

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RHOLUNDA DEMAR and U.S. POSTAL SERVICE,  
O'HARE MAIL FACILITY, Chicago, IL

*Docket No. 00-1915; Submitted on the Record;  
Issued April 20, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs, in its September 27, 1999 and February 4, 2000 decisions, abused its discretion by refusing to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128(a).

On October 15, 1998 appellant, then a 35-year-old rehabilitation clerk, filed a notice of occupational disease claiming that, on April 17, 1996, it became apparent that the walking, standing and light lifting of her federal employment caused her right leg and lower back pain.<sup>1</sup> In support of her claim, appellant submitted a personal statement, a statement from her employer, and a copy of a magnetic resonance imaging (MRI) scan dated November 21, 1996. The MRI findings were "new right-sided disc herniation at L5-S1 compared to prior study of April 22, 1992." Appellant also submitted three medical reports from Dr. William B. Fischer, a Board-certified orthopedic surgeon, dated May 8, 1996, February 20 and July 7, 1998. In his reports Dr. Fischer opined that the sitting and walking arrangement of appellant's light-duty assignment were unsatisfactory and resulted in an exacerbation of her disability.

By letter dated December 11, 1998, the Office requested that appellant submit additional factual and medical information.

Appellant submitted additional reports from Dr. Fischer dated April 30 and December 5, 1996, January 22 and July 2, 1997. In his reports Dr. Fischer noted that appellant had not improved due to physical therapy and again indicated that appellant experienced an exacerbation in April 1996 and is unable to work. Appellant also submitted a copy of the MRI dated April 22, 1992, which indicated "minimal bulging and degenerated disc at L5-S1."

By decision dated January 28, 1999, the Office denied appellant's claim since the medical evidence of record was insufficient to establish a causal connection between appellant's diagnosed condition and her employment.

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<sup>1</sup> During the time of the injury appellant was apparently working a light-duty assignment, which she began on April 6, 1996, because of a previous condition from 1992.

By letter dated July 8, 1999, appellant requested reconsideration. Appellant submitted a medical report from Dr. Jeffrey S. Meisles, a Board-certified orthopedic surgeon, dated June 2, 1997. In his report, Dr. Meisles compared the MRI films from 1992 and 1996 and noted a progression of disc herniation at L5-S1. He opined that it was possible that the increase occurred during the period when appellant returned to work in 1996. Appellant also submitted duplicate evidence already in the record.

By decision dated September 27, 1999, the Office denied appellant's application for review.

By letter dated January 11, 2000, appellant requested reconsideration. In support of her request, she submitted floor plans of her work area and a witness statement from a coworker dated January 26, 2000. She stated that the floor plans demonstrated the increased distance she had to walk when she returned to work in April 1996 and that this contributed to her injury. The witness statement merely acknowledged that the distance appellant had to walk was lengthened between 1992 and 1996.

By decision dated February 4, 2000, the Office denied appellant's application for review since the evidence appellant submitted was irrelevant and immaterial and insufficient to warrant review.

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.<sup>2</sup> As appellant filed her appeal with the Board on May 9, 2000, the only decisions properly before the Board are the Office's September 27, 1999 and February 4, 2000 decisions denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's January 28, 1999 decision.

The Board finds that the Office's refusal, in its September 27, 1999 and February 4, 2000 decisions, to reopen appellant's case for further consideration of the merits of her claim, did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> the Office's regulations provide that a claimant must: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>4</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>5</sup> When a claimant fails to

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<sup>2</sup> 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 20 C.F.R. § 10.606.

<sup>5</sup> 20 C.F.R. § 10.607.

meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>6</sup>

In support of her July 8, 1999 request for reconsideration, the only new evidence that appellant submitted was the July 8, 1999 report from Dr. Meisles. In his report Dr. Meisles stated it is "quite possible" that appellant's increase in disc herniation occurred during the period of her returning to work, yet did not provide a definitive opinion as to the cause of appellant's disability. Since the July 8, 1999 report from Dr. Meisles does not provide new or relevant evidence as to the causal connection between appellant's condition and her employment, the Office properly determined that the evidence submitted was insufficient to warrant review.

In support of her January 11, 2000 request for reconsideration, appellant submitted plans of her job site and a witness statement. Since the issue of this case is whether appellant has met her burden of proof to establish a causal connection by submitting sufficiently rationalized medical opinion evidence, the job site plans and witness statement are irrelevant. Since the information submitted was irrelevant to establish causal connection, the Office properly determined that the evidence was insufficient to warrant review.

Appellant has not established that the Office abused its discretion in its September 27, 1999 and February 4, 2000 decisions by denying her request for a review of the merits of her claim under section 8128(a) of the Act, because she has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law not previously considered by the Office or that she submitted relevant and pertinent evidence not previously considered by the Office.

The February 4, 2000 and September 27, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
April 20, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>6</sup> 20 C.F.R. § 10.608.