

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

M.T., Appellant)	
)	
and)	Docket No. 09-2298
)	Issued: June 4, 2010
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS HEALTH ADMINISTRATION,)	
San Diego, CA, Employer)	

Appearances: *Case Submitted on the Record*
Thomas Martin, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On September 15, 2009 appellant filed a timely appeal from a July 13, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying reconsideration of a June 26, 2008 merit decision. Because over a year has passed since the Office's last merit decision, dated June 26, 2008, and the filing of this appeal, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's case.

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).

FACTUAL HISTORY

On December 9, 2004 appellant, a 68-year-old retired¹ human resources specialist, filed an occupational disease claim (Form CA-2) for de Quervain's syndrome in her right wrist and

¹ Appellant retired on February 23, 2005.

thumb as well as right shoulder, back, upper arm, wrist, thumb and hand pain. She first became aware of her condition and that it was caused by her federal employment on September 20, 2004.

By decision dated February 22, 2005, the Office accepted that appellant identified the employment factors she deemed responsible for her condition but denied the claim because the evidence of record did not demonstrate the established employment factors caused a medically diagnosed injury.

On March 15, 2005 appellant requested reconsideration.

By decision dated June 22, 2005, the Office denied modification of its February 22, 2005 decision because the evidence of record did not demonstrate the established employment factors caused appellant's condition.

Appellant submitted an April 4, 2006 report in which Dr. John B. Dorsey, an orthopedic surgeon, reviewed appellant's history of injury, presented findings on examination and diagnosed cervical disc disease, right shoulder tendinitis, nonindustrial osteoporosis, carpal tunnel syndrome and de Quervain's tenosynovitis. Dr. Dorsey opines that appellant's condition was caused by her 14 years of clerical work. He reasons that "extensive" employment-related use of her hands to perform tasks such as writing, typing and "keying" produced "repetitive use syndrome," a condition which, he explains, includes, "but is not necessarily limited to," conditions such as right shoulder tendinitis, epicondylitis, de Quervain's disease and carpal tunnel. Dr. Dorsey provided work restrictions precluding appellant from using her hands for typing, writing, "forceful grasping," gripping and "fine repetitive movements." His restrictions also precluded appellant from raising her arms above shoulder level.

In a subsequent report dated July 11, 2006, Dr. Dorsey determined that appellant sustained a nine percent "whole body impairment" of her right upper extremity and five percent left upper body impairment. He also opined that appellant was disabled from work for "one year," commencing December 7, 2005.

On June 19, 2006 appellant, through her attorney, requested reconsideration. Her attorney asserted that the evidence submitted with her reconsideration request was sufficient to establish her claim.

By decision dated August 7, 2006, the Office vacated its June 22, 2005 decision and accepted appellant's claim for right shoulder tendinitis, right epicondylitis and bilateral de Quervain's disease. It also found appellant was disabled from work commencing December 24, 2004 and continued to be partially disabled from work because she cannot type or use a computer.

On August 22, 2006 appellant filed a claim for compensation (Form CA-7) in which she claimed leave without pay (LWOP) for December 24, 2004 through February 23, 2005.

By decision dated April 9, 2007, the Office denied the claim because the evidence of record did not establish appellant was temporarily totally disabled from work December 24, 2004 through February 23, 2005.

On April 26, 2007 appellant, through her attorney, requested an oral hearing.

By decision dated June 6, 2007, the Office granted appellant a schedule award for seven percent permanent impairment of her right upper extremity and three percent impairment of her left upper extremity, covering the period December 7, 2005 through July 13, 2006.

On June 22, 2007 appellant filed a compensation claim (CA-7), claiming LWOP for February 16, 2005 “to date.”

By decision dated July 30, 2007, the Office denied the claim because the evidence of record did not demonstrate appellant was incapable of working February 24, 2005 “to the present.”

Following an August 22, 2007 oral hearing, at which appellant and her attorney were present, by decision dated October 22, 2007, the Office denied the claim because the evidence of record did not demonstrate appellant was disabled from work December 4, 2004 through February 23, 2005 as a result of her accepted work-related conditions.

On August 23, 2007 appellant, through her attorney, requested an oral hearing.

Appellant submitted a March 24, 2008 note, signed by Dr. Dorsey, who, after reviewing appellant’s medical history, related that appellant was “unable to return to any form of gainful employment, even with accommodation.”

Following a March 28, 2008 oral hearing, at which appellant and her attorney were present, by decision dated June 26, 2008, the Office denied the claim because the evidence of record did not demonstrate appellant was totally disabled from work February 24, 2005 to present day.

On June 17, 2009 appellant, through her attorney, requested reconsideration.

Appellant submitted copies of Dr. Dorsey’s April 4 and July 11, 2006 reports, as well as his March 24, 2008 note.

Appellant submitted an October 28, 2008 report in which Dr. Dorsey stated that he was “firmly convinced” that appellant’s condition was caused by the “repetitive activities” she performed as a human resource specialist. Dr. Dorsey opined that appellant developed carpal tunnel syndrome “[de] Quervain’s disease,” shoulder tendinitis and epicondylitis as a consequence of the “extensive” computer use she performed as a human resource specialist. He opined that these conditions are consistent with “repetitive use syndrome” and are “generally related to repetitive activities.” Dr. Dorsey speculated that, if appellant’s “repetitive use syndrome” was not “fully caused by her work activities,” they “would have certainly aggravated the underlying condition to the point where it became disabling.”

By decision dated July 13, 2009, the Office denied the request, without conducting a merit review.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² 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.³ 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.⁴ 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.⁵

ANALYSIS

Appellant's reconsideration request did not demonstrate the Office erroneously applied or interpreted a specific point of law nor did it advance a relevant legal argument not previously considered by the Office. Her attorney, after reviewing the case history and appellant's history of injury, argued on reconsideration that the medical evidence of record is sufficient to establish appellant's claim of total disability. These were the same arguments previously reviewed and rejected by the Office in its prior decisions and, furthermore, were not relevant or pertinent to the issue underlying appellant's case. Consequently, appellant is not entitled to merit review under the first two enumerated grounds under 20 C.F.R. § 10.606(b)(2).

Appellant submitted additional copies of Dr. Dorsey's April 4 and July 11, 2006 reports as well as his March 24, 2008 note. This evidence provides no basis for reopening appellant's claim for further merit review because it duplicates evidence previously of record.⁶

Appellant also submitted Dr. Dorsey's October 28, 2008 report. The issue underlying appellant's claim was whether she was totally disabled from work February 24, 2005 to present. Dr. Dorsey proffers no opinion explaining how and why appellant was totally disabled from work February 24, 2005 to present, supported by medical findings or rationale. He may be "firmly convinced" that appellant's condition was caused by the repetitive employment tasks she performed as a human resource specialist and that she was "disabled" but, because the issue underlying appellant's claim is not causal relationship, Dr. Dorsey's generalized opinion is repetitive and duplicative, rather than relevant.⁷ Dr. Dorsey's October 28, 2008 report, though "new," is duplicative regarding the issue of total disability, and, thus, appellant is not entitled to

² 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).

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(b).

⁶ *Richard Yadron*, 57 ECAB 207 (2005); *Eugene Butler*, 36 ECAB 393 (1984).

⁷ *Ronald A. Eldridge*, 53 ECAB 218 (2001).

a review of the merits of her claim based on the third enumerated grounds under section 10.606(b)(2).

On appeal, appellant's attorney argues that the medical evidence submitted with the reconsideration request was sufficient to establish she was incapable of performing her duties due to her accepted conditions and that therefore she is entitled to compensation for "any loss of wage-earning capacity resulting from such incapacity." He also argues that the issue is not causal relationship but disability, and further, that the Office "made no effort to evaluate the medical reports that provide a rationalized unequivocal opinion that [appellant's] work-related injuries have disabled her." The Office considered and rejected these arguments in its prior decisions. The issue on appeal 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). Because counsel advances arguments previously considered and rejected by the Office in its prior decisions, there are no grounds for reopening appellant's case for merit review.

CONCLUSION

The Board finds 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 July 13, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board