United States Department of Labor
Employees' Compensation Appeals Board

S.L., Appellant	)	
and	)	**Docket No. 06-1227**
	)	**Issued: September 7, 2006**
DEPARTMENT OF THE ARMY, WEST POINT MILITARY ACADEMY, West Point, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 1, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 10, 2006 nonmerit decision denying his request for merit review of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's February 10, 2005 decision denying appellant's claim for schedule award compensation. Because more than one year has elapsed between the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.[1]

ISSUE

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

[1] *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

On March 11, 2002 appellant, then a 50-year-old equipment repairer, filed a traumatic injury claim alleging that he injured his back and left leg when he carried a heavy mat at work on March 4, 2002. He stopped work on March 5, 2002 and later returned to light-duty work for the employing establishment. The Office accepted that appellant sustained an employment-related lumbar strain and lumbar lordosis and paid appropriate compensation for periods of disability.

Appellant claimed entitlement to schedule award compensation due to his March 4, 2002 employment injury.

Appellant submitted a September 8, 2003 report in which Dr. Mitchell S. Garden, an attending Board-certified orthopedic surgeon, diagnosed chronic lumbar pain. Dr. Garden indicated that he was not a disability doctor and did not use the American Medical Association, *Guides to the Evaluation of Permanent Impairment.* He stated that under the New York State Workers' Compensation Guidelines appellant had "about 37.5 percent disability related to the back."

By decision dated June 10, 2005, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he was entitled to schedule award compensation. The Office found that the September 8, 2003 report of Dr. Garden was of diminished probative value regarding appellant's claimed impairment because he did not apply the relevant standards of the A.M.A., *Guides*. Moreover, the back is not a scheduled member under the Federal Employees' Compensation Act.

By letter dated January 26, 2006, appellant, through his attorney, requested reconsideration of his claim. Appellant argued that the Office had received a "clear indication" that he had a significant permanent impairment when it received the September 8, 2003 report of Dr. Garden. He claimed that the Office had a duty to further develop the medical evidence citing Board precedent which provides that proceedings under the Act are not adversarial in nature and that the Office is not a disinterested arbiter.[2]

Appellant submitted several brief medical reports, dated between July 2005 and January 2006, which detailed his back condition. He also submitted numerous records of chiropractic service and copies of physical therapy authorization forms.

By decision dated June 10, 2006, the Office denied appellant's request for merit review of his claim.[3]

[2] Appellant cited such cases as *Lauramae Heard*, 42 ECAB 688 (1991) and *Debbie J. Hobbs*, 43 ECAB 135 (1991).

[3] Appellant submitted additional evidence after the Office's June 10, 2006 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[4] 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.[5] 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.[6] 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.[7]

ANALYSIS

The Office accepted that appellant sustained an employment-related lumbar strain and lumbar lordosis on March 4, 2002. By decision dated February 10, 2005, the Office denied his claim for a schedule award due to his employment injury. By decision dated February 10, 2006, the Office denied appellant's request for merit review of his claim.

In connection with his January 26, 2006 request for reconsideration, appellant argued that the Office had received a "clear indication" that he had a significant permanent impairment when it received the September 8, 2003 report of Dr. Garden, an attending Board-certified orthopedic surgeon. However, this argument is not relevant to the main issue of this case, *i.e.*, whether the medical evidence shows entitlement to schedule award compensation, as a nonphysician's opinion does not have probative value regarding medical matters.[8] The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[9] The Board had already considered Dr. Garden's report and deemed it to have little probative value. Appellant also contended that the Office had a duty to further develop the medical evidence citing Board precedent which provides that proceedings under the Act are not adversarial in nature and that the Office is not a disinterested arbiter. 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.[10] Appellant's argument that the Office should have further developed the

[4] 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).

[5] 20 C.F.R. § 10.606(b)(2).

[6] 20 C.F.R. § 10.607(a).

[7] 20 C.F.R. § 10.608(b).

[8] *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993).

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

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

medical evidence does not have a reasonable color of validity as he did not articulate why his case should have been developed in such a manner.

Appellant submitted several brief medical reports, dated between July 2005 and January 2006, which detailed his back condition. However, these reports are not relevant to the main issue of the present case in that they contain no opinion on the extent of appellant's permanent impairment. Appellant also submitted numerous records of chiropractic service and copies of physical therapy authorization forms, but this nonmedical evidence also would not be relevant the main issue of this case.

In the present case, appellant has not established that the Office improperly denied his request for further review of the merits of its June 10, 2005 decision under section 8128(a) of the Act, because the evidence and argument he submitted did not to 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 his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 10, 2006 decision is affirmed.

Issued: September 7, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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