United States Department of Labor
Employees' Compensation Appeals Board

D.W., Appellant	)	
and	)	**Docket No. 06-1869**
	)	**Issued: February 20, 2007**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Brecksville, OH, 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
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 9, 2006 appellant, through her attorney, filed a timely appeal from a January 11, 2006 merit decision of the Office of Workers' Compensation Programs finding that she did not establish a recurrence of disability, a nonmerit decision dated March 17, 2006 denying her request for a hearing and a nonmerit decision dated July 26, 2006 denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the March 17 and July 26, 2006 nonmerit decisions.

ISSUES

The issues are: (1) whether appellant has established that she sustained a recurrence of disability on February 16, 2005 due to her accepted employment injury; (2) whether the Office properly denied her request for a hearing as untimely under 5 U.S.C. § 8124; and (3) whether the Office properly denied appellant's request for merit review of her claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

On February 5, 1990 appellant, then a 43-year-old nursing assistant, filed a claim for a traumatic injury to her right shoulder occurring on that date when she was transferring a patient from a bed to a chair. The Office accepted the claim for right shoulder strain and cervical strain.[1] The Office subsequently accepted that she sustained a lumbosacral strain due to a July 21, 1995 employment injury and lumbar strain due to a March 7, 1997 employment injury.[2] The Office combined her claims into file number 090427900.

On March 8, 2005 appellant filed a claim for a recurrence of disability on February 16, 2005 causally related to a November 15, 1990 employment injury. She stopped work on February 16, 2005 and returned to work on March 7, 2005. Appellant related:

> "I went to get up out of my chair from my desk and suddenly I was hit with excruciating pain from my right lower back down my right leg rendering me completely unable to walk or put any weight down on my right foot. Before my initial injury on November 15, 1990 I had absolutely no back nor leg problems but since that injury the episodes have continued, more frequently and more severe."

Regarding limitations following her employment injury, appellant noted that she was careful when lifting. In a statement accompanying the notice of recurrence, the employing establishment controverted the claim on the basis that she was injured stepping up from a chair at home rather than at work.

By letter dated November 30, 2005, the Office requested additional factual and medical evidence from appellant. She did not submit any medical evidence.[3] In a decision dated January 11, 2006, the Office found that appellant did not establish a recurrence of disability due to her February 5, 1990 employment injury.[4] The Office noted that the record did not show an injury on November 15, 1990 but did show that she sustained an injury on February 5, 1990.

In a letter postmarked February 17, 2006, appellant requested an oral hearing. By decision dated March 17, 2006, the Office denied the hearing request as untimely under section 8124. The Office found that the issue could be equally well addressed through the submission of new and relevant evidence accompanying a valid request for reconsideration.

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[1] By decision dated April 4, 1990, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish that she sustained an injury as alleged. In a decision dated July 5, 1991, the Office vacated the April 4, 1990 decision and accepted her claim for right shoulder and cervical strain.

[2] Appellant also filed a claim for an injury to her back, right shoulder and left wrist on July 20, 1996; however, the Office denied her claim in a decision dated October 4, 1996.

[3] The Office noted that appellant provided a factual statement in response to its November 30, 2005 development letter; however, this does not appear to be in the case record.

[4] The Office noted that the record did not show an injury on November 15, 1990 but did show that she sustained an injury on February 5, 1990.

On June 14, 2006 appellant requested reconsideration.[5] She indicated that she was enclosing a March 21, 2006 magnetic resonance imaging (MRI) scan study and a schedule of injections. Appellant noted that she sustained additional work injuries after February 5, 1990. She wore a back brace and experienced unrelenting pain radiating from her back into her left leg.

By decision dated July 26, 2006, the Office denied appellant's request for reconsideration on the grounds that it was insufficient to warrant further review of the January 11, 2006 merit decision. The Office noted that no medical evidence accompanied her reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

When an appellant claims a recurrence of disability due to an accepted employment-related injury, she has the burden of establishing by the weight of the reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury. This burden includes the necessity of furnishing evidence from a qualified physician, who on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports this conclusion with sound medical reasoning.[6]

Section 10.5(x) of the Office's regulations provides in pertinent part:

> "Recurrence of disability means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."[7]

The Office's procedure manual provides:

> "*Burden of Proof.* It is the employee's burden to submit factual and medical evidence in support of the claimed recurrence. It is not assumed that any subsequent incapacity involving the injured part of the body is the result of the original injury solely because the original injury was accepted."

The medical evidence required includes "a description of objective findings, reasoned medical opinion supporting causal relationship and a discussion of any similar preexisting or intervening condition affecting the same part of the body."[8]

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[5] Appellant requested reconsideration in a March 31, 2006 letter addressed to the Board. The Office asked that appellant clarify whether she wanted an appeal before the Board or reconsideration before the Office. In a June 14, 2006 letter, appellant requested reconsideration by the Office.

[6] *Ricky S. Storms*, 52 ECAB 349 (2001).

[7] 20 C.F.R. § 10.5(x).

[8] Federal (FECA) Procedural Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7.b(1) (September 2003).

ANALYSIS

The Office accepted that appellant sustained right shoulder strain and cervical strain due to a February 5, 1990 employment injury. The Office also accepted that she sustained lumbosacral strain due to a July 21, 1995 employment injury and lumbar strain due to a March 7, 1997 employment injury. The Office combined all claims into file number 090427900.

On March 8, 2005 appellant filed a notice of a recurrence of disability from February 16 to March 7, 2005 causally related to her February 5, 1990 employment injury. She related that following her original injury she experienced episodes of back and leg problems. Appellant maintained that she experienced extreme pain extending from her back to her right leg when she got out of a chair on February 16, 2005.

The Board finds that appellant has not established that she sustained a recurrence of disability on February 16, 2005 causally related to her accepted employment injuries. The Office's procedure manual provides that it is "the employee's burden to submit factual and medical evidence in support of the claimed recurrence. It is not assumed that any subsequent incapacity involving the injured part of the body is the result of the original injury solely because the original injury was accepted."[9] The procedure manual further states that medical evidence includes "a description of objective findings, reasoned medical opinion supporting causal relationship and a discussion of any similar preexisting or intervening condition affecting the same part of the body."[10] Appellant did not submit any medical evidence prior to the Office's January 11, 2006 decision finding that she had not established a recurrence of disability. By letter dated November 30, 2005, the Office advised her of the type of evidence necessary to establish a recurrence of disability; however, she did not provide the Office with the requested evidence. As appellant did not submit medical evidence substantiating that she was disabled beginning February 16, 2005 due to her accepted employment injuries, the Office properly determined that she did not establish a recurrence of disability.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Federal Employees' Compensation Act,[11] concerning a claimant's entitlement to a hearing, states that: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on [her] claim before a representative of the Secretary."[12] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[13]

[9] *Id*.

[10] *Id*.

[11] 5 U.S.C. §§ 8101-8193.

[12] 5 U.S.C. § 8124(b)(1).

[13] *Leona B. Jacobs*, 55 ECAB 753 (2004).

Section 10.615 of Title 20 of the Code of Federal Regulations provides: "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."[14]

Section 10.616(a) further provides: "A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."[15]

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing or when the request is for a second hearing on the same issue.[16] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[17]

ANALYSIS -- ISSUE 2

The Office issued a decision on January 11, 2006 finding that appellant had not established a recurrence of disability on February 16, 2005, causally related to a February 5, 1990 employment injury. Appellant sought an oral hearing by letter dated February 16, 2006 and postmarked February 17, 2006. The Office denied appellant's hearing request as untimely by decision dated March 17, 2006. As her request for a hearing was postmarked February 17, 2006, more than 30 days after the Office issued its January 11, 2006 decision, she was not entitled to a hearing as a matter of right.

The Office has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter or right.[18] The Office properly exercised its discretion by considering whether to grant a discretionary review and finding that the issue could be equally well resolved by appellant submitting additional evidence to the Office in a reconsideration request. The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are

[14] 20 C.F.R. § 10.615.

[15] *Id*. at § 10.616(a).

[16] *See André Thyratron*, 54 ECAB 257 (2002).

[17] *Sandra F. Powell*, 45 ECAB 877 (1994).

[18] *Afegalai L. Boone*, 53 ECAB 533 (2002).

contrary to both logic and probable deduction from established facts.[19] In this case, the evidence of record does not establish that the Office committed any action in connection with its denial of appellant's request for an oral hearing which could be found to be an abuse of discretion. For these reasons, the Office properly denied her request for an oral hearing as untimely under section 8124 of the Act.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[20] 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) submit relevant and pertinent new evidence not previously considered by the Office.[21] 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.[22] 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.[23]

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.[24] 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.[25] 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.[26]

ANALYSIS -- ISSUE 3

The Office found that appellant did not establish a recurrence of disability as she failed to submit any medical evidence showing that she was disabled due to her accepted employment injury. By letter dated June 14, 2006, appellant requested reconsideration. She indicated that she had enclosed an MRI scan and injection schedule; however, this evidence was not contained in the case record. Appellant also maintained that she had to wear a back brace due to pain which radiated into her left leg. The relevant issue, however, is whether the medical evidence

[19] *See André Thyratron*, *supra* note 16.

[20] 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."

[21] 20 C.F.R. § 10.606(b)(2).

[22] *Id*. at § 10.607(a).

[23] *Id*. at § 10.608(b).

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

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

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

establishes that she was unable to work beginning February 16, 2005 due to her accepted employment injury. Appellant's lay opinion is not relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.[27]

Appellant 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 submit new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, appellant is not entitled to further merit review.

CONCLUSION

The Board finds that appellant has not established that she sustained a recurrence of disability on February 16, 2005 due to her accepted employment injury. The Board further finds that the Office properly denied her request for a hearing as untimely under section 8124 and properly denied her request for review of the merits under section 8128.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 26, March 17 and January 11, 2006 are affirmed.

Issued: February 20, 2007
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

[27] *Gloria J. McPherson*, 51 ECAB 441 (2000).