

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KER-MEI YU and U.S. POSTAL SERVICE,
PACIFIC CARRIER ANNEX, San Francisco, CA

*Docket No. 01-2211; Submitted on the Record;
Issued July 10, 2002*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration.

Appellant's claim was accepted for multiple contusions to her face and hand and cervical and lumbosacral strains after she lost control of her work Jeep and hit a light pole on February 28, 1990. She returned to limited half-time duty on May 5, 1990.

Due to a conflict in the medical opinion evidence, the Office referred appellant to Dr. George G. Beattie, a Board-certified orthopedic surgeon, whose detailed report, plus a functional capacity evaluation dated December 31, 1992 and an examination by Richard F. Gravina, a Board-certified neurologist, on December 14, 1992, formed the basis for the termination of appellant's compensation effective January 7, 1995. She requested an oral hearing, which was held on August 16, 1995.

The hearing representative affirmed the termination of appellant's compensation, finding that the opinion of Dr. Beattie as an impartial medical examiner represented the weight of the medical evidence. Appellant appealed to the Board, which affirmed the termination of compensation.¹

On April 15, 2000 appellant requested reconsideration and submitted a medical report from Dr. Alan G. Zacharia, an orthopedic surgeon. He diagnosed cervical and lumbar degenerative disc disease and concluded that both conditions were due to the work-related motor vehicle accident on February 28, 1990, based on appellant's history and the absence of contradictory records.

¹ Docket No. 98-1448 (issued April 20, 1999).

On November 16, 2000 the Office denied appellant's request for reconsideration on the grounds that the Office had no jurisdiction to reconsider a Board decision and that Dr. Zacharia's report was insufficiently probative to warrant review of its prior decision.

The Board finds that the Office properly refused to reopen appellant's claim for further merit review.

The only Office decision before the Board on appeal is dated November 16, 2000, denying appellant's request for reconsideration.² Because more than one year has elapsed between the Board's last merit decision dated April 20, 1999 and the filing of this appeal September 4, 2001, the Board lacks jurisdiction to review the merits of appellant's claim.³

Section 8128(a) of the Federal Employees' Compensation Act⁴ vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁵

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).⁶ The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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.⁷

² The Office issued an October 2, 2000 decision denying compensation for appellant's left shoulder condition. On June 14, 2001 appellant requested reconsideration on the grounds that the medical evidence established a causal relationship between appellant's shoulder condition and the 1990-work accident. On September 14, 2001 the Office denied appellant's request on the grounds that the evidence submitted was cumulative and therefore insufficient to warrant merit review. This decision is not now before the Board because appellant filed her appeal on September 4, 2001. See *Martha A. McConnell*, 50 ECAB 128, 130 n. 2 (1998) (Board's jurisdiction extends only to those final Office decisions issued within one year prior to the filing of the appeal).

³ 20 C.F.R. §§ 501.2(c); 501.3(d)(2); see *John Reese*, 49 ECAB 397, 399 (1998). The Office correctly noted in its November 16, 2000 decision that it had no jurisdiction to reconsider the Board's April 20, 1999 decision; see *Theresa Johnson*, 50 ECAB 317, 318 (1999) (finding that the Office is without authority to review a Board decision and has jurisdiction only over its own final decisions).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8128(a) ("The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

⁶ 20 C.F.R. § 10.608(a) (1999).

⁷ 20 C.F.R. § 10.606(b)(1)-(2).

Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.⁸

With her request for reconsideration, appellant submitted Dr. Zacharia's report dated February 2, 2000. While new medical evidence fails to address the relevant issue of whether appellant had any residuals of the accepted work injuries.

Dr. Zacharia noted that appellant was first seen on March 28, 1995 with a history of cervical and lumbar discomfort and was discharged from treatment on October 8, 1996, when her low back was "much improved." She next sought treatment on January 24, 2000 with complaints of low back pain radiating to the left buttock, thigh, calf and foot. Dr. Zacharia did not discuss whether appellant was able to work and did not explain why he attributed her cervical and lumbar degenerative disc disease to the 1990 work injury. Because his report does not address the relevant issue, this evidence does not meet the third standard necessary for merit review under section 10.608(a).⁹

Appellant's representative argued that Dr. Beattie failed to state unequivocally that her disc herniation was not caused by the accepted injury and that, because the symptoms did not exist before the accident, it is reasonable to believe that since the symptoms have continued they are related to the original injury.

This argument was considered by the hearing representative in her decision, discussing Dr. Beattie's conclusion that appellant had no residuals of her work accepted injuries and that the herniated disc shown on the September 1991 computerized tomography (CT) scan was "now quiescent." Therefore, this argument is repetitious and does not meet the second standard under section 10.608(a).¹⁰

Appellant has failed to show that the Office erred in interpreting the law and regulations governing the termination of compensation, nor has she advanced any relevant legal argument not previously considered by the Office. Inasmuch as appellant failed to meet any of the three requirements for reopening her claim for merit review, the Office properly denied her reconsideration request.

⁸ 20 C.F.R. § 10.608(b).

⁹ See *David J. McDonald*, 50 ECAB 185, 190 (1998) (finding that documents submitted with reconsideration failed to address the relevant issue and therefore did not require merit review of the case).

¹⁰ See *David E. Newman*, 48 ECAB 305, 307 (1997) (finding that the legal arguments raised by appellant regarding the selection of the impartial medical examiner were repetitious and did not therefore require merit review of the case by the Office).

The November 16, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 10, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member