United States Department of Labor
Employees' Compensation Appeals Board

CAROL M. MOLLOY, Appellant	)	
and	)	**Docket No. 05-914**
	)	**Issued: September 6, 2005**
DEPARTMENT OF JUSTICE, OFFICE OF THE U.S. ATTORNEY, San Francisco, CA, Employer	)	

Appearances:
Carol M. Molloy, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On March 9, 2005 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decision dated December 8, 2004, which denied her request for a merit review. Because more than one year has elapsed between the last merit decision dated September 10, 2003 and the filing of this appeal on March 9, 2005, the Board only has jurisdiction to review the nonmerits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

On May 12, 1995 appellant, a 44-year-old paralegal specialist, filed an occupational disease claim alleging that her neck condition was due to her employment. In an attached

statement, she specifically attributed the aggravation of her neck condition to factors of her February 9 to 12, 1995 training in Washington, DC. The Office accepted appellant's claim for acute cervical sprain/strain on June 3, 1996 and authorized physical therapy.

In a January 27, 1997 report, Dr. Robert A. Burton, a second opinion Board-certified neurologist, opined that appellant had a period of temporary disability due to the February 1995 employment injury and that she no longer had any residuals or disability due to the accepted condition. A physical examination revealed "no objective neurological findings." Dr. Burton opined that appellant "experienced a temporary flare-up of her myofascial pain" due to her February 1995 employment injury and that her condition resolved shortly thereafter. With regards to her current symptoms and condition, Dr. Burton attributed them to "a preexisting chronic pain disorder."

On March 17, 1997 the Office issued a notice of termination of compensation. Appellant did not respond to the Office's notice and did not submit evidence within the allotted time. The Office finalized the termination of benefits by a July 1, 1997 decision.

Appellant requested an oral hearing before an Office hearing representative in a July 25, 1997 letter. A hearing was held on September 14, 1998.

Appellant submitted various reports by physical therapists and a September 11, 1998 report by Dr. Robert S. Cliff, a treating Board-certified neurologist, who noted that after discussing the records with "H. Fish:"

> "He did state that the delay in treatment following the claim in 1995 may have predisposed [appellant] to development of degenerative changes in her lumbosacral spine. [Her] poor posture (specifically c-spine) may have been a contributing factor."

By decision dated September 22, 1998, the Office hearing representative affirmed the termination of appellant's compensation.

Appellant requested reconsideration in a September 1, 1999 letter and submitted a report by October 20, 1999 Dr. James A. Davis, a Board-certified internist, in support of her request. He reported "moderately diminished range of motion." He stated "[I]t was my impression that she had ongoing osteoarthritis of her cervical spine." In response to the Office's question, he stated that [appellant] had ongoing symptoms referable to her neck, which was the same etiology of that initially diagnosed."

In a merit decision dated January 27, 2000, the Office denied appellant's request for modification.

In a letter dated January 26, 2001, appellant request reconsideration and submitted a report by Dr. Phillip R. Weinstein in support of her request. He noted that she "again informed me that her back problem is due to a work-related injury." Dr. Weinstein diagnosed an L5-S1 disc herniation.

By merit decision dated July 25, 2001, the Office denied appellant's request for modification.

In a letter dated June 5, 2002, appellant requested reconsideration and submitted an April 11, 2002 report by Dr. Bruce M. McCormack, a treating Board-certified neurosurgeon, in support of her request. He diagnosed lumbar spine degenerative disc disease due to her original 1988 automobile accident and that this condition had been aggravated during "the course of physical therapy for her cervical problems."

On August 16, 2002 the Office denied appellant's request for modification.

Appellant requested reconsideration in letters dated July 10, 30 and August 19, 2003. In support of her request, appellant submitted an April 16, 2003 report by Dr. Albert Liu, a Board-certified internist, and a July 24, 2003 supplemental report signed by Dr. E.F. Yester, a Board-certified neurosurgeon.[1]

In a decision dated September 10, 2003, the Office denied appellant's request for modification.

Appellant requested reconsideration in a letter dated September 9, 2004 and provided argument in support of her claim. She contended that her back injury was employment related based upon contemporaneous medical evidence and thus, the condition should have been included in her claim. Appellant also submitted an April 24, 2002 report by Dr. Gordon C. Lundy, a January 8, 1998 report by Dr. Weinstein, a February 7, 1997 magnetic resonance imaging (MRI) scan of the lumbar spine, a December 27, 1996 report by Dr. Dorothy Waddell, prescriptions for physical therapy by Dr. Davis dated June 18 and September 18, 1996 and January 10, 1997 and a March 21, 1990 x-ray interpretation of the left hip and lumbosacral spine.

In a nonmerit decision dated December 8, 2004, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act[2] vests the Office with discretionary authority to determine whether it will review an award for or against compensation. Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.[3]

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office

[1] It was noted that this was to supplement Dr. McCormack's earlier report, but was not signed by Dr. McCormack.

[2] 5 U.S.C. § 8128(a) ("[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[3] *Jeffrey M. Sagrecy*, 55 ECAB ___ (Docket No. 04-1189, issued September 28, 2004); *Veletta C. Coleman*, 48 ECAB 367 (1997).

erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[4] Section 10.608(b) provides that, when an application for review of the merits of a claim 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.[5] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[6]

ANALYSIS

Appellant's September 9, 2004 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. She had previously contended that the Office erred in failing to include a low back condition as an accepted condition, *via* medical evidence. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, 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).[7] Appellant also failed to satisfy the third requirement under section 10.606(b)(2). She resubmitted an April 24, 2002 report by Dr. Lundy, a January 8, 1998 report by Dr. Weinstein, a February 7, 1997 MRI scan, a December 27, 1996 report by Dr. Waddell, prescriptions for physical therapy by Dr. Davis, dated June 18 and September 18, 1996 and January 10, 1997 and a March 21, 1990 x-ray interpretation. These reports and objective evidence had been previously considered by the Office and thus, does not constitute relevant and pertinent new evidence.[8] Appellant did not submit any relevant and pertinent new evidence not previously considered by the Office and, therefore, she is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).[9] Because she was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Office properly denied the September 9, 2004 request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

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[4] 20 C.F.R. § 10.606(b)(2).

[5] 20 C.F.R. § 10.608(b).

[6] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

[7] 20 C.F.R. §§ 10.606(b)(2)(i) and (ii).

[8] Submitting evidence that is repetitious or duplicative of evidence already in the case record does not constitute a basis for reopening the claim. *Shirley Rhynes*, 55 ECAB ___ (Docket No. 04-1299, issued September 9, 2004); *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

[9] 20 C.F.R. § 10.606(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 8, 2004 is affirmed

Issued: September 6, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board