

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL ANN BRININSTOOL and DEPARTMENT OF VETERANS
AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER,
Battle Creek, MI

*Docket No. 02-1088; Submitted on the Record;
Issued February 27, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On July 30, 1993 appellant, then a 36-year-old nurse, filed a claim alleging that she injured her back, while in the performance of duty. The Office accepted appellant's claim for herniated disc at L4-5 and L5-S1 and paid appropriate compensation. Appellant had intermittent periods of disability but returned to modified work.

Thereafter, in the course of developing the claim, the Office referred appellant to several second opinion physicians and also to an impartial medical examiner.

On July 2, 1997 appellant filed a Form CA-2a, notice of recurrence of disability. She indicated a recurrence of a herniated disc due to employment-related injuries sustained on July 30, 1993.

Appellant filed a claim indicating that her spinal surgery of January 28, 1999 was necessitated by her accepted employment-related disability. She also filed a claim for total disability following spinal surgery for the period January 28 to May 27, 1999 and partial disability from the period May 28 to July 30, 1999.

In a decision dated February 17, 2000, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that appellant sustained a recurrence of disability causally related to the July 30, 1993 employment injury. The Office further determined that there was no causal relationship between the January 28, 1999 surgery and the work-related injury and, therefore, surgery was not necessitated by the accepted injury. Appellant's claim for partial and total disability was denied because the Office found that there was no causal relationship between the periods of disability and the work-related injury.

On August 31, 2000 appellant filed a claim for reconsideration and submitted a report from Dr. Earl S. Rhind, a Board-certified orthopedist.

In a merit decision dated October 5, 2000, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision.

By letter dated November 3, 2000, appellant requested a hearing before an Office hearing representative.

By decision dated March 12, 2001, the Office hearing representative denied appellant's request for a hearing on the grounds that she had already requested reconsideration on these issues and was not entitled to another review on the same issues. Appellant was informed that her case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

In an October 3, 2001 letter, appellant requested reconsideration of her claim. She submitted various medical records from July 30, 1993 to September 16, 1997, all of which were duplicates of those in the record. Appellant also submitted materials related to the Equal Employment Opportunity Commission (EEOC) proceedings and her emotional condition.

By decision dated December 5, 2001, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was cumulative in nature and insufficient to warrant review of the prior decision.

The only decisions before the Board on this appeal is the Office decision dated December 5, 2001. Since more than one year elapsed from the date of issuance of the Office's October 5, 2000 merit decision to the date of the filing of appellant's appeal, March 27, 2002, the Board lacks jurisdiction to review this decision.¹

The Board finds that the Office, in its December 5, 2001 decision, properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration did not meet the requirements set forth under section 8128.²

Under section 8128(a) of the Federal Employees' Compensation Act,³ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,⁴ which provides that a claimant may obtain review of the merits if her written

¹ See 20 C.F.R. § 501.3(d).

² See 20 C.F.R. § 10.606(b)(2)(i-iii)

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b) (1999).

application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that Office erroneously applied or interpreted a specific point of law;
or

“(ii) Advances a relevant legal argument not previously considered by the Office;
or

“(iii) Constitutes relevant and pertinent new evidence not previously considered
by the Office.”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁵

In the present case, the Office denied appellant’s claim without conducting a merit review on the grounds that the evidence submitted was cumulative and insufficient. In support of her request for reconsideration, appellant submitted various medical records from July 30, 1993 to September 16, 1997. This evidence was duplicative of evidence already contained in the record⁶ and was previously considered by the hearing representative and found deficient. Appellant did not submit medical records, which addressed her claimed disability for the periods noted or which addressed the 1999 spinal surgery. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review. Appellant also submitted materials related to the EEOC proceedings and her emotional condition. However, these materials do not establish appellant’s claim for disability for the periods in question, nor do they establish that the surgery appellant underwent on January 28, 1999 was employment related. She neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did she submit relevant and pertinent evidence not previously considered by the Office.”⁷ Therefore, appellant did not submit relevant evidence not previously considered by the Office.

⁵ 20 C.F.R. § 10.608(b).

⁶ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; see *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁷ 20 C.F.R. § 10.606(b).

The decision of the Office of Workers' Compensation Programs dated December 5, 2001 is hereby affirmed.

Dated, Washington, DC
February 27, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member