

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LISA B. CARLSON and U.S. POSTAL SERVICE,  
BACK BAY POST OFFICE, Virginia Beach, VA

*Docket No. 01-432; Oral Argument Held May 2, 2002;  
Issued June 25, 2002*

Appearances: *Karen Rye, Esq.*, for appellant; *Jim C. Gordon, Jr.*,  
for the Director, Office of Workers' Compensation Programs.

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issues are: (1) 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) in its March 1, 2000 decision; and (2) whether the Office 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) in its October 26, 2000 decision.

On May 24, 1993 appellant, then a 33-year-old window distribution clerk, filed a traumatic injury claim alleging that on that date she experienced severe pain in her lower middle back near her tailbone while removing a cash drawer from the safe. She stated that she attempted to straighten her legs from the bent position they were in and they would not go up. Appellant stopped work on May 24, 1993.

By letter dated June 15, 1993, the Office accepted appellant's claim for a lumbosacral strain. Thereafter, appellant received appropriate compensation.

The employing establishment offered appellant a modified distribution window clerk position based on her physical restrictions by letter dated April 5, 1994. Appellant accepted the employing establishment's offer and returned to work on April 11, 1994.

On March 30, 1995 appellant filed a claim for continuing compensation on account of disability beginning April 21, 1994.<sup>1</sup>

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<sup>1</sup> The record reveals that appellant was terminated by the employing establishment effective June 17, 1994 due to being charged absent without official leave when she left work on April 21, 1994 and receiving several letters of warning and suspensions.

In a February 26, 1996 decision, the Office found the evidence of record insufficient to establish that appellant was disabled from work beginning April 21, 1994 due to her May 24, 1993 employment injury. By letter dated March 14, 1996, appellant requested an oral hearing before an Office representative.

By decision dated September 25, 1996, the hearing representative vacated the Office's decision and remanded the case to the Office to resolve a conflict in the medical opinion evidence regarding appellant's ability to perform the duties of her modified position and the appropriate diagnoses for appellant's back condition.

In a January 31, 1997 decision, the Office found the evidence of record insufficient to establish that appellant was disabled from work on or after April 21, 1994 due to her May 24, 1993 employment injury based on the impartial medical opinion of Dr. Steven McCoy, a Board-certified orthopedic surgeon. Appellant requested an oral hearing in a February 26, 1997 letter.

By decision dated July 23, 1998, the hearing representative affirmed the Office's decision. In a June 10, 1999 letter, appellant requested reconsideration of the Office's decision.

In an October 15, 1999 decision, the Office denied appellant's request for modification based on a merit review of her claim. Appellant requested reconsideration of the Office's decision by letter dated November 23, 1999.

By decision dated March 1, 2000, the Office denied appellant's request for a merit review of her claim on the grounds that the evidence submitted was of a repetitious nature and partly irrelevant, and thus, insufficient to warrant a review of its prior decision. In an October 13, 2000 letter, appellant requested reconsideration of the Office's decision.

By decision dated October 26, 2000, the Office again denied appellant's request for a merit review of her claim on the grounds that the evidence submitted was of a repetitious nature, and thus, insufficient to warrant a review of its prior decision.

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 request for an appeal on December 1, 2000, the only decisions before the Board are the March 1 and October 26, 2000 decisions denying her request for a merit review of the merits of her claim.

The Board 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) in its March 1, 2000 decision.

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,<sup>3</sup> the Office's regulations provide that a claimant must: (1) show

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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. 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).

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.<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 meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.<sup>6</sup>

In support of her November 23, 1999 request for reconsideration, appellant submitted a November 17, 1999 report of Dr. Raymond Iglecia, Sr., a Board-certified psychiatrist and neurologist, finding that her problems including, chronic pain, stress, weight loss and depression were secondary to her May 24, 1993 employment injury. Dr. Iglecia also found that appellant was totally disabled on April 21, 1994 and continued to be disabled for all work. His report regarding the causal relationship between appellant's back condition and her May 24, 1993 employment injury is repetitious of his opinion that was previously considered by the Office. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening the case.<sup>7</sup> As the Office, previously considered Dr. Iglecia's opinion, it is repetitive in nature and thus insufficient to warrant reopening appellant's claim on the merits. Further, Dr. Iglecia's opinion concerning the causal relationship between appellant's other conditions and her employment injury is irrelevant to the issue in this case, whether appellant has established that she was totally disabled for work beginning April 21, 1994 due to her accepted employment-related lumbar strain, inasmuch as the Office has not accepted appellant's claim for stress, weight loss and depression.

Similarly, the treatment notes of Dr. Iglecia covering the period October 22, 1999 through February 2, 2000 regarding appellant's treatment for chronic pain failed to address whether appellant was totally disabled for work beginning April 21, 1994 due to her accepted May 24, 1993 employment injury.

The treatment notes of Sandra Gilbert, a licensed professional counselor, covering the period October 29, 1999 through February 1, 2000 and the December 7, 1999 notes of Elaine Scholl-Iglecia, a licensed social worker, regarding appellant's psychological treatment do not constitute competent medical evidence inasmuch as Ms. Gilbert and Ms. Scholl-Iglecia are not considered physicians under the Act.<sup>8</sup>

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a relevant argument not previously considered by the

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<sup>4</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(b).

<sup>7</sup> *Sandra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

<sup>8</sup> Section 8101(2) of the Act defines the term "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law; *see Cloteal Thomas*, 43 ECAB 1093 (1992); *Debbie J. Hobbs*, 43 ECAB 135 (1991).

Office or to submit relevant and pertinent new evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

The Board, however, finds that the Office 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) in its October 26, 2000 decision.

In support of her October 13, 2000 request for reconsideration, appellant submitted the April 11, 2000 treatment notes of Dr. Sidney S. Loxley, an orthopedic surgeon, who provided a history of appellant's May 24, 1993 employment injury and medical treatment. Dr. Loxley noted appellant's complaints of bilateral leg pain and inability to sleep comfortably. He further noted that appellant attempted to return to limited-duty work, but she was ultimately fired. Dr. Loxley stated:

“[Appellant] continues to receive medical coverage but not on disability retirement nor is she receiving workman's compensation. It seems quite peculiar that she was let go from her work because she could not physically perform her duties because of the limitations of her injury and that her treatment is paid for by the [employing establishment] but that she is neither on workman's compensation nor disability payments.”

Dr. Loxley noted appellant had undergone two magnetic resonance imaging evaluations in 1993 and 1995 and x-rays, which revealed significant spinal stenosis with a very small narrow lumbar spinal canal, enlarged facets, a bulging disc at L4-5 and lateral recess stenosis, although he stated that he had not seen the official interpretations. He provided his findings on physical examination and diagnosed lumbar radiculopathy, spinal stenosis and chronic low back pain.

The Board finds that Dr. Loxley's treatment notes constitute relevant and pertinent new evidence not previously considered by the Office such that review of the evidence and the case on its merits is warranted as to whether appellant has any continuing disability causally related to her May 24, 1993 employment injury.<sup>9</sup> Therefore, the Board finds that the Office abused its discretion by denying appellant's request for a review of the merits of her claim under section 8128(a) of the Act.

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<sup>9</sup> The Board notes that it does not appear that the Office considered Dr. Loxley's October 11, 2000 treatment notes and October 14, 2000 letter in its October 26, 2000 decision denying appellant's request for a merit review of her claim.

The October 26, 2000 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further consideration on its merits. The Office's March 1, 2000 decision is hereby affirmed.

Dated, Washington, DC  
June 25, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member