

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DIANE E. HAMMONDS and U.S. POSTAL SERVICE,  
POST OFFICE, Jacksonville, FL

*Docket No. 01-1673; Submitted on the Record;  
Issued September 26, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.<sup>1</sup>

On October 4, 1990 appellant, then a 30-year-old distribution clerk, filed a claim alleging that her lower back pain was caused by her employment. The Office accepted appellant's claim for lumbosacral strain and herniated nucleus pulposus, L5-S1 and paid appropriate benefits. On April 2, 1997 appellant filed a claim for a schedule award.

The Office subsequently accepted two recurrences of disability dated August 22, 1995 and May 20, 1997 and paid appropriate benefits.

In a report dated June 2, 1997, Dr. Mary K. Robinson, appellant's treating physician Board-certified in family practice, stated that she was totally disabled from May 15, 1997.

In a report dated June 26, 1997, Dr. Robinson determined that appellant had a 31 percent impairment of the right lower extremity and a 22 percent impairment of the left lower extremity. She noted that appellant had reached maximum medical improvement.

In a memorandum for the record dated July 21, 1997, the Office noted that appellant had sustained a recurrence of disability on May 20, 1997. On July 30, 1997 the Office advised appellant that she was on the periodic rolls from June 21 to August 16, 1997.

In a report dated November 4, 1997, the Office's consulting nurse recommended that appellant be evaluated by Dr. Chaim Rogozinski, a Board-certified orthopedic surgeon, to obtain return to work instructions. The nurse noted that Dr. Robinson had released appellant from her

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<sup>1</sup> The Board notes that several records in the file are not part of appellant's claim.

care but that she would contact her to obtain information on appellant's capacity to return to work and her date of maximum medical improvement.<sup>2</sup>

On January 8, 1998 the Office referred appellant to Dr. Rogozinski for a second opinion evaluation. The Office advised appellant that her full cooperation was required and that if she obstructed the examination, her compensation would be suspended until the obstruction stops. Appellant was further advised that the second opinion physician was authorized to refer her for additional medical tests or further examination to assess her medical condition.

In a report dated January 23, 1998, Dr. Rogozinski noted that he had examined appellant that day and advised her of the need to take a physical capacity evaluation to determine her work capabilities and that appellant "will be getting back to us within one week with her decision."

On March 24, 1998 the Office advised appellant that her condition had not improved sufficiently to allow her to return to any type of limited duty.

In a report dated March 18, 1998 and received by the Office on March 31, 1998, Eduardo Mesina, a physical therapist, advised the Office that he attempted to provide a physical capacity evaluation on March 12, 1998 to appellant. The therapist noted that appellant rated her pain as plus 10 on a 1 to 10 scale, but that her high pain profile did not correlate "with [her] movement pattern." Coefficient of variation tests for arms, legs and hands revealed less than maximum or poor effort. None of the material handling activities were completed, nor were the bilateral isokinetic test or the matheson test performed. Mr. Mesina stated that appellant was unwilling to finish the evaluation due to complaints of increased severe low back and right leg pain, that she did not meet the validity criteria because of her unwillingness to complete the evaluation and that he, therefore, did not provide a work level status.

In a report dated March 28, 1998 and received by the Office on April 8, 1998, Dr. Rogozinski noted *via* checkmarks that appellant was to return to full duty without restrictions. He added that she had reached maximum medical improvement and that she had no permanent impairment. In the notes section of the report, he stated: "Does n[o]t want to repeat physical capacity evaluation."

On April 2, 1998 the employing establishment directed appellant to return to work on April 11, 1998 to a rehabilitation position which she had agreed to on November 14, 1996.

In a report dated April 10, 1998, Dr. Robinson stated that appellant was totally disabled and was not to return to work under any conditions, including light duty. April 14, 1998 the Office advised appellant that she had 14 days to explain why she "obstructed the second opinion evaluation" or to return to Dr. Rogozinski for another referral. The Office stated that if appellant failed to either explain her obstruction or to return to Dr. Rogozinski for another examination, her benefits would be suspended. It also stated that it had Dr. Robinson's April 10, 1998 report,

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<sup>2</sup> At an appointment scheduled for October 30, 1997, Dr. Robinson's nurse advised appellant and the consulting nurse that she no longer treated workers' compensation patients and that a referral to another physician would be made on November 13, 1997.

but that Dr. Rogozinski' opinion that she can return to work without restrictions will stand if she failed to explain her obstruction or failed to ask for another evaluation.

By decision dated May 4, 1998, the Office suspended appellant's compensation benefits on the grounds that she obstructed a physical capacity evaluation and failed to either explain why she obstructed the evaluation or to contact Dr. Rogozinski's office for another evaluation.

By letter dated May 8, 1998, appellant requested reconsideration. In a report dated June 2, 1998, Dr. Robinson stated that appellant was unable to complete the physical capacity evaluation on March 12, 1998 and that it would not be worthwhile to arrange another evaluation.

By decision dated July 13, 1998, the Office denied modification of the May 4, 1998 decision. By letter dated October 7, 1998, appellant requested reconsideration. By decision dated December 9, 1998, the Office denied review. By letter received by the Office on January 21, 1999, appellant again requested reconsideration. By decision dated February 11, 1999, the Office again denied review. Appellant again requested reconsideration on March 5, 1999. The Office, in a decision dated April 21, 1999, denied modification of its prior decision. The Office found that Dr. Robinson's April 15, 1999 letter, which stated that appellant was advised only to perform the activities she was able to do with respect to the physical capacity evaluation, did not substantiate appellant's assertion that Dr. Robinson advised her to not take the physical capacity evaluations.

In a letter dated June 3, 1999 and received by the Office on July 30, 1999, appellant again requested reconsideration. The Office denied modification in a decision dated September 28, 1999, finding that appellant's new evidence, in which she noted additional nonwork-related medical conditions and related medical treatment, did not explain her obstruction of the physical capacity evaluation.

In a letter dated September 9, 2000 and received by the Office on November 8, 2000, appellant requested reconsideration. In a decision dated February 28, 2001, the Office denied review of her claim.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>3</sup> As appellant filed her appeal with the Board on May 18, 2001, the only decision properly before the Board is the Office's February 28, 2001 decision denying appellant's request for reconsideration.

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

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<sup>3</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may--

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”<sup>4</sup>

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of the claim by submitting evidence and argument: showing that the Office erroneously applied or interpreted a specific point of law; or advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.<sup>5</sup> Section 10.608(b) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>6</sup>

In this case, the only medical evidence submitted was a January 14, 2000 nerve conduction study and electromyography test from Dr. Arastoo T. Nabizadeh. This report did not explain why appellant obstructed the March 12, 1998 physical capacity evaluation, nor could the report be construed to be a request to take another physical capacity evaluation test and thus it is not relevant evidence sufficient to require the Office to reopen the claim for merit review.

Although appellant also submitted numerous medical reports, those reports had been submitted previously and reviewed by the Office in prior decisions. Because these reports are repetitive, they are not sufficient to require the Office to reopen appellant's claim for merit review.<sup>7</sup>

In its February 28, 2001 decision, the Office correctly noted that appellant did not provide any new and relevant evidence or raise any substantive legal arguments not previously considered sufficient to warrant a merit review. Appellant also did not argue that the Office erroneously applied or interpreted a point of law. Consequently, appellant is not entitled to a merit review of her claim based upon the requirements under 20 C.F.R. § 10.606(b)(2). Accordingly, the Board finds that the Office acted within its discretion in denying appellant's request for reconsideration.

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.606(b)(2) (1999).

<sup>6</sup> 20 C.F.R. § 10.608(b) (1999).

<sup>7</sup> *John E. Watson*, 44 ECAB 612, 614 (1993).

The February 28, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.<sup>8</sup>

Dated, Washington, DC  
September 26, 2002

Alec J. Koromilas  
Member

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member

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<sup>8</sup> The Board notes that appellant filed a claim for a schedule award on April 15, 1997. As there is no final decision of record regarding a schedule award claim, this issue is not before the Board on the present appeal. 20 C.F.R. § 501.2(c).