

**United States Department of Labor
Employees' Compensation Appeals Board**

D.C., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
CUSTOMS & BORDER PROTECTION,)
Jamaica, NY, Employer)

Docket No. 09-996
Issued: January 13, 2010

Appearances:
Thomas Harkins, 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 March 10, 2009 appellant filed a timely appeal from the December 8, 2008 decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration. Because more than one year has elapsed between the last merit decision dated July 18, 2007 and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

On March 29, 2005 appellant, then a 48-year-old import specialist, sprained her left foot and ankle while in the performance of duty. She stopped work on March 29, 2005. On June 21, 2005 the Office accepted her claim for sprain/strain of the left ankle, chondromalacia of the left

patella and sprain/strain of the left calcaneofibular. Appellant was placed on the periodic rolls and received wage-loss compensation benefits. On September 12, 2005 she returned to work part time with limitations.

In a June 19, 2006 report, Dr. Howard Adelglass, a Board-certified physiatrist and a treating physician, noted that appellant had epidural blocks on April 6 and 17, 2006 to alleviate her left lower extremity sympathetic dystrophy. He noted that this only improved her pain and swelling momentarily. Dr. Adelglass recommended that appellant continue part-time work. He also included nerve conduction studies (NCS) from July 29 and August 1, 2005, which were normal.

On June 22, 2006 the Office referred appellant for a second opinion to Dr. Wayne Kerness, a Board-certified orthopedic surgeon. In a July 27, 2006 report, Dr. Kerness reviewed appellant's history of injury and treatment and examined her. He diagnosed chondromalacia patella left knee resolved and post left ankle sprain resolved. Dr. Kerness determined that appellant was fully recovered and had reached maximum medical improvement. He indicated that physical therapy was no longer warranted.

In a September 15, 2006 report, Dr. Adelglass opined that appellant was unable to work as a result of a nonwork-related injury in which she sustained a cervical lumbar sprain and whiplash injury. He noted that previously she was unable to work due to her work-related foot, ankle and leg injury. Dr. Adelglass indicated that appellant was still receiving physical therapy because of her pain when weight bearing.

The Office found a conflict in medical opinion between Dr. Adelglass and Dr. Kerness regarding the resolution of her accepted conditions and work restrictions. On November 1, 2006 it referred appellant, together with a statement of accepted facts and the medical record, to Dr. Donald Forman, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a November 14, 2006 report, Dr. Forman reviewed appellant's history and medical treatment. He advised that she was post left ankle sprain and left knee sprain. Dr. Forman found that appellant could return to regular duty. He did not find any evidence of nerve damage in the left lower extremity or of post-traumatic reflex sympathetic dystrophy.

By letter dated May 25, 2007, the Office requested that Dr. Forman clarify his report as to whether the accepted condition had resolved. In a May 30, 2007 addendum, Dr. Forman noted that when he saw appellant on November 13, 2006 she had subjective complaints of pain in her left ankle, left thigh and left knee. However, he found no objective physical evidence to substantiate her complaints. Dr. Forman opined that appellant was capable of returning to her regular occupation as an import specialist without any employment limitations.

On June 14, 2007 the Office proposed to terminate appellant's compensation for wage loss and medical benefits on the basis that the medical evidence, as represented by the opinion of Dr. Forman, established that she had no continuing work-related disability as a result of her March 29, 2005 work injury.

The Office received reports dated June 29 and July 1, 2007 from Dr. Adelglass, who opined that appellant was unable to work due to a nonwork-related injury. Dr. Adelglass stated

that she was experiencing radiculopathy of the cervical and lumbar spines. Prior to the neck and back injury, appellant was working part time due to her foot, ankle and leg injury, which was worked related. Dr. Adelglass advised that she was continuing to receive physical therapy for her left ankle, foot and leg injury and had pain with weight bearing. He stated that appellant was unable to work until September 31, 2007.

By decision dated July 18, 2007, the Office terminated appellant's compensation benefits effective that day. It found that the weight of the medical evidence established that her injury-related disability and residuals ceased.

In a letter dated July 5, 2008, appellant's representative requested reconsideration, contending that the Office did not accept all of the injuries sustained by appellant on March 29, 2005 and that her claim should be expanded. He argued that the Office did not meet its burden to terminate appellant's compensation benefits and that Dr. Adelglass provided a rationalized opinion that she continued to have residuals from her work-related injuries. Appellant's representative also alleged that the reports of Drs. Kerness and Forman were not sufficient as they did not consider her left personal neuropathy/causalgia/neuropraxia, as related to her March 29, 2005 employment injury.

In a February 25, 2008 report, Dr. Adelglass repeated appellant's history of injury and treatment, including that she sustained a nonwork-related motor vehicle accident. He diagnosed left peroneal neuropathy, causalgia/neuropraxia, status post ankle sprain and cervical/lumbar radiculopathy, which was not work related. Dr. Adelglass indicated that appellant had a permanent moderate disability with limited use of her left leg, ankle and foot. Appellant could work in a restricted-duty position but her nonwork-related injury prohibited her from returning to work.

In an August 21, 2008 letter, the Office advised appellant that it received a reconsideration request but the basis of the request was unclear. Appellant was advised that no further action would be taken. She was advised of the type of evidence or argument needed to support a reconsideration request.

On August 26, 2008 appellant's representative repeated his request for reconsideration. He reiterated his request for reconsideration on October 30 and November 20, 2008. Counsel also repeated that additional evidence accompanied his request. However, there was no additional evidence with his request.

By decision dated December 8, 2008, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,¹ the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, set forth arguments and contains evidence that: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; and (3) constitutes relevant and pertinent new evidence not previously considered by the Office.²

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.³

ANALYSIS

Appellant disagreed with the termination of her compensation benefits and requested reconsideration. The underlying issue on reconsideration was whether the Office properly terminated her compensation benefits on July 17, 2007 finding that she no longer suffered from her injury-related disability. However, appellant did not provide any relevant or pertinent new evidence relevant to the issue.

On reconsideration appellant contended that the Office did not accept all of the injuries she sustained on March 29, 2005. The Board notes that this argument is not directly relevant or pertinent to the issue of whether the Office properly terminated her compensation benefits effective July 18, 2007. Appellant also alleged that the Office did not meet its burden to terminate appellant's compensation benefits, as she continued to have residuals of the March 29, 2005 injury and that the reports of Drs. Kerness and Forman did not consider her left peroneal neuropathy/causalgia/neuropria as related to her March 29, 2005 employment injury. However, this was not an accepted condition. Additionally, the issue of whether other medical conditions are work related is a medical issue which must be shown by the medical evidence and

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.606(b).

³ *Id.* at § 10.608(b).

not lay assertions.⁴ These arguments are not sufficient to require the Office to review the merits of appellant's claim.

The February 25, 2008 medical report from Dr. Adelglass is insufficient to require the Office to review the merits of his claim, as it is cumulative. He essentially repeated his previous findings and conclusions. The record contains NCS which were previously of record. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.⁵ The Board also notes that Dr. Adelglass indicated that appellant's nonwork-related injury prohibited her from returning to work, which would not support continued work-related residuals or disability. Appellant did not provide any relevant and pertinent new evidence sufficient to require the Office to reopen her claim for a merit review.

The evidence and argument raised by appellant on reconsideration do not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant new argument not previously considered and does not constitute relevant and pertinent new evidence not previously considered by the Office. Therefore, the Office properly denied her request for reconsideration.

CONCLUSION

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

⁴ Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. *Y.J.*, 60 ECAB ____ (Docket No. 08-1167, issued October 7, 2008).

⁵ *Khambandith Vorapanya*, 50 ECAB 490 (1999); *John Polito*, 50 ECAB 347 (1999); *David J. McDonald*, 50 ECAB 185 (1998).

ORDER

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

Issued: January 13, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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