

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA GORDON and DEPARTMENT OF AGRICULTURE,
NATIONAL RESOURCES CONSERVATION SERVICE, Ellensburg, WA

*Docket No. 01-713; Submitted on the Record;
Issued December 27, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On December 17, 1997 appellant, then a 49-year-old soil scientist, filed a claim alleging that she developed tendinitis in both arms from prolonged use of soil probes and entry of computer data.¹ Appellant indicated that she became aware of the disease on October 1, 1989. Appellant resigned from her position in November 1995.²

Appellant submitted two notes from Dr. Lee R. Akker, a Board-certified family practitioner, and several narrative statements dated October 27 and December 17, 1997. Dr. Akker's note dated March 10, 1995 indicated that appellant was seen for left finger tendinitis. The April 21, 1995 note indicated that appellant was a patient for several years and was treated for pain and discomfort in her left fourth finger. Dr. Akker noted x-rays of the hand revealed no abnormalities and that examination by a neurologist ruled out carpal tunnel syndrome. He determined that appellant's condition was related to excessive use of her hands and fingers for computer work and typing. Dr. Akker indicated that appellant was doing less activity with her hands and fingers and her symptoms were improving.

Appellant's narrative statements noted a history of appellant's tendinitis beginning in 1989. She indicated that in the fall of 1997 she returned to college and began using a

¹ Appellant filed a claim on August 17, 1998 for bilateral elbow tendinitis and back pain, claim number A14-0336236. However, this claim is not before the Board at this time.

² The record indicated that appellant resigned from her position in November 1995 after declining a reassignment out of her commuting area.

computer to complete the class assignments and the tendinitis symptoms in her left arm returned.³

By letter dated April 8, 1998, the Office requested that appellant submit additional factual and medical evidence to support her claim and afforded her 30 days within which to do so.

In support of her claim, appellant submitted treatment notes from Dr. Akker and from Dr. Saleem Khamisani, a Board-certified neurologist. The treatment notes from Dr. Akker indicated that appellant sustained a fall, in which she injured her shoulder and foot, and sought treatment for these injuries. Dr. Akker's notes from June and July 1994 indicated that appellant was being treated for tendinitis of her left shoulder and arm. He noted that it was first thought that appellant suffered from carpal tunnel syndrome but nerve conduction studies revealed no abnormalities. Dr. Akker's March 10, 1995 note indicated that appellant presented with a tender left fourth finger, which was possibly related to her computer work. Dr. Akker's October 28, 1997 note indicated that appellant was being treated for a partial dislocation of her right shoulder and soreness of her left arm brought on by excessive use of a computer. His December 2, 1997 note indicated that appellant presented with symptoms of pain in her fingers. Dr. Akker diagnosed tendinitis in appellant's elbows and fingers.

The May 1, 1998 consultation note from Dr. Khamisani provided a history of appellant's multiple injuries to her shoulder, foot and elbow. He diagnosed bilateral elbow tendinitis, status post fracture of the right foot and ankle dislocation, dislocation of the right shoulder resolved and possible bicep tendinitis of the right.

In a decision dated July 23, 1998, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that appellant sustained an injury while in the performance of duty.

In an August 25, 1998 letter, appellant requested reconsideration of her claim. Appellant submitted letters from her previous employers addressing her employment duties and additional medical evidence.

By decision dated October 15, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant modification of its prior decision.

In a letter dated November 10, 1998, appellant again requested reconsideration and submitted an additional letter from Dr. Akker. He noted appellant's history of treatment and current retirement. Dr. Akker stated that x-rays of appellant's hand and nerve conduction studies were normal. He believed that appellant's symptomology was related to her tendinitis resulting from excessive overuse of her hands and fingers on a computer.

³ In a noted dated April 6, 1998, the Office indicated that appellant filed a traumatic injury claim inappropriately, which was designated as case number A14-329145. The Office indicated that this case was a duplicate of case number A14-329183, which is presently before the Board on this appeal.

By decision dated January 26, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant modification of its prior decision.

In a letter dated May 25, 1999, appellant requested reconsideration of her claim. Appellant submitted additional evidence.

By decision dated July 23, 1999, the Office denied appellant's request without conducting a merit review on the grounds that the evidence submitted was cumulative and, therefore, insufficient to warrant review of the prior decision.

In a letter dated October 9, 1999, appellant requested reconsideration of her claim. Appellant submitted additional evidence.

By merit decision dated November 15, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence was not sufficient to warrant modification of the prior decision.

In a letter dated December 11, 1999, appellant requested reconsideration of her claim. Appellant submitted additional medical evidence.

By decision dated December 20, 1999, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was cumulative in nature and insufficient to warrant review of the prior decision.

In a letter dated August 9, 2000, appellant requested reconsideration of her claim. Appellant submitted a note from Dr. Akker dated February 16, 2000. He indicated that after reviewing her chart from other providers he noted that appellant was diagnosed with work-related tendinitis due to her soil probing activities. Dr. Akker opined that appellant's excessive data entry/computer use could have exacerbated the tendinitis dating from the original injury in 1989.

By decision dated November 9, 2000, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was cumulative in nature and insufficient to warrant review of the prior decision.

The only Office decision before the Board on this appeal is that dated November 9, 2000. Since more than one year elapsed from the date of issuance of the Office's November 15, 1999 merit decision to the date of the filing of appellant's appeal, January 16, 2001, the Board lacks jurisdiction to review the merits of this claim.⁴

The Board finds that the Office properly denied appellant's request for merit review of her claim.

⁴ See 20 C.F.R. § 501.3(d).

Under section 8128(a) of the Federal Employees' Compensation Act,⁵ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,⁶ which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(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].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁷

In this case, the Office denied appellant's claim without conducting a merit review on the grounds that the evidence submitted was cumulative. In support of her request for reconsideration, appellant submitted a note from Dr. Akker dated February 16, 2000. Dr. Akker noted that he had not treated appellant since 1997 as Dr. Akker had retired from his practice. He indicated that after reviewing her chart from other providers he noted that appellant was performing soil probing activities using repetitive thrusting and plunging motions, which produced symptoms in her arms and was ultimately diagnosed with work-related tendinitis. He noted that appellant's excessive data entry/computer use could have exacerbated the tendinitis dating from the original injury in 1989. However, this evidence was duplicative of evidence already contained in the record,⁸ and was previously considered by the Office in its decision's dated July 23, 1998 and January 26, 1999 and found deficient. Specifically, Dr. Akker indicated in his reports dated December 2, 1997 and November 9, 1998, that appellant had symptoms relating to tendinitis in her elbows and in her fingers due to her excessive use of her hands and fingers on her computer. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did she submit

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b) (1999).

⁷ 20 C.F.R. § 10.608(b).

⁸ 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; *see Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

relevant and pertinent evidence not previously considered by the Office.”⁹ Therefore, appellant did not submit relevant evidence not previously considered by the Office.¹⁰

The November 9, 2000 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 27, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁹ 20 C.F.R. § 10.606(b).

¹⁰ With her appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).