United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 10-3**
	)	**Issued: July 16, 2010**
U.S. POSTAL SERVICE, DOMINICK V. DANIELS PROCESSING & DELIVERY PLANT, Kearney, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 21, 2009 appellant filed a timely appeal of a July 6, 2009 decision of the Office of Workers' Compensation Programs denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of the case.[1]

[1] The last merit decision was the February 19, 2009 decision of an Office hearing representative affirming, as modified, an August 1, 2008 decision denying appellant's claim. For Office decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. As more than one year has elapsed between the Office's issuance of its August 1, 2008 decision and appellant's September 21, 2009 filing of an appeal with the Board, the Board does not have jurisdiction over this decision. 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). Appellant's appeal was untimely filed from the February 19, 2009 decision as more than 180 days passed between appellant's September 21, 2009 appeal and the issuance of this decision.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration of her claim under 5 U.S.C. § 8128.

On appeal appellant, through her attorney, argues that a November 19, 2008 medical report establishes that appellant's C5-6 cervical radiculopathy and bilateral carpal tunnel syndrome is due to the repetitive nature of her work. Counsel further argues that the employing establishment withdrew a limited-duty work assignment such that appellant established a recurrence of her 1991 employment injury.

FACTUAL HISTORY

On April 29, 2008 appellant, then a 49-year-old clerk, filed a notice of recurrence of disability due to a May 14, 1991 employment injury commencing on March 14, 2008, under Office File No. xxxxxx689.[2] Appellant stated that, after treatment for her carpal tunnel syndrome and back problems, she returned to work with restrictions; however, the employing establishment sent her home from her limited-duty assignment. The employing establishment controverted appellant's claim, stating that the Office had denied her claim and she was no longer considered a limited-duty case. On April 29, 2008 Edgar R. Brown, from the employing establishment, further explained the controversion, noting that there were no changes to appellant's work assignment nor did she submit medical evidence establishing that her condition had worsened.

Appellant submitted an April 17, 2008 report from Dr. Mark A.P. Filippone, a Board-certified physiatrist, who noted that she had bilateral carpal tunnel syndrome and cervical radiculopathy which appeared to be caused by a work injury of May 4, 1991.

By letter dated June 30, 2008, the Office informed appellant that her recurrence claim would be adjudicated as a new claim, assigned the current Office file number. It requested that she submit evidence in support of her claim, noting that the medical evidence did not establish the factual basis for her claim that her conditions resulted from factors of federal employment.

In an August 1, 2008 decision, the Office denied appellant's claim for benefits. It accepted that appellant experienced the claimed incident. However, the Office found that the medical evidence was insufficient to establish the diagnosis in connection with the claimed evidence of March 14, 2008, noting that Dr. Filippone never indicated work activities that appellant was performing on March 14, 2008.

By letter dated August 6, 2008, appellant, through her attorney, requested a hearing. On December 4, 2008 appellant, through her attorney, submitted an offer of modified assignment (limited duty) by the employing establishment dated July 11, 2007, which she accepted on July 21, 2007. Appellant's attorney argued that although the limited-duty assignment was made in connection with the claim for appellant's low back injury on April 12, 2007, he suggested that

[2] The Office accepted this claim for right wrist tendinitis.

the restrictions were also placed relative to appellant's prior left wrist injury under Office File No. xxxxxx689.

At the hearing held on December 2, 2008, appellant testified that she began working with the employing establishment in 1988, described several claims she filed under the Act, and described her job duties in various positions with the employing establishment, including her limited-duty assignments. She was working limited duty on March 14, 2008 when the employing establishment sent her home.

In a November 14, 2008 report, Dr. Filippone opined that appellant still had clinical evidence of left C5-6 cervical radiculopathy and bilateral carpal tunnel syndrome which were the result of injuries sustained while working at the employing establishment. In a November 19, 2008 report, he reiterated that appellant still had clinical evidence of left C5-6 cervical radiculopathy and bilateral carpal tunnel syndrome, that "within reasonable medical probability" these conditions resulted from the repetitive nature of her work at the employing establishment and were sustained while at work since May 1988.

In a February 19, 2009 decision, an Office hearing representative determined that appellant had not established that an incident or injury occurred on March 14, 2008. He noted that she was working in a "bid" position from 1997 until 2007, not in a limited-duty assignment. The hearing representative did not address the medical evidence as she found that appellant had not established that an employment incident occurred, as alleged.

On April 29, 2009 appellant, through her attorney, requested reconsideration. He resubmitted Dr. Filippone's November 19, 2008 report. Counsel contended that appellant had provided *prima facie* evidence of an occupational disease claim as she testified that her work for the employing establishment involved repetitive work.

In a decision dated July 6, 2009, the Office denied appellant's request for reconsideration as the arguments and evidence submitted in support of appellant's request were not sufficient to warrant review of the prior decision.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] 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.[4] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year

[3] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b)(2).

of the date of that decision.[5] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[6]

ANALYSIS

On appeal, appellant's attorney makes various arguments with regard to the merits of the case. However, as previously stated, the Board does not have jurisdiction to review the merits of this case as appellant's September 21, 2009 filing date for this appeal was more than one year after the Office issued its August 1, 2008 decision and more than 180 days after the issuance of the Office hearing representative's February 19, 2009 decision.[7]

All of appellant's arguments set forth on reconsideration with regard to the merits of the case had previously been made and rejected by the Office. Appellant did not make any new argument that the Office erroneously applied or interpreted a specific point of law nor did she advance a relevant legal argument not previously considered by the Office. The medical evidence, *i.e.*, the November 2008 reports by Dr. Filippone, were in the record at the time of the Office's February 19, 2009 decision. The hearing representative's decision did not contain a discussion of these reports because appellant's claim was denied due to the fact that she did not establish that an incident occurred as alleged, making discussion of the medical evidence unnecessary.[8]

The Board therefore finds that appellant did not meet any of the standards of 20 C.F.R. § 10.606(b)(2). Accordingly, the Office properly denied the application for reconsideration without review of the merits of the claim.

CONCLUSION

The Board finds that the Office properly denied appellant's request for further review of the merits of her claim under 5 U.S.C. § 8128.

[5] *Id.* at § 10.607(a).

[6] *Id.* at § 10.608(b).

[7] *See supra* note 1.

[8] *See S.P.*, 59 ECAB __ (Docket No. 07-1584, issued November 15, 2007) (where a claimant did not establish an employment incident alleged to have caused his or her injury, it was not necessary to consider the medical evidence.)

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 6, 2009 is affirmed.

Issued: July 16, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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