

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

C.P., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Buffalo, NY, Employer

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**Docket No. 09-2375
Issued: July 22, 2010**

Appearances:
David W. Covino, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 23, 2009 appellant, through her attorney, filed a timely appeal from a July 23, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. As there was no appeal from the December 29, 2008 merit decision within 180 days, the Board lacks jurisdiction to review the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUE

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

FACTUAL HISTORY

On November 6, 2003 appellant, then a 46-year-old practical nurse, filed a traumatic injury claim alleging that on October 14, 2003 she was lifting a patient and injured her neck.

¹ For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

The Office accepted a herniated disc at C4-5 and authorized an anterior cervical discectomy and fusion at C4-5 which was performed on September 23, 2004. Appellant was paid appropriate benefits for periods of disability. She stopped work on October 17, 2003 and returned to work at light duty on February 28, 2005. On June 21, 2005 appellant was released to full-time unrestricted duties.

From October 31, 2003 to March 3, 2004 appellant was treated by Dr. Naren Kansal, a Board-certified neurosurgeon, who noted that appellant presented with right side neck pain, difficulty lifting her arms and tingling and numbing sensation in both arms. Dr. Kansal diagnosed large herniated disc at C4-5 with spinal cord compression and recommended an anterior cervical discectomy. A magnetic resonance imaging scan of the cervical spine dated October 28, 2003 revealed a large central disc herniation at C4-5. A computerized tomography (CT) scan of the cervical spine dated December 29, 2003, revealed degenerative bony spurs at C3-4, C4-5 and C7-T1, a small central disc protrusion with moderate stenosis at C3-4 and C4-5. On September 23, 2004 Dr. Kansal performed an anterior cervical discectomy and fusion at C4-5 and diagnosed C4-5 herniated disc with cervical spinal stenosis. In reports dated to December 8, 2004, he advised that appellant was progressing well postoperatively and discharged her from his care.

Appellant submitted reports dated December 7, 2004 to February 9, 2005 from Dr. Anil K. Mathur, a Board-certified family practitioner, who advised that appellant underwent cervical surgery on September 23, 2004 and remained totally disabled. In a February 9, 2005 duty status report, Dr. Mathur returned appellant to work light duty with restrictions.

On February 25, 2005 the employing establishment offered appellant a full-time position as a licensed practical nurse, with a tour of duty from 12:00 a.m. to 8:00 a.m. and a salary of \$37,594.00. Appellant accepted the position and returned to work.

In prescription notes dated March 30 to May 24, 2005, Dr. Mathur advised that appellant remained partially disabled but could continue to work full time with restrictions. On June 21, 2005 he returned appellant to work without restrictions. Appellant submitted a November 4, 2005 report from Dr. Kansal who treated her for numbness and tingling in her fingers which began one month earlier. Dr. Kansal diagnosed possible left cervical radiculopathy and possible left carpal tunnel syndrome and recommended nerve conduction studies.

On February 28, 2007 appellant filed a CA-2a, notice of recurrence of disability, alleging she developed neck pain on October 5, 2005 causally related to her October 14, 2003 injury. She stopped work on October 5, 2005.

In a decision dated May 25, 2007, the Office denied appellant's claim for a recurrence of disability on the grounds that the medical evidence submitted was insufficient to establish that she sustained disability commencing October 5, 2005 causally related to her October 14, 2003 injury.

On March 25, 2008 appellant requested reconsideration. She submitted a November 10, 2005 prescription note from Dr. Mathur. In notes dated to December 8, 2005, Dr. Mathur indicated that appellant was totally disabled due to work-related neck and arm pain. Similarly, in notes dated February 1, 2006 to May 4, 2007, he reiterated that appellant was totally disabled. Dr. Mathur treated appellant on March 13, 2005 and noted that on July 21, 2005 she had no neck

pain or cervical issues. He treated her again on October 19, 2005 and noted worsening neck pain for two weeks, tingling in her fingers and muscle spasm. Dr. Mathur indicated that appellant did not report any of these findings during her examination on July 21, 2005 and reported no new injuries. Based on appellant's history of cervical disc herniation and his clinical findings before and after October 5, 2005, she sustained a recurrence of disability on October 5, 2005 causally related to her October 14, 2003 injury.

On September 7, 2007 appellant was treated by Dr. Valerie Vullo, a Board-certified physiatrist, for a reinjury to her neck. She reported returning to work in March 2005 and reinjuring herself in October 2005 when leaning over a counter. Dr. Vullo diagnosed chronic neck pain, left cervical radiculopathy and status post cervical fusion with plates. On October 12, 2007 she noted that appellant's symptoms were unchanged and diagnosed chronic neck pain and left cervical radiculopathy, status post C4-5 fusion which was stable. Dr. Vullo noted that appellant remained totally disabled.

In a June 24, 2008 decision, the Office denied modification of the May 25, 2007 decision.

On October 1, 2008 appellant requested reconsideration. In a September 17, 2008 report, Dr. Mathur disagreed with Dr. Vullo, noting that appellant did not sustain a new injury in October 2005. Rather, appellant had a recurrence of her original injury. Dr. Mathur stated that he was appellant's treating physician both before and after October 5, 2005 and she reported that her neck pain increased when she bent over and when she lifted patients. He opined that her cervical spine condition got worse on October 5, 2005 without any new trauma.

By decision dated December 29, 2008, the Office denied modification of the May 25, 2007 decision.

On April 23, 2009 appellant requested reconsideration. She asserted that Dr. Mathur's reports were well rationalized and explained why her condition recurred without a new trauma. In a March 21, 2009 report, Dr. Mathur opined that appellant's condition became objectively worse with no history of new trauma. He asserted that the Office misconstrued his opinion and that appellant's disability was the result of her job duties. Dr. Mathur indicated that any patient with a cervical injury which required spinal fusion was left with permanent partial disability.

By decision dated July 23, 2009, the Office denied appellant's reconsideration request on the grounds that her request neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

LEGAL PRECEDENT

Under section 8128(a) of the 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

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b).

may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

“(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

The Office’s July 23, 2009 decision denied appellant’s reconsideration request, without conducting a merit review, on the grounds that the evidence submitted neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision. Appellant’s April 23, 2009 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.

On reconsideration, appellant contended that Dr. Mathur’s March 21, 2009 report provided sufficient rationale to establish that her condition recurred without any specific new trauma. However, her letter did not show how the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Appellant did not set forth a particular point of law or fact that the Office had not considered or establish that the Office had erroneously interpreted a point of law. Consequently, she 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, Dr. Mathur’s March 21, 2009 report noted only that appellant’s condition became objectively worse on October 5, 2005 with no history of new trauma. He reiterated that because appellant was objectively worse after her recurrence, with no new trauma, he believed she sustained a recurrence. The Board notes that this report, while new, is essentially duplicative of Dr. Mathur’s prior reports of March 13 and September 17, 2008 that were considered by the Office in its decisions of June 24 and December 29, 2008 and found

⁴ *Id.* at § 10.608(b).

deficient.⁵ It is well established that evidence which repeats or duplicates that already of record has no evidentiary value and is not sufficient to reopen a case for merit review.⁶

On appeal, appellant asserts that Dr. Mathur's reports of September 17, 2008 and March 21, 2009 were rationalized and support her claim for a recurrence of disability on October 5, 2005. The Board only has jurisdiction to consider whether the Office properly denied appellant's request for reconsideration without a merit review of the claim. As noted, the Office previously considered Dr. Mathur's reports of September 17, 2008 and March 21, 2009. The evidence and argument submitted on reconsideration is insufficient to warrant further merit review of the claim.

CONCLUSION

The Board finds that Office properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 22, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

⁵ 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; *see Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁶ *See Mary A. Ceglia*, 55 ECAB 626 (2004).