

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

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**DEBRA A. STANFORD, Appellant**

**and**

**DEPARTMENT OF THE NAVY, NAVAL SEA  
SYSTEMS COMMAND, Seal Beach, CA,  
Employer**

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**Docket No. 04-307  
Issued: May 17, 2004**

*Appearances:*  
*James Wright, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member

**JURISDICTION**

On November 17, 2003 appellant, through her representative, filed a timely appeal from an Office of Workers' Compensation Programs' decision dated August 19, 2003, which denied her untimely request for reconsideration and a nonmerit April 30, 2003 Office decision, which denied her request for a merit review. Because more than one year has elapsed between the last merit decision of March 26, 2002 and the filing of this appeal on November 17, 2003, 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). As the only decisions filed within one year from the date of appeal are the April 30 and August 19, 2003 nonmerit Office decisions, the Board has jurisdiction to review such decisions under 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUES**

The issues are: (1) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a); and (2) whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the

grounds that her request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

### **FACTUAL HISTORY**

On April 14, 1997 appellant, then a 36-year-old explosive operator supervisor, sustained an injury to her back when she stepped backward while loading a truck and fell off the back of the truck. Appellant did not know or realize that the lift plate had been lowered. The Office accepted her claim for lumbosacral strain. The claim was later expanded to include medial meniscus tear of the right knee, for which appellant underwent an authorized arthroscopic surgery on July 23, 1998. The record indicates that appellant was placed in the position of logistic management specialist due to a reduction in workforce procedure in September 1997. On January 4, 1999 appellant returned to work for four hours per day, but stopped again on January 21, 1999. The Office paid all appropriate periods of disability.

By decision dated April 24, 2001, the Office terminated appellant's compensation benefits, effective the same date, on the basis that the weight of the medical evidence, as represented by the February 21, 2001 report of Dr. Howard Sturtz, a Board-certified orthopedic surgeon and an impartial medical specialist, established that she recovered from the accepted work injuries.

On April 30, 2001 appellant filed a Form CA-7 claim for compensation, claiming schedule award benefits. By decision dated May 12, 2001, the Office denied appellant's claim for a schedule award finding that because the weight of the medical evidence indicated no objective findings to support continued benefits, there was no basis of a claim of permanent impairment.

In a May 22, 2001 letter, appellant requested an oral hearing on the Office's April 24, 2001 decision terminating her benefits. She additionally requested that her list of witnesses be subpoenaed. By letter dated August 21, 2001, the Office denied appellant's request that subpoenas be issued.

On November 1, 2001 appellant's hearing took place and she was represented by her representative of record. By decision dated March 26, 2002, an Office hearing representative affirmed the termination decision of April 24, 2001. The hearing representative found that the Office had met its burden of proof in relying on the report from Dr. Sturtz, in terminating entitlement to compensation benefits as it was the most comprehensive and well-rationalized report of record and constituted the weight of the medical evidence in establishing that appellant had no continuing condition or disability causally related to the accepted employment injury. The hearing representative further found that an October 12, 2001 report from Dr. David LaRochelle, an orthopedic surgeon and appellant's treating physician, was not sufficient to create a new conflict in medical opinion as established by the report from Dr. Sturtz.

In a March 20, 2003 letter, appellant, through her representative, requested reconsideration of the March 26, 2002 decision and advised that additional medical evidence would be submitted shortly. A copy of the previously submitted August 28, 2001 magnetic resonance imaging (MRI) scan of the lumbar spine was received.

In an April 29, 2003 report of telephone call, appellant's representative advised that appellant had a medical examination scheduled for May 16, 2003 and a report would follow.

In a nonmerit decision dated April 30, 2003, the Office denied appellant's request for reconsideration finding that the evidence submitted was of a repetitious nature and did not warrant a merit review of the prior decision. It further noted that, although appellant had a medical examination scheduled for May 16, 2003, it remained her responsibility to submit relevant evidence with the request for reconsideration.

In a July 1, 2003 letter, appellant, through her representative, requested reconsideration and attached a May 16, 2003 medical report from Dr. Robert E. Lieberman, a neurosurgeon, which was noted as being the additional medical evidence originally referred to in her March 20, 2003 request for reconsideration. In his May 16, 2003 report, Dr. Lieberman stated that the current examination was remarkable for significant embellishment and noted that a number of nonanatomic tests including the Waddell's tests for head tap, torso rotation, dorsal tenderness and the flip test were positive. No clear evidence of a focal neurological abnormality was found. Although range of motion of the low back was decreased, Dr. Lieberman stated that the decrease was out of proportion to spasm. Although examination of the knees failed to reveal any abnormality, Dr. Lieberman noted that the operative report describing appellant's meniscectomy had identified chondromalacia, but no identifiable tear. The physician stated that he only had basic medical knowledge in the area of the knees but, based on appellant's operative report of her right knee, he opined that appellant has some significant objective findings, disability and a need for additional treatment of her knee and advised that an additional orthopedic consultation was necessary. With regard to the low back, Dr. Lieberman opined that appellant had essentially plateaued and she should be restricted from any repetitive bending, stooping, lifting or one-time lifting in excess of approximately 20 pounds. He further opined that appellant could not perform the work duties of the position at the time of injury or those provided later in a "modified" position.

By decision dated August 19, 2003, the Office denied further review of the claim on the grounds that appellant's reconsideration request was untimely filed and did not establish clear evidence of error.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.<sup>1</sup> Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>2</sup> When reviewing an

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<sup>1</sup> 20 C.F.R. § 10.606(b)(2) (1999).

<sup>2</sup> 20 C.F.R. § 10.608(b) (1999).

Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

In the present case, the Office in its April 30, 2003 decision denied appellant's request for reconsideration, without conducting a merit review, on the grounds that the evidence submitted was of a repetitious nature and did not warrant a merit review of the prior decision. In her March 20, 2003 letter, appellant, through her representative, noted that additional medical evidence would be submitted; however, no evidence was received by the Office. It is appellant's responsibility to see that all relevant evidence has been submitted to the record for consideration by the Office. As appellant failed to submit any new evidence or offer any arguments with her request for reconsideration, appellant did not provide evidence sufficient to warrant a reopening of her case for further review on its merits. Consequently, appellant's statement that additional medical evidence would be submitted does not constitute a basis for reopening a claim for further merit review under the three criteria of 20 C.F.R. § 10.606(2). Although the Office had noted that duplicative copies of previously submitted evidence were also received,<sup>4</sup> the Board has long held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.<sup>5</sup> Therefore, under 20 C.F.R. § 10.608(b) the Office properly denied appellant's application for reopening her case for a review on its merits.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of the Federal Employees' Compensation Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>6</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.<sup>7</sup> The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>8</sup> One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.<sup>9</sup> In those instances when a request for reconsideration is not timely filed, the Office will undertake a limited review to determine whether the application presents "clear evidence of

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<sup>3</sup> *Annette Louise*, 54 ECAB \_\_\_\_ (Docket No. 03-335, issued August 26, 2003).

<sup>4</sup> The Board notes that the Office had stated that it received a copy of the August 28, 2001 MRI scan of the lumbar spine and a copy of Dr. LaRochelle's October 12, 2001 letter. However, a review of the record indicates that, contrary to the Office's statement, it did not receive an additional copy of Dr. LaRochelle's October 12, 2001 letter following the March 26, 2002 decision of the Office.

<sup>5</sup> *James E. Norris*, 52 ECAB 93 (2000).

<sup>6</sup> 5 U.S.C. § 8128(a); see *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>7</sup> 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 his own motion or on application." 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.607 (1999).

<sup>9</sup> 20 C.F.R. § 10.607(a) (1999).

error” on the part of the Office.<sup>10</sup> In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

The one-year time limitation begins to toll the day the Office issued its March 26, 2002 decision, as this was the last merit decision in the case.<sup>12</sup> Appellant’s request for reconsideration was dated July 1, 2003, therefore, she is not entitled to review of her claim as a matter of right. Because appellant filed her request more than one year after the Office’s March 26, 2002 merit decision, she must demonstrate “clear evidence of error” on the part of the Office in denying her claim for compensation.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>13</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>14</sup> Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.<sup>15</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>16</sup> The evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.<sup>17</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>18</sup>

The Board finds that the arguments and evidence submitted by appellant in support of her application for review do not raise a substantial question as to the correctness of the Office’s termination decision of March 26, 2002.<sup>19</sup> A limited review of the evidence reveals that the

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<sup>10</sup> 20 C.F.R § 10.607(b) (1999).

<sup>11</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>12</sup> See *Veletta C. Coleman*, 48 ECAB 367, 369 (1997).

<sup>13</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>14</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>15</sup> See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

<sup>16</sup> See *Leona N. Travis*, *supra* note 14.

<sup>17</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>18</sup> See *John Crawford*, 52 ECAB 395 (2001); *Pete F. Dorso*, 52 ECAB 424 (2001).

<sup>19</sup> Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disabling condition has ceased or that it is no longer related to the employment. See *Patricia A. Keller*, 45 ECAB 278 (1993).

Office terminated appellant's benefits based on the February 21, 2001 medical report of Dr. Sturtz, a Board-certified orthopedic surgeon, who served as an impartial medical specialist. Dr. Sturtz stated that the course of appellant's medical care has been characterized by prolonged symptomatology without objective corroboration and found that all the medical examiners, himself included, had noted discrepancies in appellant's performance and noted symptom magnification. Dr. Sturtz noted that, although the MRI scan study of the right knee showed some changes in the posterior meniscus, possibly consistent with a tear, he opined that, despite the MRI scan study, there were no abnormal findings of the right knee during arthroscopy, appellant should have had a prompt and complete recovery from the surgery without disability and there was no symptomatology or disability due to the right knee condition. He further stated that such MRI scan findings were commonplace in asymptomatic individuals at this age. Dr. Sturtz further opined, based on the absence of any clear objective physical findings by either himself or the examiners of record, that appellant recovered from the symptomatology regarding her back due to the accident of April 14, 1997. He noted that the MRI scan of the lumbar spine showed degenerative changes at multiple levels with no clear signs of a disc herniation or protrusion. He stated that although there might be some low-grade symptomatology on an intermittent basis, this may be due to the naturally occurring degenerative process. Dr. Sturtz further opined that there was no permanent aggravation of degenerative disc disease and, at most, appellant had suffered a temporary aggravation lasting several months. Dr. Sturtz also reviewed the job positions of appellant's original job and her new job and opined that she might have some intermittent back symptomatology if she were to return to the original job, but the new job would be medically suitable with modifications. He concluded that appellant's ongoing symptomatology was not supported by objective findings.

The Board finds that the evidence submitted by appellant, in support of her request, does not raise a substantial question as to the correctness of the Office's March 26, 2002 merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. In his May 16, 2003 report, Dr. Lieberman opined that appellant had not reached a stable plateau with regard to her knees based on significant objective findings from her operative report. He further opined that, with regard to her back, appellant could not perform the duties of either her original or modified position and provided restrictions. The Board notes that, while this medical opinion is supportive of continuing employment-related residuals after March 26, 2002, it is not sufficiently probative to shift the weight of the evidence in appellant's favor. With regard to the issue of whether appellant has any residuals for her accepted knee condition, Dr. Lieberman admitted that he only had basic knowledge with respect to the knees and had opined that a referral to an orthopedic physician was necessary. As Dr. Lieberman admitted to not having specialized expertise in the area of the knees, his opinion on the matter carries diminished probative value as it pertained to an area which was outside his field of expertise.<sup>20</sup> Moreover, although Dr. Lieberman opined that appellant could not perform the duties of either her original or modified position with regard to her back and had provided restriction, he failed to provide a well-reasoned discussion, based on a complete and accurate history, explaining the medical basis for the opinion held.<sup>21</sup> The Board has held that medical evidence

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<sup>20</sup> See generally *Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

<sup>21</sup> *Id.*

such as a detailed, well-rationalized medical report, which if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case.<sup>22</sup> The Board finds that appellant has failed to submit clear evidence of error such that the Office did not abuse its discretion in denying further merit review of her claim.

### **CONCLUSIONS**

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a). The Board further finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that it was untimely filed and failed to show clear evidence of error.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 19 and April 30 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 17, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>22</sup> See *Pete F. Dorso*, 52 ECAB 424 (2001), *Fidel E. Perez*, 48 ECAB 663 (1997).