United States Department of Labor
Employees' Compensation Appeals Board

V.C., Appellant	)	
and	)	**Docket No. 09-2245**
	)	**Issued: June 21, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Richmond, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 8, 2009 appellant filed a timely appeal from August 10, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying merit review of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision.[1]

ISSUE

The issue is whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[1] The record contains a November 17, 2008 Office merit decision terminating appellant's compensation effective November 22, 2008 on the grounds that she refused an offer of suitable work. Appellant did not appeal this decision to the Board and the subject matter of the decision is not currently before the Board.

FACTUAL HISTORY

On February 10, 2006 the Office accepted that appellant, then a 43-year-old rural mail carrier, sustained bilateral medial epicondylitis due to performing her repetitive work duties. She stopped work and received compensation from the Office for periods of disability. In August 2008, Dr. Robert Draper, a Board-certified orthopedic surgeon serving as an Office referral physician, indicated that appellant could work on a full-time basis within specific restrictions. On September 8, 2008 the employing establishment offered appellant a position as a modified rural mail carrier. Appellant refused the position indicating on September 15, 2008 that the work restrictions provided by her physician prevented her from performing the duties of the position.

In a September 23, 2008 letter, the Office advised appellant of its determination that the position offered by the employing establishment was suitable. It informed appellant that compensation would be terminated if she did not accept the modified rural mail carrier position or provide good cause for not doing so within 30 days of the date of the letter. Appellant submitted a September 16, 2008 work restriction form in which Dr. John P. Byrne, an attending Board-certified orthopedic surgeon, indicated that she could not perform any work.

In an October 30, 2008 letter, the Office advised appellant that her reasons for not accepting the position offered by the employing establishment were unjustified. It informed appellant that her compensation would be terminated if she did not accept the position within 15 days of the date of the letter.[2] On November 17, 2008 the employing establishment verified that the modified rural mail carrier position was still available to appellant.

In a November 17, 2008 decision, the Office terminated appellant's compensation effective November 22, 2008 on the grounds that she refused an offer of suitable work. It indicated that appellant did not accept the modified rural carrier position within the time allotted by its October 30, 2008 letter.

On November 25, 2008 the Office received a document that appellant signed on November 20, 2008 indicating that she accepted the modified rural mail carrier position.[3] In a November 22, 2008 status report received on December 2, 2008, Mr. Terry indicated that on November 22, 2008 appellant had returned to work for the employing establishment as a modified rural mail carrier. Appellant also submitted a November 25, 2008 report of Dr. Byrne who stated that she reported increased back symptoms after returning to work for the employing establishment. Dr. Byrne recommended that she stop work and participate in physical rehabilitation activities. On December 2, 2008 he stated that appellant's return to work

[2] A November 14, 2008 telephone record revealed that a personnel official from the employing establishment called the Office on that date and advised that appellant had not responded to the Office's October 30, 2008 letter. In a November 18, 2008 memorandum, Charles Terry, an Office rehabilitation specialist, indicated that appellant had not responded to the October 30, 2008 letter.

[3] In a November 26, 2008 e-mail, Richard Gallanti, appellant's vocational rehabilitation counselor, advised Mr. Terry that appellant sent him an e-mail on November 25, 2008 informing him that she had returned to work on November 22, 2008. In a January 14, 2009 report, Mr. Gallanti stated that appellant sent him an e-mail on November 25, 2008 advising him that she had accepted the position offered by the employing establishment.

aggravated her back condition. Appellant submitted additional medical and physical therapy reports detailing the treatment of her back condition from mid November 2008 onwards.[4]

In an April 8, 2009 letter, appellant stated that she was filing a reconsideration request because she was not sure what was happening in her case. She indicated that she was told that the Office canceled her benefits because she did not return to work, but asserted that she did in fact return to work. Appellant claimed that Mr. Gallanti told her that the Office had reversed its decision and that paperwork had been crossed in the mail with the Office. She stated:

> "If needed he said you can call him for verification at his office. I have tried on several occasions to find out what was going with this but no one will return my calls or letters. I sent an appeal form in December but never got anything back on it either. Please advise because I no longer know what to do and no one is helping me."

In an August 10, 2009 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that appellant's reconsideration request did not raise substantive legal questions or include new and relevant evidence.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[5] the Office 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.[6] 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 of the date of that decision.[7] 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.[8] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[9] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for

[4] A number of the reports indicated that appellant was disabled for periods which began after her return to work on November 22, 2008.

[5] 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).

[6] 20 C.F.R. § 10.606(b)(2).

[7] *Id*. at § 10.607(a).

[8] *Id*. at § 10.608(b).

[9] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

reopening a case.[10] While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[11]

Section 8106(c)(2) of the Act provides in pertinent part, "A partially disabled employee who--. (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[12]

ANALYSIS

The Office accepted that appellant sustained bilateral medial epicondylitis due to performing her repetitive work duties and paid her compensation for periods of disability. In a November 17, 2008 decision, it terminated appellant's compensation effective November 22, 2008 on the grounds that she refused an offer of suitable work.

In her April 8, 2009 reconsideration request, appellant asserted that the Office improperly terminated her compensation in its November 17, 2008 decision because she did in fact return to work for the employing establishment. She claimed that Mr. Gallanti, her vocational rehabilitation counselor, told her that the Office had reversed its decision and that paperwork had been crossed in the mail with the Office. The Board finds that the presentation of this argument would not require reopening of appellant's case for review of her claim on the merits as she did not present a legal contention with a reasonable color of validity.

Appellant submitted evidence showing that she accepted the modified rural mail carrier position on November 20, 2008 and returned to work in the position on November 22, 2008. By the time of this acceptance, however, the Office had justifiably terminated appellant's compensation. In an October 30, 2008 letter, it advised appellant that her reasons for not accepting the modified rural mail carrier position were unjustified and that her compensation would be terminated if she did not accept the position within 15 days of the date of the letter. The evidence of record clearly indicates that appellant did not accept the offered position within the allotted period and the Office properly terminated her compensation in its November 17, 2008 decision.[13]

Appellant also submitted reports of Dr. Byrne, an attending Board-certified orthopedic surgeon, who indicated that she was disabled for periods which began after her return to work on November 22, 2008. The submission of these reports would not require reopening of appellant's claim because they are not relevant to the main issue of the present case. The reports address appellant's disability after the Office issued its November 17, 2008 decision and do not have any bearing on whether she was justified in refusing the position offered by the employing establishment prior to the Office's issuance of that decision.

[10] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[11] *John F. Critz*, 44 ECAB 788, 794 (1993).

[12] 5 U.S.C. § 8106(c)(2).

[13] There is no indication in the record that the Office reversed its November 17, 2008 decision.

Appellant has not established that the Office improperly denied her request for further review of the merits of its November 17, 2008 decision under section 8128(a) of the Act, because the evidence and argument she submitted did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 10, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 21, 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