

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

C.S., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, EKHCS-TOPEKA, Leavenworth, KS,)
Employer)

Docket No. 09-1850
Issued: March 5, 2010

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On July 8, 2009 appellant filed a timely appeal from a May 14, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying reconsideration the Office's December 18, 2008 merit decision that denied her claim. As over 180 days has passed since the last merit decision in this case dated December 18, 2008, and the filing of this appeal, on July 8, 2009, the Board lacks jurisdiction over the merits of this case.¹ Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit May 14, 2009 decision.

ISSUE

The issue is whether the Office properly denied appellant's request for merit review under 5 U.S.C. § 8128(a).

¹ For 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).

FACTUAL HISTORY

On August 13, 2008 appellant, a 53-year-old supervisory medical administrator, filed a traumatic injury claim (Form CA-1) for a strained back she allegedly sustained on July 22, 2008 while reaching for some files. She relates that, while sitting in a chair, she reached for a file, at which time she experienced pain and a burning sensation in her middle back.

Appellant submitted evidence and her claim was developed.

By decision dated December 18, 2008, the Office denied the claim. It accepted that the incident of July 22, 2008 occurred as alleged but found that the evidence of record did not establish any medical condition caused by the established work incident.

On April 23, 2009 appellant requested reconsideration. In an April 20, 2009 note, she reported that her injury occurred at work as she was reaching for some files. Appellant noted that she experienced thoracic back pain months earlier when she fell while at work. She reported falling twice in December 2006 and once in October 2007. The back pain appellant experienced in July 2008 was acute and accompanied by a burning sensation. She did not submit any new medical evidence with her request for reconsideration.

By decision dated May 14, 2009, the Office denied appellant's request because she had not satisfied any of the enumerated grounds for reconsideration.²

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 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

² Appellant submitted additional evidence on appeal. The Board may not consider evidence for the first time on appeal, which was not before the Office at the time, it issued the final decision in the case. 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision).

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).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

ANALYSIS

The Office has accepted that on July 22, 2008 appellant reached for files and sustained back pain in the performance of her employment duties. It however denied her claim as she did not submit medical evidence to establish that she sustained a diagnosed condition causally related to this accepted incident. To obtain merit review of her claim, appellant was required to submit new and relevant evidence that she did sustain an injury causally related to the accepted incident.

In her April 23, 2009 reconsideration request, appellant provided her own history of back pain, both preceding and after July 22, 2008. Her recitation of her back symptoms neither alleged nor demonstrated the Office erroneously applied or interpreted a specific point of law in denying her claim. Additionally, it did not advance a relevant legal argument not previously considered by the Office. Therefore, appellant was not entitled to a review of the merits of her claim based upon the first and second above-noted requirements under section 10.606(b)(2).⁷

Appellant also did not submit new relevant and pertinent evidence not previously considered by the Office and, consequently, has not satisfied the third enumerated ground. She did not submit any new medical evidence in support of her reconsideration request. With her August 23, 2009 reconsideration request, appellant submitted an April 20, 2009 note describing her employment injury and history of injury. The relevant issue underlying appellant's case is medical in nature, which can only be proven by rationalized medical opinion evidence, and, accordingly, appellant's lay opinion is not relevant.⁸

Appellant's reconsideration request failed to show that 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. Her reconsideration request did not present new relevant and pertinent evidence not previously considered by the Office.⁹ Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

CONCLUSION

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

⁷ *Id.* at § 10.606(b)(2)(i) and (ii).

⁸ *Gloria J. McPherson*, 51 ECAB 441 (2000).

⁹ *Edgar G. Maiscott*, 4 ECAB 558 (1952) (holding appellant's subjective symptoms and self-serving declarations do not, in the opinion of the Board, constitute evidence of a sufficiently substantial nature).

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 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