

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

L.A., Appellant)

and)

DEPARTMENT OF DEFENSE, BANGOR)
COMMISSARY STORE, Silverdale, WA,)
Employer)

Docket No. 06-1976
Issued: March 7, 2007

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 23, 2006 appellant filed a timely appeal of the June 15, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying reconsideration. The most recent decision in the case is dated May 6, 2005. Because appellant filed her appeal more than a year after the last merit decision, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board does not have jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 5, 1997 appellant, then a 40-year-old produce clerk, filed an occupational disease claim, Form CA-2, for "chronic wear and tear," bone spurs and calcium deposits on her

spine.¹ She alleged that this condition was caused by continual lifting and shelving of cases of produce weighing from 10 to 50 pounds.

By decision dated September 1, 1998, the Office denied appellant's claim on the grounds that she had not established that she sustained an injury in the performance of duty. It accepted that she repetitively lifted up to 50 pounds and extensively used her arms to arrange produce displays. The Office found that appellant had submitted no evidence of a diagnosis. However, it also found that she had not submitted medical opinion evidence explaining how any diagnosed condition was caused by the accepted work factors.

On September 8, 1998 appellant requested an oral hearing and submitted medical reports related to both her shoulder and her back conditions. In a decision dated July 14, 1999, the Office hearing representative affirmed the September 1, 1998 decision. She found that the medical evidence did not establish that the accepted work factors caused the diagnosed medical conditions.

On May 22, 2000 appellant filed a request for reconsideration of the Office hearing representative's decision. She enclosed magnetic resonance imaging (MRI) scan reports for her thoracic and cervical spine and the report of Dr. Lynn Staker² dated July 28, 1999. The MRI scan revealed evidence of degenerative disc disease at the C5-6 and C6-7 levels and probable central canal stenosis at the T5-6 level caused by spondylosis. Dr. Staker stated that she believed appellant's cervical, scapular, anterior chest and lower back pain were related to the repetitive lifting required by her federal employment. She indicated that appellant's degenerative disc disease was aggravated by her employment. Appellant contended that Board precedent related to compensation for aggravation of underlying conditions imposed a duty on the Office to help develop the medical evidence required to prove a claim.

By decision dated March 9, 2004, the Office denied modification of the July 14, 1999 decision. It found that Dr. Staker's medical report did not provide adequate rationale in support of the physician's opinion on causal relation. Dr. Staker did not list specific employment factors that led to the aggravation of appellant's degenerative disc disease and did not provide objective findings demonstrating a material change in the underlying disease.

On February 23, 2005 appellant again requested reconsideration. She argued that her spine condition was caused by or related to her shoulder injury and that all of the evidence from her shoulder injury file should have been considered in her claim. Appellant enclosed several reports from physicians involved in her shoulder injury claim. She also contended that the actions of the employing establishment, which formed the basis for her Equal Employment Opportunity (EEO) claim, aggravated her conditions by creating stress and keeping her from working within her restrictions. Appellant provided evidence related to her EEO claim.

¹ The Board notes that this claim was initially filed under appellant's accepted shoulder injury claim, OWCP File No. 14032587.

² Dr. Staker's specialty and Board-certification status could not be ascertained.

By decision dated May 6, 2005, the Office denied modification of its March 9, 2004 decision. Although appellant submitted new medical evidence demonstrating degenerative disc disease of her upper spine and sacroiliitis of her lower spine, it did not establish that these conditions were caused by the accepted employment factors. While her physicians reported increased pain associated with employment duties the increase in pain or discomfort did not constitute a specific diagnosis. The Office also found that claims of stress induced by appellant's working conditions could not be considered as part of her spinal claim.

On May 5, 2006 appellant filed a request for reconsideration. She argued that an employee's disability was compensable even when federal employment was only one of several causes contributing to it. Appellant attached medical records from Dr. Julie Carkin, a Board-certified internist with a specialty in rheumatology, who treated her in 2001 and 2002. Dr. Carkin noted that appellant did not have musculoskeletal problems prior to her federal employment, which required a substantial amount of heavy lifting. She diagnosed possible spondyloarthropathy with thoracic involvement. Dr. Carkin indicated that some of appellant's spine pain was likely a combination of inflammatory pain, fibromyalgia-like myofascial pain and mechanical pain and that it was worsened by severe vicious cycle and secondary depression.

By decision dated June 15, 2006, the Office denied further merit review, finding that the medical evidence that appellant had submitted was not relevant or material to the issues of whether she had a diagnosed condition causally related to the accepted employment factors.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act, the Office has the discretion to reopen a case for review on the merits.³ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that an application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.⁴ Section 10.608(b) provides that, when an application for reconsideration 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.⁵

ANALYSIS

The Office denied appellant's claim on the basis that she did not submit sufficient medical evidence to establish that her spine condition was caused by lifting in her federal employment. Therefore, the underlying issue in the case is medical in nature.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ 20 C.F.R. § 10.608(b).

Appellant's May 5, 2006 request for reconsideration alleged that the Office had not considered the legal argument that compensation is payable under the Act when employment factors contribute to an employee's condition, even in a minor way. Her contention that the Office should have assisted in the development of the claim is not relevant to the basis on which the claim was denied. As the Office has not yet found that employment factors contributed in any way to appellant's diagnosed conditions, this legal contention does not require the Office to conduct a merit review under the second part of section 10.606(b)(2).⁶

Appellant also submitted new medical evidence from Dr. Carkin who stated that appellant had a history of heavy lifting at work and that she had possible spondyloarthropathy. However, Dr. Carkin did not address the underlying issue of causal relationship between the spondyloarthropathy and any accepted employment factors. Thus, the evidence is not relevant or pertinent to the underlying issue of whether appellant established an injury in the performance of duty causally related to factors of her federal employment. Therefore, she was not entitled to review under the third section of 10.606(b)(2).⁷

The Board notes that appellant's May 5, 2006 request for reconsideration did not allege that the Office erroneously applied or interpreted a specific point of law. She is not entitled to further review on the merits of her case under the first part of section 10.606(b)(2).⁸

As appellant did not meet any of the statutory requirements for a review of the merits of her claim, the Office properly denied the May 5, 2006 request for reconsideration.

CONCLUSION

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

⁶ 20 C.F.R. § 10.606(b)(2)(ii).

⁷ 20 C.F.R. § 10.606(b)(2)(iii).

⁸ 20 C.F.R. § 10.606(b)(2)(i).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation dated June 15, 2006 is affirmed.

Issued: March 7, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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