United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 08-1229**
	)	**Issued: October 10, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Northport, NY, Employer	)	

Appearances:
James P. Linehan, 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 March 20, 2008 appellant, through her attorney, filed a timely appeal from a January 9, 2008 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. As more than one year has elapsed since the last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the January 9, 2008 nonmerit decision.

ISSUE

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

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

FACTUAL HISTORY

On October 18, 1976 appellant, then a 36-year-old licensed practical nurse, filed a claim alleging that she sustained an injury to her low back on September 18, 1976 in the performance of duty. She stopped work on September 27, 1976 and did not return. The Office accepted the claim for an aggravation of a herniated disc at L4-5.

On May 19, 2006 the Office referred appellant to Dr. D. Barry Lotman, a Board-certified orthopedic surgeon, for a second opinion examination.[2] In a report dated July 7, 2006, Dr. Lotman noted that the most recent medical evidence was a report dated February 1991. He diagnosed status post a nonemployment-related laminectomy at L4, mechanical low back pain and symptom magnification. Dr. Lotman found that appellant had no objective residuals of her September 1976 employment injury and that the "aggravation caused by that injury has resolved." He indicated that she could not perform her date-of-injury position due to her underlying spine condition. Dr. Lotman stated, "There is no current treatment plan directed to her accepted condition as I believe that has resolved." He recommended exercise and medication for her underlying spinal condition.

The Office provided appellant with a notice of proposed termination on November 21, 2006 and allowed her 30 days to submit evidence in response to the proposed termination. On December 5, 2006 appellant argued that a conflict in medical opinion existed.

By decision dated January 23, 2007, the Office terminated appellant's compensation and entitlement to medical benefits effective January 24, 2007 on the grounds that she had no further employment-related condition or disability. It found that Dr. Lotman's opinion constituted the weight of the evidence and established that her condition had resolved.

On January 7, 2008 appellant, through her attorney, requested reconsideration. Counsel contended that Dr. Lotman was not competent to render a medical opinion as he was on five-year medical licensure probation. He further maintained that the physician did not review the entire case record but only the evidence from 1991 onward. Counsel argued that Dr. Lotman found that appellant was not able to perform his date-of-injury position and determined that she required further medical treatment. He asserted that a conflict in medical opinion existed.

By decision dated January 9, 2008, the Office denied appellant's request for reconsideration after finding that the evidence submitted was insufficient to warrant merit review of the claim.

[2] Appellant had not submitted medical evidence regarding her condition since October 7, 1998. The last medical evidence of record is a February 7, 2001 report from Dr. Harold C. Friend, a Board-certified neurologist and referral physician, who diagnosed a permanent aggravation of a herniated disc at L4-5 and found that she could not perform her date-of-injury position.

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 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]

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.[7] 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.[8] 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.[9]

ANALYSIS

The Office accepted that appellant sustained an employment-related aggravation of a herniated disc at L4-5 on September 18, 1976. Appellant stopped work and did not return. By decision dated January 23, 2007, the Office terminated her compensation and entitlement to medical benefits after finding that she had no further disability or condition due to the accepted work injury. The Office found that the opinion of Dr. Lotman, the second opinion examiner, established that appellant's condition had resolved and that she required no further medical treatment.

On January 7, 2008 appellant's attorney requested reconsideration. Counsel argued that Dr. Lotman's opinion created a conflict in medical evidence. Appellant, however, previously raised this contention to the Office prior to the termination of her compensation. Evidence or

[3] 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."

[4] 20 C.F.R. § 10.606(b)(2).

[5] 20 C.F.R. § 10.607(a).

[6] 20 C.F.R. § 10.608(b).

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

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

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

argument which duplicates that already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[10]

Counsel further contended that Dr. Lotman's opinion was of diminished probative value as he was on probation. There is no evidence, however, that Dr. Lotman is not a licensed physician qualified to examine appellant and provide an opinion regarding her orthopedic condition at the time of the July 7, 2006 examination. Consequently, the argument does not have a reasonable color of validity such that it would warrant reopening her case for merit review.[11]

Counsel also argued that Dr. Lotman only reviewed the evidence from 1991 onward. Dr. Lotman, however, clearly noted that the most recent evidence available for review was 1991 rather than finding that there was no evidence prior to 1991. Counsel maintained that the physician found that appellant was not able to perform her date-of-injury position and required further medical treatment. Dr. Lotman determined, however, that she had no residuals of her work injury and required no treatment plan as her accepted injury had resolved. He listed limitations and the need for medical treatment due to an underlying nonemployment-related spinal condition. Consequently, counsel's contentions lack a reasonable color of validity.[12]

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 constitute 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 merit review of her claim pursuant to section 8128.

[10] *J.P.*, 58 ECAB ___ (Docket No. 06-1274, issued January 29, 2007); *Helen E. Paglinawan*, 51 ECAB 591 (2000).

[11] *M.E.*, 58 ECAB ___ (Docket No. 07-1189, issued September 20, 2007); *Elaine M. Borghini*, 57 ECAB 549 (2006).

[12] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 9, 2008 is affirmed.

Issued: October 10, 2008
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