United States Department of Labor
Employees' Compensation Appeals Board

S.W., Appellant	)	
and	)	**Docket No. 09-1455**
	)	**Issued: February 16, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Phoenix, AZ, Employer	)	

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument November 17, 2009

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 20, 2009 appellant filed a timely appeal of a January 9, 2009 decision of the Office of Workers' Compensation Programs denying her request for reconsideration without a merit review. Because more than a year has elapsed from the last merit decision dated October 22, 2007 to the filing of this appeal on May 20, 2009, 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 reconsideration without a further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 7, 1995 appellant, then a 32-year-old custodial laborer, injured her right shoulder when she reached up to clean wall partitions. The Office accepted her claim for right shoulder strain with impingement syndrome with a glenoid labrum tear. It authorized right shoulder arthroscopy with debridement of the glenoid labrum and bursoscopy with subacromial

decompression. The Office also accepted chronic pain and depression as a consequential injury. Appellant stopped work on July 18, 1995 and returned intermittently. On September 13, 1996 she returned to limited duty as a part-time modified general clerk. Appellant began working as a full-time general clerk on April 18, 1997. She worked intermittently until March 13, 2000 when she returned full-time to a permanent modified general clerk position. On September 4, 2004 appellant accepted a position as a full-time modified sales associate/window clerk. The Office paid her appropriate compensation benefits.

In a November 21, 2005 duty status report, appellant's treating physician, Dr. L. Markham McHenry, an osteopath specializing in family and neuromusculoskeletal medicine, advised that appellant reduce her work schedule to six hours per day. The employing establishment offered her a light-duty assignment as a modified maintenance support clerk, effective September 2, 2006, based on her work restrictions as of November 21, 2005. Appellant did not accept the position as she indicated that Dr. McHenry found it not medically suitable.[1]

Appellant filed a claim for total temporary disability beginning September 11, 2006. Her representative asserted that this claim constituted a recurrence as the employing establishment withdrew her full-time modified window clerk position when it offered her light duty as a maintenance support clerk. On October 19, 2006 the Office requested additional evidence to establish that the claimed recurrence beginning September 11, 2006 was caused by the accepted 1995 injury, not from the new work factors from her position that she began in November 2004.

In an October 12, 2006 statement, appellant indicated that on July 27, 2006 she met with the employing establishment's customer service relations coordinator and manager and asserted that her rehabilitation window clerk position had been withdrawn due to overstaffing. She noted that the customer service relations coordinator informed her that she would be provided a new written job offer compliant with her medical restrictions. Appellant indicated that the light-duty maintenance support clerk assignment offered to her was not medically suitable. In a September 27, 2006 report, Dr. McHenry advised that she decline the light-duty assignment as it involved too much repetitive arm motions, similar to the window clerk activities that exacerbated her pain.

On November 6, 2006 the Office requested that the employing establishment clarify whether appellant's full-time, permanent modified rehabilitation assignment as a window clerk had been withdrawn. On November 13, 2006 the employing establishment indicated that the window clerk position remained available since September 4, 2004 when she signed the job offer, which was deemed suitable by her treating physician. The employing establishment noted that the November 21, 2005 duty status report directed that appellant not work with her arms away from her body. Accordingly, it offered her light duty in compliance with the increased restrictions until claim file number xxxxxx813 was resolved and she could return to her full-time permanent modified job as a window clerk.

[1] On March 10, 2006 appellant filed an occupational disease claim for an aggravated right shoulder condition from her job as a window clerk. The Office is adjudicating this claim under file number xxxxxx813. This claim is not presently before the Board.

In a December 6, 2006 decision, the Office denied appellant's claim for total temporary disability compensation beginning September 11, 2006. It found that her job assignment had never been withdrawn and that her new work restrictions had not been accepted as being due to her accepted condition.

An oral hearing was held on May 22, 2007. On May 23, 2007 appellant's representative asserted that the employing establishment eliminated appellant's rehabilitative job to reduce staff. He further asserted that the employing establishment was unwilling to modify appellant's job duties when her job offer as a maintenance support clerk was deemed medically unsuitable by her treating physician. On June 26, 2007 the employing establishment reiterated that it never revoked her position. It noted providing appellant with a light-duty position pending the outcome of claim file number xxxxxx813. However, appellant refused this job offer. The employing establishment further noted that the modified light-duty assignment was deemed medically suitable by Dr. McHenry in 2004. It indicated that appellant could be placed back into her previous position if she recovered from her increased disability from November 2005. Appellant submitted statements reiterating her work restrictions from November 21, 2005 and reiterated that her window clerk job was withdrawn due to overstaffing.

In an October 22, 2007 decision, a hearing representative affirmed the December 6, 2006 decision finding that appellant did not establish that she sustained a recurrence of total disability on September 11, 2006 due to a withdrawal of her limited-duty assignment based on her January 7, 1995 work injury. He also noted that she was not performing her full-time restricted-duty position because her treating physician disabled her from her position, not because the position had been withdrawn.

On October 21, 2008 appellant requested reconsideration. She asserted that the employing establishment terminated her rehabilitative assignment due to budgetary reasons and not because her new work limitations were attributed to her aggravated condition. Appellant also provided quoted excerpts from a July 27, 2006 meeting with the employing establishment to support her contention that her job had been withdrawn. She noted that she was only quoting material that supported her allegation.

Appellant submitted a May 20, 2008 letter from the employing establishment noting that, medical documentation determined that no reasonable accommodation could be made allowing her to perform the duties of her assigned job and therefore, she would remain an unencumbered employee. A partial February 12, 2007 Equal Employment Opportunity (EEO) investigative affidavit from the employing establishment's customer service relations coordinator listed her accepted and nonaccepted work restrictions. Appellant also noted that the employing establishment would nominate her to the District Reasonable Accommodation Committee. A February 20, 2007 affidavit from the employing establishment's injury compensation manager noted that her accepted work restrictions permitted an eight-hour day assignment.

In reports dated April 15 and August 6, 2004, Dr. McHenry indicated that the duties for the modified window clerk position were in compliance with appellant's physical abilities. In a May 13, 2008 report, Dr. McHenry advised that the job offer as a mail processor/distribution clerk was not medically suitable and not in compliance with appellant's medical work tolerances.

Appellant submitted several partial EEO investigative affidavits, dated July 13, 2007 and undated, from the employing establishment's customer service relations coordinator who noted that she was provided a medically suitable job offer until November 2005 when she had new nonjob-related work restrictions. She noted that the new restrictions consisted of reducing work hours from eight to six hours per day and prohibiting arm movement away from her body except for two hours at the window. Appellant noted that she was subsequently offered a light-duty position for her new restrictions; she accepted that position but did not show up. A February 21, 2007 EEO investigative affidavit from the employing establishment's senior injury compensation specialist described her accepted job-related work restrictions and noted they were expected to be permanent. Appellant also submitted a November 16, 2004 statement attached to a portion of an October 26, 2004 job offer noting that she reported to her window clerk position on September 4, 2004 as it was deemed within her physical limitations by her physician. A March 22, 2006 statement from her supervisor noted that appellant became a window clerk in 2004 and was utilized within her work restrictions.

The record contains a job offer and position description listing the physical demands of the sales associate/window clerk position. Appellant also submitted her own questions regarding whether her window clerk position was withdrawn. The questions contained partial unidentifiable answers. Appellant also submitted several medical reports and documents already of record.

In a January 9, 2009 decision, the Office denied appellant's request for reconsideration finding that the additional evidence was duplicative and irrelevant to the issue under review.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a), 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.[2] Section 10.608(b) of Office regulations provide that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[3]

ANALYSIS

Appellant's request for reconsideration consists of a letter asserting that the employing establishment withdrew her window clerk assignment due to budgetary reasons. To support her contention, she included quoted excerpts that she indicated were from a transcript of a July 27, 2006 meeting with the employing establishment. By appellant's own admission, she only provided quoted excerpts that support her allegation that her job was withdrawn. The Board finds that this evidence is not relevant as the authenticity of these quotes is not corroborated or

[2] 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

[3] *Id*. at § 10.608(b); *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

verified by their original sources or from any other evidence of record.[4] Moreover, appellant's assertion is broad and conclusory and is similar to her previous statements regarding this matter. The submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[5] Similarly, appellant has not raised any new legal arguments as the issue of withdrawal has been addressed in prior Office decisions.

The EEO investigative affidavits, dated February 20 and 21, 2007, from the employing establishment's injury compensation manager and senior injury compensation specialist merely acknowledge that they were aware of appellant's physical limitations and they listed her accepted work restrictions. As these affidavits did not address the pertinent issue of whether she sustained a recurrence of disability due to a withdrawal of her window clerk position, this evidence is not relevant to the particular issue involved and thus did not warrant a reopening of the case for merit review.[6] Similarly, all of the EEO investigative affidavits from the employing establishment's service relations coordinator indicate that appellant had a medically suitable job assignment as a window clerk until November 2005 when her nonaccepted work restrictions changed, at which time she was offered a light-duty assignment. However, the service relations coordinator's affidavits are not relevant as appellant only submitted partial sections from each affidavit consisting of intermittent pages from multi-page documents. Moreover, none of her affidavits addressed the relevant issue of whether her window clerk position was withdrawn.

Appellant also submitted evidence regarding her acceptance of the window clerk position. This consisted of a job description and offer of the position; a November 16, 2004 statement noting that the window clerk assignment for which appellant reported on September 4, 2004 was within her limitations; a March 22, 2006 statement from appellant's supervisor indicating that she was utilized within her restrictions as a window clerk; and Dr. McHenry's reports dated April 5 and August 6, 2004 advising that the window clerk position was within her abilities. These documents, though, are not relevant as they are not contemporaneous to appellant's recurrence claim beginning September 11, 2006 and do not otherwise address whether appellant's window clerk position was withdrawn.

Dr. McHenry's May 13, 2008 report advising that the distribution clerk position was not medically suitable and the employing establishment's May 20, 2008 letter regarding appellant as an unencumbered employee pertain to appellant's subsequent job offers, which have no relevance to the present issue of whether the employing establishment withdrew the window clerk position in September 2006. The record also contains several documents and medical

[4] *See R.M.*, 59 ECAB __ (Docket No. 08-734, issued September 5, 2008) (it is a well-established principle that the Board is best qualified by its expertise to judge the probative value of certain types of testimony, such as hearsay); *see also J.T.*, Docket No. 08-2394 (issued July 20, 2009) (where the Board found that appellant's mere statement of allegations did not address the underlying issue of verification and corroboration and was not sufficient to require the Office to reopen the claim for merit review).

[5] *D.K., supra* note 2.

[6] *See E.M.*, 60 ECAB ___ (Docket No. 09-39, issued March 3, 2009) (where the Board held that new evidence submitted upon a reconsideration request that does not address the pertinent issue is not relevant evidence); *Freddie Mosley*, 54 ECAB 255 (2002).

reports already of record. As noted, the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.

On appeal, appellant asserts that it was the employing establishment's intent to take away her window clerk position to make her go through the creation of a new job offer. She supports her assertion by providing a chart that outlines the discrepancy between what the employing establishment and her treating physician accepted as her work restrictions. The employing establishment's intent and the conflicting views over appellant's work restrictions are not relevant as neither addresses the underlying issue regarding whether the window clerk position was withdrawn. Accordingly, appellant has not presented new and relevant legal arguments or evidence to warrant reopening her case for a further merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration without a further merit review under 5 U.S.C. § 8128(a).[7]

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated January 9, 2009 is affirmed.

Issued: February 16, 2010
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

[7] The Board notes that appellant submitted new evidence after the Office issued its decision. However, the Board may only review evidence that was in the record at the time the Office issued its final decision. *See* 20 C.F.R. § 501.2(c).