

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NORMA J. MOYLE and DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS, Carson City, NV

*Docket No. 02-1926; Submitted on the Record;
Issued January 27, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on September 21, 2001; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On October 15, 2001 appellant, then a 53-year-old social worker, filed a traumatic injury claim, alleging that on September 21, 2001 she sustained neck, back and right hip injuries due to a vehicular accident at work. She did not stop work at the time of the accident. By letter dated November 28, 2001, the Office advised appellant about the standards under which chiropractic reports may be considered as medical evidence and requested that she provide additional evidence within 30 days. By decision dated January 7, 2002, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained an injury in the performance of duty on September 21, 2001. By decision dated March 27, 2002, the Office denied appellant's request for a merit review.

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on September 21, 2001.

Appellant did not submit sufficient medical evidence to establish that she sustained an injury in the performance of duty on September 21, 2001. She submitted an October 26, 2001 report in which Dr. Mark Muldoon, an attending Board-certified chiropractor, indicated that she was partially disabled from September 21, 2001 until an undetermined time. Dr. Muldoon listed the September 21, 2001 employment incident, but did not provide any findings or a diagnosis.¹

¹ Dr. Muldoon checked a "no" box indicating that appellant's condition was not related to the reported incident, but stated, "[s]ome soreness from injury that occasionally caused discomfort."

The opinion of Dr. Muldoon, however, has no probative medical value on the issue of whether appellant sustained an employment-related injury because his reports do not constitute medical evidence within the meaning of the Federal Employees' Compensation Act. Under section 8101(2) of the Act, chiropractors are only considered physicians and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.² However, Dr. Muldoon did not indicate in his report that subluxations were demonstrated by x-rays to exist. The Office provided appellant with an opportunity to provide probative medical evidence containing an opinion on causal relationship, but she did not do so within the time allotted.³

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of Act,⁴ the Office's regulations provide that 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) submit relevant and pertinent new evidence not previously considered by the Office.⁵ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁷

In connection with her February 18, 2002 reconsideration request, appellant submitted a letter in which she further described the nature of her claimed injury. She indicated that she was seeking medical care from a physician, but she did not submit any medical evidence. This letter, however, would not require reopening of appellant's claim as it does not relate to the main issue of the present case, *i.e.*, whether she submitted sufficient medical evidence to establish that she sustained an injury in the performance of duty on September 21, 2001. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁸

² 5 U.S.C. § 8107(a); *see Jack B. Wood*, 40 ECAB 95, 109 (1988).

³ Appellant submitted additional evidence on appeal to the Board, but the Board cannot consider such evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

⁴ 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).

⁵ 20 C.F.R. §§ 10.606(b)(2).

⁶ 20 C.F.R. § 10.607(a).

⁷ 20 C.F.R. § 10.608(b).

⁸ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

In the present case, appellant has not established that the Office abused its discretion in its March 27, 2002 decision by denying her request for a review on the merits of its January 7, 2002 decision under section 8128(a) of the Act, because she 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 submit relevant and pertinent new evidence not previously considered by the Office.

The March 27 and January 7, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
January 27, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member