

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**M.S., Appellant**

**and**

**DEPARTMENT OF ENERGY, WESTERN  
POWER ADMINISTRATION,  
Salt Lake City, UT, Employer**

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**Docket No. 08-863  
Issued: January 12, 2009**

*Appearances:*

*James R. Black, Esq., for the appellant*

*No Appearance, for the Director*

Oral Argument July 15, 2008

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On January 31, 2008 appellant, through counsel, filed a timely appeal of the decision of the Office of Workers' Compensation Programs dated December 6, 2007 denying merit review of the hearing representative's decision affirming the termination of benefits. Because more than one year has elapsed between the last merit decision dated October 2, 2006 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).<sup>1</sup>

**ISSUE**

The issue is whether the Office properly denied appellant's requests for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> Appellant, through counsel, alleged that she did not receive the October 2, 2006 decision until March 29, 2007. This argument is not addressed in the December 6, 2007 decision denying merit review. The Board further notes that the Office, in its March 29, 2007 letter, indicated that the October 2, 2006 decision was sent to appellant's correct address.

## **FACTUAL HISTORY**

On June 19, 1987 appellant, then a 44-year-old personnel officer, filed a traumatic injury claim alleging that on June 14, 1987, while stooping down to pull out a low double wide file drawer, the runner broke off the side of the drawer and the drawer fell towards appellant's feet. Appellant noted that she tried to support the falling drawer and keep it from hitting her feet and legs and in the process, sustained a herniated disc. The Office accepted appellant's claim for low back strain and herniated nucleus pulposus at L4-5.

By letter dated July 14, 2004, the Office referred appellant to Dr. A. Creig MacArthur, a Board-certified orthopedic surgeon, for a second opinion. In a note dated August 19, 2004, Dr. MacArthur listed appellant's condition as mechanical low back pain and discogenic low back pain. He noted that objective findings for the accepted condition of chronic low back strain were not evident. However, Dr. MacArthur noted that given previous surgery in 1985 and appellant's medical history it was difficult to relate her current condition to her work accident. He opined that any aggravation of her underlying condition caused by the June 1987 work accident was temporary.

In a September 7, 2004 report, Dr. Alan Brown, a Board-certified orthopedic surgeon, noted current objective findings including continued pain and decreased range of motion. He stated that, although appellant did have a preexisting surgery, her current condition was due to the work injury of June 14, 1987. Dr. Brown opined that appellant was probably not capable of working her date-of-injury position.

Due to the conflict between Drs. Brown and MacArthur with regard to whether appellant had any residual disability due to her work injury, by letter dated September 29, 2004, the Office referred appellant to Dr. Robert P. Hansen, a Board-certified orthopedic surgeon, for an impartial medical examination. In an opinion dated December 21, 2004, Dr. Hansen concluded that the injury of 1987 aggravated a previous L4-5 disc herniation and that there was also evidence of L4-5 disc narrowing and facet arthritic changes with some degenerative disc changes in 1987. He noted current objective findings of limitation of motion of lumbar spine and pain with right straight leg raising. Dr. Hansen reported that appellant's current condition appeared related to the degenerative disc changes in her back. He indicated that the June 14, 1987 injury did cause a temporary aggravation of the underlying condition, but that it was impossible to give a precise date as to when this temporary aggravation decreased due to the 17-year period that has lapsed since the injury. Dr. Hansen reported that appellant was not capable of working her date-of-injury position due to the time she has been off work, degenerative changes, limited motion and stiffness and history of chronic depression. In a January 27, 2005 updated report, he indicated that he would estimate that appellant sustained an aggravation of her underlying condition until January 22, 2000 at which time the magnetic resonance imaging scan showed degenerative disc changes but no disc herniation or stenosis.

On January 19, 2005 the Office issued a notice of proposed termination of benefits based on the opinion of Dr. Hansen, the impartial medical examiner. By decision dated February 22, 2005, it terminated appellant's compensation and medical benefits effective March 19, 2005.

On March 8, 2005 appellant requested an oral hearing before an Office hearing representative and appointed legal counsel. Additional evidence was submitted, including a February 15, 2005 report wherein Dr. Robert H. Horne, a Board-certified orthopedic surgeon, stated that he examined appellant and reviewed her previous medical and work history. He noted that he stood by the reports of appellant's surgeon and concluded that the work-related injury was an L4-5 disc herniation, not an aggravation of a recurrence. He based this on the fact that appellant's surgeon noted that appellant's 1985 surgery was for extruding a fragment from the L5-S1 disc, that had migrated superiorly to the L4-5 level, but did not involve the L4-5 disc. He disagreed with Dr. McArthur that appellant had a free fragment.

In a decision dated October 2, 2006, the hearing representative affirmed the February 22, 2005<sup>2</sup> decision. The hearing representative specifically found that there were no residuals from the June 14, 1987 employment injury.

By letter dated September 26, 2007, appellant, through counsel, requested reconsideration of the hearing representative's decision. In support thereof, he submitted an August 29, 2007 report wherein Dr. Horne provided an extensive comparison of doctor's notes with regard to appellant's December 9, 1985 injury and the injury in this claim, which occurred on June 14, 1987. Dr. Horne determined that the surgery in 1985 was secondary to a herniated disc that occurred when appellant was on a treadmill. He found that the new injury in 1987, at a level above, constituted a "new injury." Dr. Horne noted that continuing disability and herniation of the disc would be compatible with a disc herniation large enough to produce a progressive deterioration of the disc. He then concluded, "The June 4, 1987 injury is not a temporary aggravation of a preexisting injury because the preexisting injury is in the L5-S1 disc space and not in L4-5."

By decision dated December 6, 2007, the Office denied appellant's request for reconsideration of the merits.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> 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.<sup>4</sup> 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

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<sup>2</sup> The Board notes that although the Office hearing representative indicated that she was affirming a May 12, 2005 Office decision, this is a typographical error as the most recent decision issued by the Office at the time of the oral hearing is February 22, 2005.

<sup>3</sup> 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).

<sup>4</sup> 20 C.F.R. § 10.606(b)(2).

of the date of that decision.<sup>5</sup> 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.<sup>6</sup>

### **ANALYSIS**

In the instant case, on September 26, 2007 appellant filed a timely request for reconsideration of the hearing representative's October 2, 2006 decision finding that appellant had no residuals from her June 14, 1987 employment injury. In a decision dated December 6, 2007, the Office denied appellant's request without merit review.<sup>7</sup> The Office found that the new evidence submitted by appellant, *i.e.*, Dr Horne's report of August 29, 2007, was cumulative and repetitive of his prior report of February 5, 2005. However, the Board finds that the August 29, 2007 report is sufficient to constitute pertinent new and relevant evidence not previously considered by the Office. This report contains a thorough discussion of appellant's 1985 and 1987 injuries and specifically concluded that the June 14, 1987 employment injury was not a temporary aggravation of a preexisting injury because the preexisting injury was located in the L5-S1 disc space and the June 14, 1987 employment injury was located in the L4-5 disc space. Accordingly, the Board finds that the Office should have conducted a merit review.

### **CONCLUSION**

The Board finds that the Office abused its discretion by refusing to reopen appellant's case for further consideration of the merits, pursuant to 5 U.S.C. § 8128(a).

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<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> 20 C.F.R. § 10.608(b).

<sup>7</sup> The December 6, 2007 decision references the "clear evidence of error" standard, which is the standard used to review requests for reconsideration that are not timely filed. *See* 20 C.F.R. § 10.607(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 6, 2007 is set aside. The case is remanded for further proceedings by the Office consistent with this decision.

Issued: January 12, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board