United States Department of Labor
Employees' Compensation Appeals Board

Y.S., Appellant	)	
and	)	**Docket No. 08-440**
	)	**Issued: March 16, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Austin, TX, Employer	)	

Appearances:
James R. Linehan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 5, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 20, 2007 decision which denied merit review. Because more than one year has elapsed between the last merit decision dated November 14, 2005 and 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(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On July 23, 2002 appellant, a 46-year-old mail clerk, filed an occupational disease claim alleging that her bilateral elbow condition resulted from performing repetitive duties at work. She became aware of her condition and realized it was caused by her job on May 29, 2002. The Office accepted bilateral tendinitis of the elbows and right shoulder impingement syndrome. It authorized surgeries which were performed on April 9, 2003 and January 12, 2004. Appellant

did stop work but continued in a limited-duty position.[1] She came under the treatment of Dr. L. Don Greenway, a Board-certified orthopedic surgeon, for a work-related bilateral elbow condition. Dr. Greenway diagnosed traumatic tendinitis extensor tendons of the lateral humeral epicondyle of the left elbow. He performed a fasciotomy extensor tendons and partial ostectomy of the lateral humeral epicondyle of the left elbow and diagnosed traumatic tendinisis of the extensor tendons of the lateral and humeral epicondyle of the left elbow.

On August 18, 2003 appellant returned to work light duty four hours per day and stopped work in December 2003 due to disabling right shoulder pain. On January 12, 2004 Dr. Greenway diagnosed tear of the glenoid labrum of the right shoulder and performed arthroscopic surgery on January 12, 2004. Appellant underwent a functional capacity evaluation on March 26, 2004, which found that she could work full time in a light-duty capacity. In a report dated April 2, 2004, Dr. Greenway noted appellant's continued complaints of left elbow pain. He released appellant to work based on the findings of the functional capacity evaluation, for eight hours per day on April 12, 2004.

On April 15, 2004 the employing establishment offered appellant a modified mail processing clerk position subject to restrictions set forth by her physician effective April 22, 2004. On April 20, 2004 appellant declined the position noting that the job offer did not comply with her preexisting medical condition prohibiting her from driving long distances during late hours. She submitted an April 26, 2004 medical report form Dr. Robert K. Emerson, a Board-certified pulmonologist, who treated her for a sleep disorder. Dr. Emerson advised that appellant could not commute long distances to work or work nights due to her excessive daytime somnolence related to her obstructive sleep apnea.

In an April 20, 2004 letter, the Office advised appellant that the job offer constituted suitable work. Appellant was informed that she had 30 days to accept the position or provide reasons for refusing it; otherwise, she risked termination of her compensation benefits.

Appellant submitted medical evidence from Dr. William F. Brooke, a family practitioner, who treated her for daytime somnolence on April 23, 2004. Dr. Brooke noted that appellant was offered a position with work hours of 5:00 p.m. to 1:30 a.m. and advised that she avoid driving long distances because of her sleep apnea.

On May 25, 2004 the Office advised appellant that the position of a modified mail processing clerk was suitable work. It noted that it considered the reasons given by appellant for refusing the position and found then to be unacceptable. The Office afforded appellant 15 additional days to accept the job offer.

Appellant submitted a statement and noted that she had a serious sleep disorder which prevented her from driving distances and from accepting the job offer. She submitted reports from Dr. Greenway dated April 2 to May 27, 2004. Dr. Greenway noted reviewing Dr. Emerson's April 6, 2004 letter confirming that appellant had sleep apnea. He retracted his prior statements permitting appellant to return to work full time, limited duty and opined that he did not approve of the job offer due to appellant's preexisting sleep apnea medical condition.

[1] Appellant filed a separate occupational disease claim for a right elbow condition, which the Office accepted for right elbow tendinitis, File No. xxxxxx103. The Office doubled this claim with the current claim before the Board.

In a decision dated June 16, 2004, the Office terminated appellant's compensation benefits effective July 11, 2004 on the grounds that she refused an offer of suitable work.

Appellant submitted several requests for reconsideration and in merit decisions dated July 16 and November 18, 2004 and April 21 and July 18, 2005, the Office denied modification of the June 16, 2004 decision terminating her compensation benefits on the grounds that she refused an offer of suitable work.

On July 29, 2005 appellant requested reconsideration. She submitted a copy of the July 18, 2005 decision, a functional capacity evaluation and a report from Dr. Greenway dated May 27, 2004.

In a merit decision dated November 14, 2005, the Office denied modification of the prior decision.

In a letter dated September 20, 2006, appellant requested reconsideration. She asserted that she did not refuse an offer of suitable work and indicated that the job offer was not suitable. Appellant further noted that her reason for not accepting the job offer was reasonable and explained that she was unable to drive distances to and from work or work evening or night shifts due to severe sleep apnea. She asserted that the Office failed to consider Dr. Greenway's April 23, 2004 report, which found that the job offer was not proper due to her preexisting sleep apnea. Appellant alleged that the Office failed to consider all of her impairments in determining the suitability of the job offer including the diagnosed conditions of sleep apnea, anxiety and depression. She further noted that the Office did not consider that she no longer resided in the job offer location. Appellant submitted a July 5, 2006 report from Dr. Greenway, who noted appellant's continued complaints of pain in her elbows and right shoulder. Dr. Greenway noted findings upon physical examination of the right shoulder revealed anterolateral tenderness with palpation of the rotator cuff, active range of motion was 90 percent of normal, with good muscle strength. He noted that examination of the right and left elbows revealed lateral tenderness with palpation of the extensor tendon at the lateral humeral epicondyle. Dr. Greenway indicated that he would follow up with appellant in three months.

In a decision dated September 20, 2007, the Office denied appellant's reconsideration request on the grounds that she had neither raised a substantive legal question nor included new or 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. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[3] which provide that a claimant may obtain review of the merits of his or her written

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b).

application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that either:

> "(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 September 20, 2006 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office.

Appellant, through her attorney, submitted a statement and reiterated her allegations that she did not refuse an offer of suitable work as the job offer was not suitable. She noted that the Office failed to consider Dr. Greenway's April 23, 2004 report, which found that the job offer was not appropriate due to appellant's preexisting sleep apnea, the Office failed to consider all of her impairments in determining the suitability of the job offer and that she was no longer residing in the job offer location. Appellant asserted that her reasons for not accepting the job were reasonable because she was unable to drive distances to and from work or work evening or night shifts due to severe sleep apnea. However, this is insufficient to show that the Office erroneously applied or interpreted a specific point of law nor does it advance a relevant legal argument not previously considered. The Board notes that the Office had previously considered appellant's allegations, and she did not set forth a particular point of law that the Office had not considered or establish that the Office had erroneously interpreted a point of law with regard to her claim.[5]

Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review. 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 report from Dr. Greenway dated July 5, 2006, who noted her continued complaints of pain in her right shoulder and bilateral

[4] *Id*. at § 10.608(b).

[5] *See Brent A. Barnes*, 56 ECAB 336 (2005) (evidence that is repetitious or duplicative of evidence already in the case record does not constitute a basis for reopening the claim).

elbows with tenderness over the right rotator cuff and lateral tenderness over the extensor tendon at the lateral humeral epicondyle bilaterally. However, this report is essentially duplicative of Dr. Greenway's previous reports that were considered by the Office in its decisions dated July 18 and November 14, 2005 and found insufficient. 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.[6] Therefore, this report is insufficient to require the Office to reopen the claim for a merit review. On appeal, appellant's attorney has further characterized the medical evidence as sufficient to require reopening of the claim for a merit review. Counsel also asserted that the medical evidence was not sufficient to establish that the offered job was suitable. His opinion, however, was not relevant to the underlying issue of whether the medical evidence established that appellant could perform the duties of the offered position. As the issue was medical in nature, it could only be resolved through the submission of relevant medical evidence from a physician.[7] But, as noted above, appellant did not submit any relevant new medical evidence with her reconsideration request.

Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did she submit relevant and pertinent new evidence not previously considered by the Office.[8] Consequently, she 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).

On appeal, appellant's attorney requests summary judgment pursuant to the Federal Rules of Civil Procedure, 56(c), asserting that the Office failed to respond to, contest or rebut the evidence and arguments appellant made in her appeal to the Board and therefore she should be granted summary judgment. Contrary to appellant's contention, section 501.4(a) of the Board's *Rules of Procedure* does not require the Director of the Office to file a pleading in appeals before the Board.[9] The Board's *Rules of Procedure* also do not provide any sanctions for not filing a pleading. Instead, section 501.4(a) affords the Director the discretion to file a pleading as appropriate. This contemplates that there may be situations in which the Director may deem it not appropriate to file a pleading. Additionally, the Board notes that it is well established that procedures before the Board are not governed by the Federal Rules of Civil Procedure.[10]

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration.[11]

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[6] *See id.*

[7] *L.H.*, 59 ECAB ___ (Docket No. 07-1191, issued December 10, 2007).

[8] 20 C.F.R. § 10.606(b).

[9] *Id*. at § 501.4(a); *see also Thomas D. Mooney*, 44 ECAB 241 (1992).

[10] *See generally Bertha Keeble*, 45 ECAB 355 (1994) (where the Board noted that federal workers' compensation claims are governed by the Act); *see* 5 U.S.C. §§ 8101-8193.

[11] The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision; therefore, the Board is unable to review evidence submitted by appellant after the September 20, 2007 decision. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 16, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge, dissenting:

In a June 16, 2004 decision, the Office terminated appellant's compensation benefits under section 8106 of the Federal Employees' Compensation Act finding that she refused an offer of suitable work. However, the Office failed to consider appellant's contention that she was disabled from performing such employment due to a sleep disorder. It is well established that, before benefits may be terminated under this section of the Act, the Office must consider preexisting and subsequently acquired conditions in determining whether the job offer is suitable.[1] The issue of whether an employee has the physical capacity to perform modified duty is primarily a medical question that must be resolved by probative medical opinion.[2]

The Office based its suitability determination on the reports of appellant's attending physician, Dr. Greenway, a Board-certified orthopedic surgeon. He treated her accepted elbow and right shoulder conditions, advising on April 2, 2004 that she had the capacity to perform modified duty full time subject to specified restrictions.[3]

[1] *Richard P. Cortes*, 56 ECAB 200 (2004). *See Mary E. Woodard*, 57 ECAB 211 (2005); *Karen L. Yaeger*, 54 ECAB 323 (2003).

[2] *Kathy E. Murray*, 55 ECAB 288 (2004).

[3] The one-page job offer of record lists the title of the modified-duty processing clerk, the work hours and merely notes that appellant would be required to work within her restrictions. The job offer fails to provide a description of the work duties to be performed or of the specific physical requirements of the position, as required. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.a.1 (June 1997). However, as the Board does not have merit review, this is not the focus of my remand.

Following receipt of the job offer, appellant submitted medical evidence from Dr. Emerson, a Board-certified internist specializing in respiratory medicine, who treated her for a sleep disorder. Dr. Emerson advised that the job offer, which required that appellant work from 5:00 p.m. until 1:30 a.m. Wednesday through Sundays, was not appropriate as she had classical symptoms of sleep apnea with severe fatigue, daytime drowsiness and sleepiness. He noted that she had a history of falling asleep while driving. On April 6, 2004 Dr. Emerson stated that, under the job offer, appellant would be required to drive from one to two hours each way at night in order to work at the post office in Austin, TX. He related that appellant took diet pills which contained ephedrine stimulants to try to stay awake while driving but she still had trouble "nodding off." Dr. Emerson advised that it was not safe for her to drive the distance required to work. On April 16, 2004 he again advised that appellant not commute late at night because of excessive somnolence related to her sleep apnea.

Prior to the termination of her compensation benefits, appellant also submitted additional medical opinion from Dr. Greenway, who reviewed the records pertaining to her sleep apnea condition on April 23, 2004 and advised that he could no longer approve of the job offer.

In a June 16, 2004 decision, the Office terminated appellant's compensation effective July 11, 2004. I note that the compensation order did not address any disability related to appellant's sleep apnea condition or whether the job offer was suitable in light of this condition. Rather, it merely noted: "You have been diagnosed with a concurrent sleep disorder; however, this condition has not been accepted as job related." There is no analysis pertaining to appellant's disability due to sleep apnea as required before terminating compensation under section 8106. The Office merely noted that appellant made a personal decision to relocate further from Austin, TX, *i.e.,* "98.22 miles/1 hour 38 minutes to Austin, [TX.]" It stated: "You elected to move after your injury and initial disability status. Your inability to drive long distances, due to a concurrent medical condition (sleep apnea/hyponea) does not disable you from performing the duties of the modified position." The decision does not address the medical opinion of Dr. Emerson or Dr. Greenway that appellant submitted to the record following the job offer.

Appellant subsequently requested reconsideration on multiple occasions, contending that the Office had not properly considered whether the job offer was suitable in light of her sleep apnea condition. In a June 10, 2004 report, a Dr. Jario A. Melo advised that appellant experienced severe fatigue, daytime drowsiness and memory loss, noting again her limitations on driving.

On July 14, 2004 the Office denied modification of the termination decision, noting that her relocation to her current residence was a matter of her personal choice and that the employing establishment was not responsible to ensure that she got to and from work. On November 18, 2004 the Office again denied modification, finding again that appellant had "voluntarily move[d] away from the commuting area." On April 21, 2005 it denied modification, briefly noting that she failed to support her request with valid medical documentation. On July 18, 2005 the Office reviewed additional evidence from Dr. Greenway pertaining to appellant's orthopedic conditions, finding that he did not identify those duties which appellant would be unable to perform.

"What we have here is a failure to communicate."

Cool Hand Luke

With her most recent request for reconsideration, appellant again contends that the job offer was not suitable in light of disability arising from her sleep apnea condition. The Office denied reconsideration of the merits, stating that her arguments have previously been considered. However, I find that appellant and the Office are talking past one another. Instead of reviewing the medical evidence pertaining to her sleep apnea and whether the job offer was suitable in light of this medical condition, the Office focused instead on the fact that appellant relocated to a town further away from the location of the job offer in Austin, TX. These are two different questions. I would remand the case to the Office for further merit review.

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