U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of BETTY J. LOFTON and DEPARTMENT OF JUSTICE, OFFICE OF POLICY & LEGISLATION, Washington, DC

*Docket No. 01-849; Submitted on the Record;*
*Issued October 25, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained a recurrence of disability on December 20, 1999 causally related to her February 9, 1998 employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

On March 16, 1998 appellant, then a 50-year-old legal technician, filed a traumatic injury claim alleging that on February 9, 1998 she injured her lower back due to unpacking heavy stacked boxes and heavy lifting during an office move. Appellant stopped work on February 26, 1998 and returned to work on March 2, 1998.

By letter dated June 15, 1998, the Office accepted appellant's claim for cervical and lumbar strains.

On December 20, 1999 appellant filed a claim alleging that she sustained a recurrence of disability. By letter dated January 24, 2000, the Office advised appellant to submit medical evidence supportive of her claim.

In a June 23, 2000 decision, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability on December 20, 1999 causally related to her February 9, 1998 employment injury. In a letter dated July 11, 2000, appellant requested reconsideration of the Office's decision.

By decision dated October 19, 2000, the Office denied appellant's request for a review of the merits of her claim.[1]

The Board finds that appellant has failed to establish that she sustained a recurrence of disability on December 20, 1999 causally related to her February 9, 1998 employment injury.

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and who supports that conclusion with sound medical reasoning.[2]

In support of her recurrence claim, appellant submitted a January 28, 2000 report of Dr. Ashkan Aazami, a chiropractor. In this report, Dr. Aazami noted appellant's complaints of lower back pain, findings on physical examination and a diagnosis of lumbar sprain/strain. Dr. Aazami opined that, based on the mechanism of injury, subjective complaints and objective findings, appellant's complaints were directly related to her February 9, 1998 injury. Under section 8101(2) of the Federal Employees' Compensation Act,[3] "[t]he term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation of the spine as demonstrated by x-ray to exist and subject to regulation by the Secretary."[4] If a chiropractor's reports are not based on a diagnosis of subluxation as demonstrated by x-ray to exist, they do not constitute competent medical evidence to support a claim for compensation.[5] Inasmuch as Dr. Aazami did not diagnose subluxation as demonstrated by x-ray evidence, his report does not constitute competent medical evidence.

Because appellant failed to submit rationalized medical evidence establishing that she sustained a recurrence of disability on December 20, 1999 causally related to her accepted February 9, 1998 employment injury, the Board finds that appellant has not met her burden of proof.

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[1] The Board notes that, on appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501.2(c).

[2] *Louise G. Malloy*, 45 ECAB 613 (1994); *Lourdes Davila*, 45 ECAB 139 (1993); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8101(2); *see also* 20 C.F.R. § 10.400(a); *Robert J. McLennan*, 41 ECAB 599 (1990); *Robert F. Hamilton*, 41 ECAB 431 (1990).

[5] *Loras C. Dignann*, 34 ECAB 1049 (1983).

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[6] 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.[7] 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.[8] 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.[9]

In her July 11, 2000 letter requesting reconsideration of the Office's June 23, 2000 decision, which denied her recurrence claim, appellant merely noted that the Office failed to indicate the correct date of injury, and that she was currently receiving medical treatment for her cervical and lumbar strains. Appellant did not raise any substantive legal questions, and failed to submit any new relevant and pertinent evidence not previously reviewed by the Office. Therefore, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

The October 19 and June 23, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 25, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] 5 U.S.C. §§ 8101-8193. 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).

[7] 20 C.F.R. § 10.606(b)(1)-(2).

[8] *Id*. at § 10.607(a).

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