

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DESIREE M. BROWN and DEPARTMENT OF DEFENSE,
DEFENSE FINANCING & ACCOUNTING SERVICE, San Bernardino, CA

*Docket No. 00-159; Submitted on the Record;
Issued November 1, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a lower back injury in the performance of duty on September 10, 1998; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

On September 16, 1998 appellant, then a 41-year-old accounting technician, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that she sustained a back injury while in the performance of duty on September 10, 1998. Appellant described the nature of her injury as lower back pain and lumbosacral strain. She explained that the chair and computer desk she used caused her to experience severe lower back pain.

By decision dated October 27, 1998, the Office denied appellant's claim based upon her failure to establish that she sustained an injury on September 10, 1998 as alleged. Appellant subsequently requested a hearing, which was held on April 29, 1999. In a decision dated July 8, 1999, the Office hearing representative found that while appellant established fact of injury, she failed to demonstrate a causal relationship between her claimed lower back condition and her employment exposure on September 10, 1998. Accordingly, the Office hearing representative denied appellant's claim for compensation.

On July 26, 1999 appellant filed a request for reconsideration. The Office denied appellant's request by decision dated August 5, 1999. She filed another request for reconsideration with the Office on August 24, 1999. Appellant also filed an appeal with the Board on August 30, 1999. While her appeal was pending before the Board, the Office issued a decision dated September 17, 1999 denying appellant's August 24, 1999 request for reconsideration. Appellant subsequently filed another request for reconsideration with the Office

on September 22, 1999. By decision dated October 7, 1999, the Office denied appellant's most recent request for reconsideration without addressing the merits of her claim.¹

The Board has given careful consideration to the issues involved, appellant's contentions on appeal and the entire case record. The Board finds that the decision of the hearing representative of the Office dated July 8, 1999 is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the Office hearing representative.²

The Board further finds with respect to the Office's August 5, 1999 decision denying reconsideration, that the Office properly exercised its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides 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.³ 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.⁴

Appellant's July 26, 1999 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office.

¹ The Board finds that the Office did not have the authority to issue its October 7 and September 17, 1999 decisions denying reconsideration. The Board and the Office may not simultaneously exercise jurisdiction over the same issue in a case. *Arlonia B. Taylor*, 44 ECAB 591 (1993). At the time the Office issued its October 7 and September 17, 1999 decisions, appellant had already filed an appeal with the Board regarding the Office hearing representative's April 9, 1997 decision. Inasmuch as the Board had obtained jurisdiction over the case on August 30, 1999, the Office lacked the authority to issue the October 7 and September 17, 1999 decisions denying reconsideration. Accordingly, the Office's decisions dated October 7 and September 17, 1999 are set aside as null and void. *Terry L. Smith*, 51 ECAB __ (Docket No. 97-808, issued November 29, 1999).

² In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred. *Elaine Pendleton*, 40 ECAB 1143 (1989). The second component is whether the employment incident caused a personal injury. *John J. Carlone*, 41 ECAB 354 (1989). An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury. *Shirley A. Temple*, 48 ECAB 404, 407 (1997). The fact that the etiology of a disease or condition is unknown or obscure neither relieves an employee of the burden of establishing a causal relationship by the weight of the medical evidence nor does it shift the burden of proof to the Office to disprove an employment relationship. *Judith J. Montage*, 48 ECAB 292, 294-95 (1997). In the instant case, appellant failed to meet her burden of demonstrating that her claimed lower back condition is causally related to the September 10, 1998 employment incident.

³ 20 C.F.R. § 10.606(b)(2) (1999).

⁴ 20 C.F.R. § 10.608(b) (1999).

Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, the August 5, 1999 decision denying reconsideration correctly notes that appellant did not submit any new and relevant evidence along with her July 26, 1999 request for reconsideration. Appellant merely submitted a copy of the Office hearing representative's July 8, 1999 decision. Consequently, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2). As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office did not abuse its discretion in denying appellant's July 26, 1999 request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated August 5 and July 8, 1999 are hereby affirmed.

Dated, Washington, DC
November 1, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member