

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LISA W.K. NIIMI-MONTALBO and DEPARTMENT OF THE ARMY,
FORT SHAFTER, HI

*Docket No. 01-524; Submitted on the Record;
Issued May 3, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits.

The Board has reviewed the case record and finds that the Office acted within its discretion in refusing to reopen appellant's claim for further review of the merits.

The Office initially accepted that appellant sustained thoracic and lumbar strains while in the performance of duty on February 1, 1997.

Appellant subsequently filed a claim for a recurrence of disability alleging that on January 13, 1998, as a result of an examination by Dr. Ramon Bagby, a second opinion physician, she sustained a recurrence of her back pain as well as pain to her neck, low back and middle back area.

By decision dated June 24, 1998, the Office denied appellant's claim for a recurrence of disability as a result of her February 1, 1997 work-related injury. The Office further noted that appellant failed to establish any periods of total disability causally related to the work-related injury.

By letter dated July 10, 1998, appellant requested an oral hearing. A hearing was held on May 19, 1999 and appellant testified regarding her claim for recurrence of disability.

By decision dated August 5, 1999, the hearing representative denied appellant's claim for recurrence of disability. However, she ordered the immediate reinstatement of appellant's medical benefits for her initial work-related injury inasmuch retroactive to June 24, 1998 as she noted that that decision improperly terminated medical benefits for her work-related injury.

By letter dated June 1, 2000, appellant, through counsel, requested reconsideration.

In support of her request, appellant submitted a December 24, 1999 report from Dr. Thomas Hiroshi Sakoda, appellant's treating physician and a specialist in neurosurgery, as well as his intermittent treatment notes from February 9 to May 12, 2000.

By decision dated August 30, 2000, the Office denied appellant's request for reconsideration in a nonmerit decision.

The only decision before the Board on this appeal is the Office's August 30, 2000 decision denying appellant's request for a review on the merits of the hearing representative's August 5, 1999 decision affirming the Office's June 24, 1998 decision denying appellant's claim for a recurrence of disability or for any period of temporary total disability as a result of her work-related injury. Because more than one year has elapsed between the issuance of the hearing representative's August 5, 1999 merit decision and November 27, 2000, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the August 5, 1999 decision of the Office's hearing representative.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² 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.³ 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 on the merits.⁴ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁵

In this case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; she has not advanced a relevant legal argument not previously considered by the Office; and she has not submitted relevant and pertinent evidence not previously considered by the Office. Dr. Sakoda's December 24, 1999 report and treatment notes were either repetitious of evidence which had been reviewed by the Office or irrelevant to the issue of causal relationship. Although Dr. Sakoda's treatment notes subsequent to August 5, 1999, represented new evidence, such notes were not relevant to the issue of whether appellant's condition was causally related to her work-related injury. The treatment notes represented medical status updates on appellant's condition and updated prescription orders. For example, in his May 3, 2000 note Dr. Sakoda stated that appellant had made moderate increases in her domestic and employment activities, and in his May 12, 2000 treatment note, he stated that

¹ See 20 C.F.R. § 501.3(d)(2).

² 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).

³ 20 C.F.R. § 10.607(a).

⁴ *Id.* at § 10.608(b); *Nancy Marcano*, 50 ECAB 110 (1998).

⁵ *Nancy Marcano*, 50 ECAB 110 (1998).

appellant was now using an internet prescription service. Additionally, appellant's request for reconsideration letter failed to show that the Office erroneously applied or interpreted a point of law, nor did it advance a point of law or fact that the Office had not previously considered.

Appellant failed to submit new and relevant medical evidence in support of her contention that she sustained a recurrence of disability or a disabling condition based on her work-related injury. Therefore, the Office acted within its discretion in refusing to reopen appellant's claim for a review on the merits.

The August 30, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
May 3, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member