United States Department of Labor
Employees' Compensation Appeals Board

VIJIT ALLEN, Appellant	)	
and	)	**Docket No. 05-1199**
	)	**Issued: September 6, 2005**
DEPARTMENT OF THE ARMY, MONTCRIEF ARMY COMMUNITY HOSPITAL, Fort Jackson, SC, Employer	)	

Appearances:
Frederick I. Hall, III, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 9, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 3, 2005 nonmerit decision, denying her request for reconsideration. 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 20, 2004 decision terminating her compensation. Because more than one year has elapsed between the last merit decision and the filing of this appeal on May 9, 2005, 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 her claim pursuant to 5 U.S.C. § 8128(a).

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

FACTUAL HISTORY

On June 26, 2002 appellant, then a 52-year-old food service worker, filed an occupational disease claim alleging that she sustained an upper extremity condition due to the repetitive motion required by her job.[2] The Office accepted that she sustained employment-related tendinitis of the right wrist. Appellant received appropriate compensation for periods of disability.[3]

In a report dated March 18, 2003, Dr. Deanna L. Constable, an attending Board-certified orthopedic surgeon, stated that appellant reported pain in her upper extremities. She provided an upper extremity diagnosis of "persistent bilateral upper extremity pain and discomfort with noted lateral epicondyle symptoms" and indicated that appellant's functional capacity examination supported that she could return to "sedentary-type duties with no repetitive use of her upper extremities." Dr. Constable indicated that she had nothing further to offer her at that time.[4]

On August 22, 2003 the employing establishment offered appellant a position as a modified food service worker. The position involved helping to set up and replenish food service tables, serving food and operating a dishwasher. The physical requirements included, lifting up to 3½ pounds and pushing up to 20 pounds, but appellant was restricted from engaging in pulling, gripping or lateral pinching.

In early September 2003, appellant declined the modified food service worker position offered by the employing establishment.

By letter dated December 19, 2003, the Office advised appellant of its determination that the modified food service worker position offered by the employing establishment was suitable and informed her that she had 30 days to accept the position or provide good cause for refusing it.

In several statements dated in mid to late 2003, appellant argued that her physicians had restricted her from engaging in repetitive motion of her upper extremities, but that the position offered by the employing establishment required such motion. She argued that the employing establishment wrongly claimed that it had modified the physical requirements of her regular job as a food service worker because the newly offered position had the same duties as her original position. Appellant submitted a September 19, 2003 report in which Dr. Constable stated that she could perform sedentary work duties with no repetitive use of her upper extremities.

By letter dated February 4, 2004, the Office advised appellant that she had not presented good cause for refusing the offered position and provided her with 15 days to accept the position.

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[2] The job consisted of setting up, cleaning and breaking down food service tables, serving food and operating a dishwasher. It required lifting objects weighing up to 40 pounds.

[3] Appellant returned to the employing establishment performing light-duty work, but last worked in April 2003.

[4] A March 13, 2003 functional capacity evaluation indicated that appellant could lift up to 3½ pounds and push up to 20 pounds. The record contains a similar report of Dr. Constable dated June 11, 2003.

By letter dated February 17, 2004, appellant refused the offered position for the reasons provided in her prior communications.

By decision dated February 20, 2004, the Office terminated appellant's compensation effective that date on the grounds that she refused an offer of suitable work.

On February 7, 2005 appellant requested reconsideration of her claim, indicating that her request was only premised on legal argument.[5] She asserted that the modified food service worker position offered by the employing establishment was not within her medical restrictions because it required her to engage in repetitive motion of her upper extremities. Appellant argued that the employing establishment indicated that it was modifying the physical requirements of her regular job as a food service worker, but claimed that the new job offered by the employing establishment had the same duties as the job she held when injured.

By decision dated March 3, 2005, the Office denied appellant's request for merit review of her claim.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[6] the Office 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.[7] 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.[8] 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.[9] The Board has held that the submission of argument which repeats or duplicates argument already presented to the Office does not constitute a basis for reopening a case.[10]

[5] Around the time of appellant's reconsideration request, the record was supplemented by several physical therapy progress notes from 2002. However, per appellant's statement, it does appear that these documents were intended to be part of her reconsideration request.

[6] 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).

[7] 20 C.F.R. §§ 10.606(b)(2).

[8] 20 C.F.R. § 10.607(a).

[9] 20 C.F.R. § 10.608(b).

[10] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

ANALYSIS

The Office accepted that appellant sustained employment-related tendinitis of the right wrist. After a period of work stoppage, the employing establishment offered her a position as a modified food service worker. By decision dated February 20, 2004, the Office terminated appellant's compensation effective that date on the grounds that she refused an offer of suitable work.

On February 7, 2005 appellant requested reconsideration of the Office's February 20, 2004 decision. She indicated that her request was only premised on legal argument and argued that the modified food service worker position offered by the employing establishment was not within her medical restrictions because it required her to engage in repetitive motion of her upper extremities. Appellant also claimed that the employing establishment wrongly asserted that it modified the physical requirements of her regular job as a food service worker.

The submission of this argument would not require reopening of appellant's case for review of the merits of her claim. She previously made the same arguments and the Office previously considered and rejected these arguments. As noted above, the submission of argument which repeats or duplicates argument already presented to the Office does not constitute a basis for reopening a case.[11]

Appellant has not established that the Office improperly denied her request for further review of the merits of its February 20, 2004 decision under section 8128(a) of the Act, because the argument she submitted 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 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 her claim pursuant to 5 U.S.C. § 8128(a).

[11] *See supra* note 10 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' March 3, 2005 decision 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

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