U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of TRINETTA E. THOMAS and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Cleveland, OH

*Docket No. 00-2237; Submitted on the Record;*
*Issued June 15, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for further consideration of the merits of her claim.

On April 29, 1984 appellant, then 30-year-old nurse, sustained an employment-related acute low back strain and chronic lumbosacral myofascitis. The Office accepted several employment-related recurrences of disability and paid compensation.

By decision dated March 31, 1999, the Office terminated appellant's compensation effective March 31, 1999 on the grounds that she had no residual disability due to her April 29, 1984 employment injury. The Office based its termination on the opinion of Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon who served as an impartial medical examiner.[1] By decisions dated September 14, 1999 and April 4, 2000, the Office denied appellant's requests for merit review.

The only decisions before the Board on this appeal are the Office's September 14, 1999 and April 4, 2000 decisions denying appellant's requests for a review on the merits of its

[1] The Office had determined that there was a conflict in the medical opinion between Dr. Robert C. Corn, appellant's attending Board-certified orthopedic surgeon, and Dr. Richard S. Kaufman, a Board-certified orthopedic surgeon acting as an Office referral physician, on the issue of whether appellant continued to have residuals of her employment injury. Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989); 5 U.S.C. § 8123(a).

March 31, 1999 decision. Because more than one year has elapsed between the issuance of the Office's March 31, 1999 decision and July 5, 2000, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the March 31, 1999 decision.[2]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[4] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[5] When a claimant fails to 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.[6]

With her July 1999 reconsideration request, appellant submitted a May 4, 1999 report in which Dr. Robert C. Corn, an attending Board-certified surgeon, noted that she had facet arthritis of the lumbar spine and indicated that she should remain on restricted status indefinitely. Dr. Corn stated: "In my opinion, these findings are directly and causally related to her remote spinal injury." This report is not sufficient to require reopening appellant's claim because it does not contain a clear opinion on the cause of appellant's condition. Therefore, the May 4, 1999 report is not relevant to the main issue of the present case, *i.e.*, whether the record contains rationalized medical evidence showing that appellant had disability after March 31, 1999 due to her April 29, 1984 employment injury. The Board has held that the submission of evidence, which does not address the particular issue involved does not constitute a basis for reopening a case.[7] Moreover, the May 4, 1999 report is similar to previously submitted reports of Dr. Corn, which had been considered by the Office. The Board has held that the submission of evidence, which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[8]

Appellant also submitted copies of numerous medical reports and administrative documents. Most of this evidence had previously been submitted and considered by the Office; several other medical reports constituted new evidence but they were not relevant to the present case as they did not contain any opinion on the main issue of the case. Appellant also presented several arguments in support of her reconsideration request but none of these are relevant to the

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 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 her own motion or on application." 5 U.S.C. § 8128(a).

[4] 20 C.F.R. § 10.606(b)(2).

[5] 20 C.F.R. § 10.607(a).

[6] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[7] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[8] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

main issue of the present case. For example, appellant argued that the Office medical evidence was not adequate to support termination of her compensation. However, this argument would not be relevant in that appellant is not qualified to present a medical opinion on the main issue of the present case.[9] Appellant further argued that the Office wrongly wrote dates on correspondence by hand; that the Office did not correctly characterize the nature of her accepted employment injury; and that the Office did not consider her "other injuries." Appellant did not further explain these assertions or otherwise show that they are relevant to the main issue of the present case which is essentially medical in nature.

In support of her March 2000 reconsideration request, appellant submitted a January 28, 2000 report in which Dr. Mark Allen, attending Board-certified orthopedic surgeon, indicated that she had experienced pain since an injury in 1984. Dr. Allen stated: "I support the fact that her original injury was the initiating cause of her present function with intractable pain." The submission of the January 28, 2000 report is not sufficient to require reopening of appellant's claim in that the report is similar to other reports, which had been submitted and considered by the Office. Moreover, the report is not relevant to the main issue of the present case because it does not contain a clear opinion on the extent of appellant's disability. Appellant also submitted numerous reports of examination and diagnostic testing, dated between April 1999 and February 2000, which indicated that she had degenerative disc disease of the low back. However, these reports are not relevant in that they do not contain any opinion that appellant had disability due to an employment injury after March 31, 1999.[10]

In this case, appellant has not established that the Office abused its discretion in its September 14, 1999 and April 4, 2000 decisions by denying her requests for a review on the merits of its March 31, 1999 decision under section 8128(a) of the Act, because she did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.

[9] *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993).

[10] It has not been accepted that appellant sustained degenerative disc disease of the low back. The Office accepted that appellant sustained an employment-related acute low back strain and chronic lumbosacral myofascitis.

The April 4, 2000 and September 14, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
June 15, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member