United States Department of Labor
Employees' Compensation Appeals Board

G.S., Appellant	)	
and	)	**Docket No. 08-2536**
	)	**Issued: June 4, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Wichita, KS, Employer	)	

Appearances:
Steven D. Gough, 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 September 29, 2008 appellant filed a timely appeal of the July 30, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying merit review of its July 27, 2007 decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this appeal.[1]

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[1] Because more than one year had elapsed between the date of the Office's most recent merit decision, dated July 27, 2007, and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim. 20 C.F.R. § 501.3(d)(2).

FACTUAL HISTORY

Appellant's December 16, 2003 traumatic injury claim was accepted for a herniated disc at L4-5 and radiculopathy of the right leg. She underwent approved right L4-5 laminectomy with nerve root decompression on February 18, 2004.

On November 27, 2006 appellant requested a schedule award. In support of her request, she provided a July 14, 2005 functional capacity evaluation, reflecting that she was functioning at a sedentary level. Appellant also submitted an October 31, 2006 report from Dr. Bruce E. Barclay, Board-certified in the field of family medicine, who stated that, after undergoing a microdiscectomy on February 18, 2004, appellant continued to struggle with low back pain, as well as lower extremity damage. Dr. Barclay opined that she had reached maximum rehabilitation potential and that "any residual deficits would be permanent."

The Office referred appellant to Dr. Michael H. Munhall, a Board-certified physiatrist, for an examination and an opinion as to whether appellant had a permanent impairment of a scheduled member as a result of her accepted injury according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). In a June 14, 2007 report, Dr. Munhall diagnosed low back and bilateral leg pain. He stated that appellant reached maximum medical improvement on August 2, 2005, when she was released from care by her neurosurgeon. Dr. Munhall opined that appellant's clinical history was too unstable to allow determination of an impairment rating. He noted that she might have residual nerve root scarring and arachnoiditis, but that her examination, which was inhibited by pain and fear, was inconclusive of specific nerve root deficits.

The Office routed the file to the district medical adviser for review and an opinion as to whether appellant had permanent impairment of a scheduled member as a result of her accepted injury. On July 14, 2007 the district medical adviser noted Dr. Munhall's conclusion that he was unable to offer an impairment rating based on the fifth edition of the A.M.A., *Guides*. He stated that, based on Dr. Munhall's report, appellant was not eligible for an impairment rating for her right or left extremity due to permanent residuals of her accepted conditions affecting the lumbar spine.

By decision dated July 27, 2007, the Office denied appellant's request for a schedule award. It found that the evidence was insufficient to establish that she had sustained a permanent impairment of a scheduled member due to her accepted work injury.

On July 21, 2008 appellant, through her representative, requested reconsideration of the July 27, 2007 decision. The representative stated his belief that Dr. Munhall had not conducted a proper examination of appellant. He contended that appellant did have an adequate clinical history, and that a proper examination would show her entitlement to a schedule award. The representative indicated that he would be forwarding a physician's report in support of his request for reconsideration. Appellant did not submit any new medical evidence in support of his request for reconsideration.

By decision dated July 30, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant merit review. It found that she had failed to submit any new or relevant evidence, and had not advanced any new legal contentions that have not previously been considered.

LEGAL PRECEDENT

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[2] This section provides that the application for reconsideration must be submitted in writing, and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[3]

Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements the Office will deny the application for reconsideration without reopening the case for a review on the merits.[4]

ANALYSIS

In his July 21, 2008 letter requesting reconsideration, appellant's counsel stated his belief that the Office's second opinion physician had not conducted a proper examination of appellant. He contended that appellant had an adequate clinical history, and that a proper examination would show her entitlement to a schedule award. Although counsel disputed the probative value of Dr. Munhall's report, he neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. 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).

Appellant's request for reconsideration indicated that appellant would submit additional medical evidence supporting her schedule award request. However, no additional medical evidence was submitted prior to the issuance of the Office's July 30, 2008 decision. Therefore, appellant did not meet the third requirement listed in section 10.606(b) by submitting relevant and pertinent new evidence not previously considered by the Office.

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 July 21, 2008 request for reconsideration.

[2] 20 C.F.R. § 10.608(a).

[3] *Id.* at § 10.608(b)(1) and (2).

[4] *Id.* at § 10.608(b).

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).[5]

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 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

[5] The Board notes that appellant submitted additional evidence after the Office rendered its July 30, 2008 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Therefore, this new evidence cannot be considered by the Board on appeal. Appellant may submit this evidence to the Office, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).