United States Department of Labor
Employees' Compensation Appeals Board

D.W., Appellant	)	
and	)	**Docket No. 10-1967**
	)	**Issued: June 22, 2011**
U.S. POSTAL SERVICE, KNOXVILLE PROCESSING & DISTRIBUTION CENTER, Knoxville, TN, 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, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 27, 2010 appellant filed a timely appeal from a June 11, 2010 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. The record also contains a March 25, 2010 merit decision denying appellant's claim for transportation services. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over both the merits of the case.

ISSUES

The issues are: (1) whether appellant is entitled to payment of transportation expenses for the period November 30 through December 18, 2009; and (2) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 25, 2009 appellant, then a 57-year-old mail processing clerk, filed a traumatic injury claim alleging that on August 22, 2009 she injured her right shoulder while picking up and moving tubs.[2] The Office accepted the conditions of right shoulder sprain, right shoulder rotator cuff tear, right shoulder infraspinatus tear, right shoulder supraspinatus tear and right shoulder suprascapular tear. It authorized right shoulder arthroscopy, which appellant underwent on November 11, 2009. The Office paid compensation benefits. Appellant returned to full-time limited duty on November 30, 2009 with the employing establishment providing transportation to and from work.[3] She returned to full duty in her regular job on July 8, 2010.

On December 21, 2009 the Office received a request for payment of transportation services provided to appellant by ACCESS ONTIME transportation.[4] In a December 29, 2009 letter, it informed her that it received a request for authorization of transportation services provided to her by ACCESS ONTIME and advised her of the evidence required to support her claim. The Office noted that, if the transportation was used for getting her to work, the fees were not reimbursable.

In a November 24, 2009 treatment note, Dr. W. David Hovis, a Board-certified orthopedic surgeon, provided his postsurgical impressions. He advised appellant not to drive while taking narcotics and with her arm in a sling. In a December 22, 2009 treatment note, Dr. Hovis released her to work full duty with a limitation of no use of her right arm.

Physical therapy daily progress notes pertaining to appellant's postoperative right shoulder condition dated December 1, 4, 8, 14 and 21, 2009 were also received.

In January 6, 2010 telephone calls, the employing establishment informed the Office that it had approved appellant's transportation to and from work and to and from physical therapy appointments for a two-week period.[5] The employing establishment noted that appellant's use of ACCESS ONTIME transportation service was approved. The Office informed the employer that it was not able to provide transportation to and from work. On January 7, 2010 it contacted appellant and informed her that it could not authorize payment for transportation for an employee to get to work.

[2] The record indicates that appellant's job involved fixed hours and place of work.

[3] In a December 1, 2009 telephone memorandum, an Office field nurse advised the Office that, while appellant's physician restricted appellant from driving, the employing establishment was willing to provide a way for her to get to work. On December 6, 2009 the field nurse noted that the employer was willing to accommodate appellant and drive her to and from work on November 30, 2009.

[4] The transportation services were rendered on December 21, 2009, which is outside the claimed period of November 30 through December 18, 2009.

[5] The two-week period was from November 30 through December 18, 2009.

In a February 2, 2010 letter, the Office informally denied appellant's claim for payment of transportation services provided to her by ACCESS ONTIME. It noted that it made no provision for transportation to and from a place of employment. On February 15, 2010 appellant requested a formal decision be issued.

By decision dated March 25, 2010, the Office formally denied appellant's claim for payment of transportation charges on the basis that the medical evidence failed to support that she was unable to drive to work or to obtain other transportation during the claimed period.

In a May 28, 2010 letter, appellant requested reconsideration. She advised that her physician restricted her from driving for six weeks after surgery. Appellant stated that she lived 70 miles round trip from work, that there was no bus service from where she lives to work and that, since she lives alone, there was no one to take her to work.

By decision dated June 11, 2010, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

Medical expenses, along with transportation and other expenses incidental to securing medical care, are covered by section 8103 of the Act.[6] This section provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree of the period of any disability or aid in lessening the amount of any monthly compensation. The employee may initially select a physician to provide medical services, appliances and supplies, in accordance with such regulations and instructions as the Secretary considers necessary and may be furnished necessary and reasonable transportation and expenses incident to the securing of such services, appliances and supplies. In interpreting this section, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The only limitation on the Office's authority is that of reasonableness.[7]

Office regulations provide that the employee is entitled to reimbursement of reasonable and necessary expenses, including transportation needed to obtain authorized medical services, appliances or supplies. To determine what is a reasonable distance to travel, the Office will consider the availability of services, the employee's condition and the means of transportation. Generally, 25 miles from the place of injury, the work site or the employee's home, is considered a reasonable distance to travel.[8]

[6] 5 U.S.C. § 8103(a).

[7] *D.C.*, 58 ECAB 620 (2007). *Lecil E. Stevens*, 49 ECAB 673, 675 (1998); *see Marjorie S. Geer*, 39 ECAB 1099 (1988) (the Office has broad discretionary authority in the administration of the Act and must exercise that discretion to achieve the objectives of section 8103).

[8] 20 C.F.R. § 10.315.

ANALYSIS -- ISSUE 1

Appellant underwent a November 11, 2009 right shoulder arthroscopy. On November 30, 2009 she returned to full-time limited-duty work with the employing establishment providing transportation to and from work. The employing establishment indicated that it had agreed to pay appellant's transportation expenses to and from work as well as to and from physical therapy appointments for a two-week period, November 30 through December 18, 2009. Appellant also attended physical therapy sessions in December 2009. The Office subsequently adjudicated the issue of whether she was entitled to reimbursement for transportation charges during the period from November 30 through December 18, 2009.

The only medical evidence of record discussing appellant's ability to drive was Dr. Hovis treatment note of November 24, 2009. In that report, Dr. Hovis advised appellant not to drive while taking narcotics and with her arm in a sling. This statement does not affirmatively establish that she was restricted from driving. It merely discouraged appellant from driving while taking narcotics and while her arm was in a sling. Furthermore, Dr. Hovis did not address whether she was unable to drive to medical appointments for her work injury during the claimed period.

Under the factual circumstances of this claim, the basis for payment of transportation expenses for appellant's daily commute to and from work is not readily apparent under the Act. As an employee with fixed hours and place of work, it cannot be stated that her transportation expenses were being incurred as a requirement of her employment with the Federal Government.[9] Neither can it be stated that appellant's transportation expenses were incurred as an expense under an approved vocational rehabilitation program.[10] Rather, her transportation expenses appear to stem from an agreement between appellant and the employing establishment, a matter not within the Office's purview.[11] As noted, Office regulations only provide for transportation expenses with regard to obtaining authorized medical services.

To the extent that transportation costs incurred were made in connection with injury-related medical treatment for travel to or from a treatment facility or physician's office, this may be a reasonable expense.[12] However, the medical evidence of record fails to contain a clear no

[9] *See e.g., Kathryn A. Tuel-Gillem*, 52 ECAB 451 (2001) (a rural letter carrier required to furnish her car for use during the workday).

[10] 5 U.S.C. § 8104. *See generally* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Vocational Rehabilitation Services*, Chapter 2.813.8 (September 1995).

[11] Appellant should contact the employing establishment with regard to any expenses incurred as a result of their agreement.

[12] 5 U.S.C. § 8103. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Services and Supplies*, Chapter 3.400.10 (April 1992).

driving restriction as a result of the work injury along with an indication of medical treatment dates for the work injury during the claimed period.[13]

The Board has generally recognized that the Office has broad discretion in approving medical services or vocational rehabilitation as provided under sections 8103 and 8104 of the Act, with the only limitation on the Office's authority being that of reasonableness.[14] However, the terms of the Act are specific as to the methods and payment of compensation. Unless a claimant's contentions are in keeping with the scope or intent of the Act, *i.e.*, unless the statute authorizes payment of the kind demanded, the Office's denial must be affirmed.[15] Neither the Office nor the Board has the authority to enlarge the terms of the Act.[16]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a), 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.[17] Section 10.608(b) of Office regulations provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[18] 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.[19]

ANALYSIS -- ISSUE 2

On May 28, 2010 appellant disagreed with the Office's March 25, 2010 decision which denied payment of transportation charges to and from work and from work to medical appointments during the period from November 30 through December 18, 2009. Her request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Appellant did not advance a relevant legal argument not

[13] In any event, the Office has not adjudicated the issue of whether appellant should be reimbursed for transportation services to attend medical appointments or physical therapy during the claimed period. Therefore, this matter is not presently before the Board. *See* 20 C.F.R. § 501.2(c).

[14] *See James R. Bell*, 52 ECAB 414 (2001); *Daniel J. Perea*, 42 ECAB 214 (1990).

[15] *See Edward Schoening*, 48 ECAB 326 (1997).

[16] *See James R. Bell, supra* note 14; *Raymond H. Chandler*, 49 ECAB 480 (1998); *Alonzo R. Witherspoon*, 43 ECAB 1120 (1992).

[17] 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB 141 (2007).

[18] *Id.* at § 10.608(b); *K.H.*, 59 ECAB 495 (2008).

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

previously considered by the Office. She is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also did not submit relevant and pertinent new evidence not previously considered by the Office. While she stated that she was restricted from driving for six weeks after surgery, the medical evidence of record does not support her statement. Appellant also offered an explanation as to why she required a transportation service and why this was the Office's responsibility and not the employing establishment's. Thus, her statements are insufficient to reopen her claim for further merit review.

The evidence submitted by appellant did not show that the Office erroneously applied or interpreted a specific point of law; advance a relevant legal argument not previously considered or constitute relevant and pertinent new evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that she is not entitled to further merit review.[20]

On appeal, appellant argues the Office's decision is contrary to fact and law. However, as noted within this decision, the evidence does not establish her claim.

CONCLUSION

The Board finds that the Office properly denied appellant's request for transportation fees for travel to and from work for the period November 30 through December 18, 2009. The Board further finds that the Office properly denied her request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[20] *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the June 11 and March 25, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 22, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board