[5] 5 U.S.C. § 8128(a).

[6] *Annette Louise*, 54 ECAB 783, 789-90 (2003).

[7] Under section 8128(a) of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his or her] own motion or on application." *See supra* note 5.

[8] 20 C.F.R. § 10.606(b)(2).

[9] *Id*. at § 10.607(a).

[10] *Id*. at § 10.608(b).

[11] *D.I.*, 59 ECAB __ (Docket No. 07-1534, issued November 6, 2007); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

[12] *D.K.*, 59 ECAB __ (Docket No. 07-1441, issued October 22, 2007); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

February 14, 2005 report from Dr. Morris does not constitute relevant and pertinent new evidence not previously considered by the Office.

Appellant did not submit evidence or argument that showed that the Office erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered or constituted relevant and pertinent new evidence not previously considered by the Office. Therefore, the Office properly denied her request for reconsideration.

On appeal, appellant asserts that Dr. Morris' February 14, 2005 report constitutes relevant and pertinent new evidence on the issue of whether she had a cervical spine condition causally related to her December 10, 2002 work-related thoracic strain. As noted, Dr. Morris did not provide a rationalized medical opinion as to how appellant's cervical spine condition was causally related to her 2002 employment injury. Therefore, this report does not constitute relevant and pertinent new evidence. Appellant argued that the reports of Dr. Smith and Dr. Hubbard, the Office referral physician and the impartial medical specialist respectively, were not based on a complete and accurate medical history because the Office did not obtain a copy of Dr. Morris' February 14, 2005 report and provide it to them.[13] However, the employee has the burden of submitting evidence necessary for the establishment of his or her claim.[14] The February 14, 2005 report of Dr. Morris was not of record at the time of the evaluations of Dr. Smith and Dr. Hubbard. It was appellant's responsibility to provide medical evidence from her physicians that she wanted the Office to consider. Therefore, her argument that the Office should have provided a copy of the February 15, 2005 report to Dr. Smith and Dr. Hubbard does not constitute relevant and pertinent legal argument not previously considered by the Office.

CONCLUSION

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration.

[13] Appellant stated that Dr. Judish, her attending physician, referenced Dr. Morris in his reports.

[14] *See* 20 C.F.R. § 10.115(f).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 8, 2008 is affirmed.

Issued: February 13, 2009
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