

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOAN A. BRANT and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Richmond, VA

*Docket No. 02-1454; Submitted on the Record;
Issued May 14, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On December 12, 1990 appellant, then a 43-year-old tax examining clerk, was injured in the performance of duty when she slipped and fell on a wet floor. The Office accepted the traumatic injury claim for cervical, thoracic and lumbar strains with a nondisplaced fracture of the L3 vertebra. Appellant received wage-loss compensation from December 12, 1990 until her benefits were terminated by the Office effective October 30, 1992, on the grounds that she no longer had any work-related disability. Appellant subsequently received compensation based on a recurrence of disability during the following periods: January 27, 1993 to January 3, 1994, April 8, 1994 to January 9, 1995 and March 16, 1995 to February 12, 1996.

On February 6, 1998 appellant filed a (Form CA-8) claim for compensation for lost wages for the period of May 9, 1996 through January 24, 1998.

In conjunction with that claim, appellant submitted a March 16, 1998 report from Dr. John H. Feibel, a Board-certified neurologist and her treating physician, who discussed appellant's symptoms of back pain and stated that she suffered from chronic cervical and lumbar strains due to the work injury of December 12, 1990. He reported that appellant was disabled from work and under his care from May 8, 1996 to January 26, 1998. He noted that he had previously returned appellant to work with restrictions that she avoid prolonged sitting and be given a fitted orthopedic chair to use. Dr. Feibel related that appellant's condition had deteriorated following her last attempt at work, as a direct result of the prolonged sitting and typing required while she worked at a computer terminal. He noted that appellant was depressed. The physician opined that appellant's condition had materially worsened over time as a result of her attempted return to work but was met with the employing establishment's refusal to accommodate her medical restrictions of no prolonged sitting and by failing to provide her with an appropriate computer chair. He again noted that appellant's disability applied to the period of May 8, 1996 through January 26, 1998.

In a Form CA-20(a) attending physician's report dated March 16, 1998, Dr. Feibel diagnosed chronic cervical and lumbar strain with depression due to the work injury of December 12, 1990. He noted that the employing establishment had agreed to accommodate appellant's work restrictions and had fitted with an ergonomically correct chair for typing and computer work. He approved appellant's return to work with restrictions effective January 26, 1998.

In a September 10, 1998 letter, the Office notified appellant of the factual and medical evidence required to establish her claim for disability wage loss. The Office pointed out that Dr. Feibel's opinion was not well reasoned as to why appellant had to stop work on May 8, 1996 or why she had to be off work for such a long period of time. The Office also requested a medical opinion addressing whether her depression was work related or consequential to the December 12, 1990 work injury. No additional medical evidence was forthcoming.

In a decision dated October 22, 1998, the Office denied appellant's claim for compensation on the grounds that the evidence was insufficient to establish that the claimed period of disability was causally related to the accepted work injury.

Appellant requested reconsideration on October 19, 1999 and submitted the following evidence: a statement, in which she contended that she was unable to work beginning May 8, 1996 (identified as "Item C"), a February 2, 1996 statement from a chiropractor and a report from Dr. Feibel dated October 15, 1999.

In his October 15, 1999 report, Dr. Feibel noted that appellant had been released to return to work in February 1996, but that her condition again worsened as a result of sitting for extended periods of time at work. He related that by May 8, 1996 appellant's back, neck and leg pain was so severe she was unable to work at all. He stated, "the patient was provided with [physician's] notes for each of the periods of absence. The patient was first seen on July 30, 1996 after being taken off work effective May 8, 1996." Dr. Feibel noted that appellant could not tolerate sitting for any length of time so he decided that she should be placed on medical leave until such time as her condition improved. According to the physician, appellant returned to work in January 1998, with restrictions but again had a worsening of her condition resulting in more severe back pain. He noted that appellant's chronic back condition was not surgically remediable, therefore, appellant has had to rely on conservative care. Dr. Feibel stated, "[appellant's] chronic cervical and lumbar strain, which prevented her from working during the period of May 8, 1996 to January 26, 1998, is caused by the injury suffered at work on December 12, 1990.

In a November 23, 1999 decision, the Office denied modification of the October 22, 1998 decision.¹

On November 20, 2000 appellant submitted a reconsideration request together with the following evidence: medical reports from Dr. Feibel dated February 2, 1996, January 10 and March 16, 1998, July 12 and October 15, 1999, a disability slip dated January 4, 1991, copies of

¹ The Office noted that the chiropractic report predated the alleged period of disability, therefore, it was not relevant.

magnetic resonance imaging scan reports, a routing slip, medical notes dated from March 12 to April 16, 1996, an insurance statement dated May 2, 1996 and numerous pharmacy slips. All of the evidence was previously of record except for the pharmacy slips, which noted the dates, on which appellant had her prescription filled and the medications prescribed to her.

In a decision dated January 18, 2001, the Office denied modification of the prior decisions.

In a letter dated January 10, 2002, appellant requested reconsideration and provided a copy of an affidavit from Dr. Feibel dated November 2, 1998. The affidavit stated that Dr. Feibel had treated appellant since March 1992, for complaints of severe back and neck pain, headaches and numbness in the legs. He noted that appellant attempted to return to work in 1993, but after three days experienced severe back pain and left leg numbness that prevented her from walking so she was taken off work. Dr. Feibel stated that he had a discussion with appellant's supervisor on March 29, 1993 and suggested that she be allowed a 3 to 5 minute break each hour to get up and stretch. He also suggested on January 15, 1994 that appellant be provided an ergonomically appropriate chair or else a more suitable job be provided to her. When the chair was not provided, Dr. Feibel related that appellant became depressed as a result of chronic pain and having to sit for long periods of time at her computer terminal. He stated that, "[appellant] attempted to return to work again in January 1994, January 1995, February 1996 and January 1998," but each time it resulted in an increase in back and neck pain. He concluded that "based upon a reasonable degree of medical certainty, that [appellant's] condition deteriorated following each attempt to return to work as a direct result of the employer not following the restrictions I placed on her ability to return to work."

In a January 22, 2002 decision, the Office denied appellant's request for reconsideration, finding that Dr. Feibel's affidavit was repetitious of the evidence of record and, therefore, insufficient to warrant a merit review of the record.

The Board finds that the Office properly denied appellant's request for reconsideration under section 8128.

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.² As appellant filed her appeal with the Board on April 30, 2002 the only decision before the Board is the Office's January 22, 2002 decision denying reconsideration on the merits. The Board does not have jurisdiction to review the Office's decision of January 18, 2001, or to consider whether the Office correctly determined that appellant failed to establish a recurrence of disability.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.³ The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law;

² See 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Earl David Seal*, 49 ECAB 152 (1997).

³ 5 U.S.C. § 8128; see *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

(2) 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.⁴ When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. 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.⁵ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.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 review on the merits.⁷

In this case, appellant did not show in her reconsideration request that the Office erroneously applied or interpreted a specific point of law. She failed to advance a relevant legal argument to show that the Office erred in denying her claim compensation based on a recurrence of disability. Although appellant submitted a November 2, 1998 affidavit from Dr. Feibel, the Board finds that the affidavit is repetitive evidence. The Board notes that Dr. Feibel previously stated in reports dated March 16, 1998 and October 15, 1999, that the employing establishment failed to comply with his medical and work restrictions for appellant, therefore, she sustained a worsening of her back condition due to sitting for prolonged periods of time. Dr. Feibel's affidavit reports his opinion that appellant's back condition deteriorated after each return to work. He also reiterated in his affidavit, as he did in prior reports, that appellant became depressed as a result of the pain she experienced from having to sit for long periods of time. As such, this evidence is duplicative of other medical reports of record.

The Board has held that submission of evidence or legal argument, which repeats or duplicates evidence already of record does not constitute a basis for reopening a case.⁸ Consequently, because appellant has not satisfied the requirements of section 8128, the Office properly denied her request for reconsideration on the merits.

⁴ 20 C.F.R. § 10.606(b) (1999).

⁵ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁶ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

⁷ 20 C.F.R. § 10.608(b).

⁸ *See David E. Newman*, 48 ECAB 305 (1997); *Alton L Vann*, 48 ECAB 259 (1996).

The January 22, 2002 is decision of the Office of Workers' Compensation Programs hereby affirmed.

Dated, Washington, DC
May 14, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member