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

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| **A.K., Appellant** | ) | |
| **and** | ) | **Docket No. 10-1111** |
| | ) | **Issued: December 7, 2010** |
| **U.S. POSTAL SERVICE, POST OFFICE, Toledo, OH, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On March 15, 2010 appellant filed a timely appeal from the January 26, 2010 nonmerit decision of the Office of Workers' Compensation Programs denying her request for further review of the merits of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision.[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).

### *FACTUAL HISTORY*

This case has previously been before the Board. In the most recent appeal, the Board issued a decision on February 17, 2009 affirming the Office's June 6, 2008 decision which denied

[1] The most recent merit decision of record is the January 2, 2001 decision of the Board, affirming the denial of appellant's recurrence of disability claim. *See* Docket No. 99-2541 (issued January 2, 2001).

appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).[2] The Office had found that the medical reports and argument submitted by appellant in support of her reconsideration request either duplicated or were similar to evidence and argument previously considered by the Office.[3] The facts of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

On July 24, 2009 appellant requested reconsideration of her claim for recurrence of disability. In a July 20, 2009 letter, appellant argued that the Office impermissibly denied her claim under the mistaken assumption that she was terminated from the employing establishment on June 2, 1993 when in fact she was terminated on June 3, 1993. She asserted that the Office indicated, in a June 6, 2008 decision, that she was terminated from the employing establishment on June 2, 1993 and that her claim should be denied because the factual evidence of the case showed that her work stoppage was a result of being terminated on that date. Appellant claimed that, because her work stoppage occurred on June 2, 1993 and her termination occurred on June 3, 1993, her work stoppage could not have been due to the termination which occurred a day later.[4] She stated:

> "I ask you how then could my work stoppage be a result of my termination when my work stopped the day before my termination. You based your denial on the belief that the factual evidence of the case indicated my work stoppage to be a result of my being terminated. The factual evidence shows this is incorrect."

In a January 26, 2010 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

## ***LEGAL PRECEDENT***

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[5] the Office's regulations provide that the evidence or

[2] Docket No. 08-2013 (issued February 17, 2008). On April 7, 1993 appellant, then a 51-year-old letter carrier, sustained a work-related acute lumbosacral strain and right knee strain. She stopped her limited-duty work on June 2, 1993 and was terminated from the employing establishment effective June 3, 1993. Appellant alleged that she sustained a recurrence of disability on June 3, 1993 due to her April 7, 1993 employment injury. In several decisions, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a work-related recurrence of disability on or after June 3, 1993.

[3] In October 2, 1998 and January 2, 2001 decisions, the Board affirmed the Office's finding that appellant had not met her burden of proof to show that she sustained a recurrence of disability on or after June 3, 1993 due to her April 7, 1993 employment injury. Docket No. 97-63 (issued October 2, 1998); Docket No. 99-2541 (issued January 2, 2001). In later decisions, the Board found that the Office had properly denied appellant's multiple requests for further review of the merits of her claim.

[4] Appellant submitted an undated "disability certificate" in which a person with an illegible signature stated that she could not work from June 2 to 21, 1993. This document was previously submitted and considered by the Office and the Board. Appellant also submitted a June 11, 1993 letter in which the postmaster at her workplace indicated that she was separated from the employing establishment effective June 3, 1993 because of her unsatisfactory job performance.

[5] 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).

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.[6] 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.[7] 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.[8] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[9] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[10] While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[11]

## ***ANALYSIS***

On April 7, 1993 appellant sustained a work-related acute lumbosacral strain and right knee strain. She stopped work on June 2, 1993 and alleged that she sustained a recurrence of disability on June 3, 1993 due to her April 7, 1993 employment injury. The Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a work-related recurrence of disability on or after June 3, 1993. In a January 26, 2010 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

In support of her reconsideration request, appellant argued that the Office impermissibly denied her claim under the mistaken assumption that she was terminated from the employing establishment on June 2, 1993 when in fact she was terminated on June 3, 1993. She asserted that the Office denied her claim on the basis that her work stoppage was a result of being terminated on June 3, 1993. Appellant claimed that, because her work stoppage actually occurred on June 2, 1993 and her termination from the employing establishment occurred on June 3, 1993, her work stoppage could not have been due to the termination which occurred a day later.

The Board finds that the submission of this argument does not require reopening of appellant's claim for further review of the merits because this argument does not have a reasonable color of validity with respect to main issue of the present case.[12] Appellant argued

[6] 20 C.F.R. § 10.606(b)(2).

[7] *Id.* at § 10.607(a).

[8] *Id.* at § 10.608(b).

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

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

[11] *John F. Critz*, 44 ECAB 788, 794 (1993).

[12] *See supra* note 11.

that the basis of the Office's denial of her claim for recurrence of disability was its mistaken assumption that she stopped work due to the termination of her employment. However, the basis for the Office's denial of appellant's claim was its finding that she did not submit sufficient medical evidence to establish that she sustained a work-related recurrence of disability on or after June 3, 1993.[13] The main issue of the present case is medical in nature and would generally be resolved by the submission of probative medical evidence. Appellant did not submit any new and relevant medical evidence in connection with her reconsideration request.[14]

Appellant has not established that the Office improperly denied her request for further review of the merits of its prior decisions under section 8128(a) of the Act, because the evidence and argument she submitted did not to 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).

[13] On appeal appellant argued that she submitted relevant evidence on reconsideration with respect to the Office's use of "wrong dates." She did not provide any further explanation of this argument.

[14] Appellant submitted an undated "disability certificate" in which a person with an illegible signature stated that she could not work from June 2 to 21, 1993. The submission of this document would not require reopening of appellant's claim as it was previously submitted and considered by the Office and the Board. *See supra* note 9. She also submitted a June 11, 1993 letter in which the postmaster at her workplace indicated that she was separated from the employing establishment effective June 3, 1993 because of her unsatisfactory job performance. The submission of this document would not require reopening of appellant's claim as it is not relevant to the main issue of the present case. *See supra* note 10. As noted above, appellant's case was denied due to her failure to submit sufficient medical evidence and this document is not directly relevant to this matter.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the January 26, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 7, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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