United States Department of Labor
Employees' Compensation Appeals Board

K.M., Appellant	)	
and	)	**Docket No. 09-2050**
	)	**Issued: May 12, 2010**
U.S. POSTAL SERVICE, MONTGOMERY VILLAGE BRANCH, Gaithersburg, MD, Employer	)	

Appearances:
Appellant, pro se
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 August 10, 2009 appellant filed a timely appeal from a March 16, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. The most recent merit decision is dated March 5, 2008, more than one year prior to the filing of the appeal. The Board lacks jurisdiction to review the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e).[1]

ISSUE

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

[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).

FACTUAL HISTORY

The Office accepted that on September 18, 2003 appellant, then a 48-year-old clerk, sustained lumbar strain in the performance of duty. On January 6, 2006 appellant underwent a lumbar decompression at L4-5. The Office compensated appellant for intermittent periods of disability.[2]

In a work restriction capacity evaluation dated April 18, 2007, Dr. David Perim, an attending Board-certified orthopedic surgeon, found that appellant could work six hours per day with restrictions, including operating a motor vehicle no more than 30 minutes per session to and from work. The employing establishment offered appellant a position as a modified sales, service and distribution associate working from 12:00 p.m. to 6:30 p.m. Monday through Friday in accordance with physical limitations set forth by Dr. Perim.

By decision dated August 23, 2007, the Office terminated appellant's compensation effective that date finding that she refused an offer of suitable work under 5 U.S.C. § 8107(c).[3] It determined that the offered position of modified sales, service and distribution associate working 12:00 p.m. to 6:30 p.m. Monday through Friday was within her physical capacity and constituted suitable employment.

On September 6, 2007 appellant requested an oral hearing. By decision dated March 5, 2008, a hearing representative affirmed the August 23, 2007 decision. She considered appellant's argument that she was unable to perform the position because working from 12:00 p.m. to 6:30 p.m. would have required her to commute by automobile for longer than the 30-minute driving restriction set forth by Dr. Perim. The hearing representative found, however, that appellant had not established that stopping work at 6:30 p.m. would result in a longer commute.[4] The hearing representative also considered her contention that performing her duties required her to either stand on a cement floor or to sit on a stool and prevented her from walking as needed. She reviewed the medical evidence, however, and determined that the position was within appellant's restrictions. The hearing representative noted that she had returned to work on September 19, 2007 but had sustained an injury on that date under another file number.

On March 1, 2009 appellant requested reconsideration. She noted that the hearing representative had referred to the offered position as a permanent classified position. Appellant contended that she was not offered a permanent classified position but instead a modified

[2] By decision dated March 6, 2007, the Office denied appellant's claim for a schedule award after finding that she had not established that she sustained an impairment to a scheduled member. In a decision dated March 20, 2007, the Office found that she had not established a recurrence of disability on February 8, 2007. It accepted that appellant sustained a recurrence of disability on February 28 and June 8, 2007. By decision dated July 16, 2007, the Office denied her claim for compensation beginning January 24, 2007.

[3] On August 23, 2007 the Office denied appellant's claim for a schedule award. By decision dated August 30, 2007, it found that appellant had not established a recurrence of disability beginning August 7, 2007, citing its termination of her compensation for refusing suitable work. In a decision dated September 27, 2007, the Office denied her claim for leave without pay on August 7, 2007.

[4] Prior to the job offer from the employing establishment setting work hours as 12:00 p.m. to 6:30 p.m., appellant performed similar duties working from 9:00 a.m. to 3:00 p.m.

position that consisted of *ad hoc* assignments. She asserted that the employing establishment's failure to offer her a permanent classified position violated 5 U.S.C. § 5101(2) and *Bracey V. OPM*.[5] Appellant also maintained that the hearing representative erroneously found that Dr. Perim did not restrict her from working on concrete. She indicated that on August 2, 2007 Dr. Perim found that her pain increased when she stood on hard surfaces. Appellant further alleged that the hearing representative showed bias in stating that she reduced her own work hours and referring to witnesses as her friends rather than as professionals with specific knowledge. She also argued that the hearing representative gave credence to a nurse's allegation that she was upset with her change in job hours because she could not babysit her grandchildren. Appellant contended that the statements made by the nurse should be excluded from the record. She asserted that the hearing representative sarcastically noted that she sustained a work injury on the date that she "finally" returned to work.

Appellant submitted a March 21, 2007 form completed by her supervisor, who related that the employing establishment had "offered [her] modified assignments to meet her restrictions since [the] date of injury." She maintained that her supervisor's statement established that she was not offered a permanent position.

By decision dated March 16, 2009, the Office denied appellant's request for further review of the merits of her claim. It determined that she had not raised legally valid arguments relevant to the pertinent issue of whether the offered position was within her medical restrictions. The Office performed a limited review of Dr. Perim's August 2, 2007 report and found that he did not restrict her from standing on cement but instead only noted that it increased her pain.[6] It further noted that the employing establishment offered appellant a permanent position and that her assignments were within her restrictions.

On appeal, appellant contends that the Office accepted the employing establishment's account of events rather than her own. She asserted that the hearing representative was biased against her. Appellant refused the job offer because it was outside the physical limitations found by her attending physician. She argued that the Office and employing establishment colluded together to have her accept a position outside her restrictions.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[7] the Office's regulations provide that 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.[8] To be entitled to a merit

[5] 236 F.3d 1356 (2001).

[6] In a progress note dated August 2, 2007, Dr. Perim described appellant's complaints of "increasing pain when standing for an extended period of time, while at work on a concrete floor."

[7] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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."

[8] 20 C.F.R. § 10.606(b)(2).

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.[9] 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.[10]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[11] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[12] While the 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.[13]

ANALYSIS

The Office terminated appellant's compensation effective August 23, 2007 on the grounds that she refused an offer of suitable work. On March 5, 2008 a hearing representative affirmed the suitable work termination.

Appellant requested reconsideration on March 1, 2009. She contended that the employing establishment did not offer her a permanent classified position as required by 5 U.S.C. § 5101(2) and *Bracey*. Appellant submitted evidence from her supervisor, who related that she had been provided with modified work within her restrictions since the date of injury. The provisions of 5 U.S.C. § 5101, however, are relevant to classifying positions to ensure that federal employees are paid equally for equal work. In *Bracey*, the Court of Appeals for the Federal Circuit addressed the meaning of a position in the context of eligibility for disability retirement.[14] Neither the statute nor the cited case are relevant to the issue at hand, which is whether appellant refused an offer of suitable work as defined by section 8106(c) of the Act.

Appellant argued that the position required her to commute in a motor vehicle for more than 30 minutes at a time. She also asserted that the position was outside her physical

[9] *Id*. at § 10.607(a).

[10] *Id*. at § 10.608(b).

[11] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[12] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[13] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

[14] In *Bracey*, the Court of Appeals for the Federal Circuit differentiated between entitlement to receive benefits under the Act and disability retirement. Regarding entitlement under the Act, the Court stated, "One of the conditions of continuing to receive benefits is that a partially disabled employee must be willing to accept "suitable work" when the agency offers such work. *See* 5 U.S.C. § 8106(c)(2); 20 C.F.R. § 10.515(b). The employee's refusal to accept such work results in termination of his FECA benefits. If the employee's disability renders the employee eligible for disability retirement, however, the employee is free to refuse the offer of such work and to take disability retirement instead of FECA benefits. The two schemes offer different benefits under different circumstances, and there is nothing anomalous about the fact that an employee may be eligible for one set of benefits while being ineligible for the other."

limitations. The Office, however, previously considered appellant's contentions that the position required her to commute more than 30 minutes per day and was not within her work restrictions. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.[15]

Appellant additionally asserted that, in a report dated August 2, 2007, Dr. Perim found that she could not stand on cement floors because of increased pain. Dr. Perim, however, did not specifically find that she was unable to work on hard surfaces but instead noted her complaints that working on concrete resulted in increased pain. Thus, appellant's argument does not have a reasonable color of validity such that it would warrant reopening her case for merit review.[16]

Appellant maintained that the hearing representative was biased against her. She related that the hearing representative referred to her witnesses as friends, sarcastically noted that she had "finally" returned to work, and discussed statements made by a nurse that she did not want her hours changed so she could baby sit her grandchildren. Appellant maintained that the nurse's statements should be excluded from the record. Her allegations, however, do not specifically address the relevant issue of whether the position offered by the employing establishment was suitable. Evidence or argument that does not address the particular issue involved does not warrant reopening a case for merit review.[17] Moreover, appellant's arguments are not supported by any additional evidence submitted to the record.

On appeal appellant argued that the hearing representative was biased and the job offer was not within the work restrictions set forth by her attending physician. She further maintained that the Office accepted without proof the statements by the employing establishment. As discussed, however, appellant has not shown that the Office erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered by the Office or submitted new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

CONCLUSION

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

[15] *J.P.*, 58 ECAB 289 (2007); *Richard Yadron*, 57 ECAB 207 (2005).

[16] *Elaine M. Borghini*, 57 ECAB 549 (2006).

[17] *P.C.*, 58 ECAB 405 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 16, 2009 is affirmed.

Issued: May 12, 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