

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PEGGY L. DOBBINS and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Tuscaloosa, AL

*Docket No. 01-2192; Submitted on the Record;
Issued May 17, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

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.

On July 10, 1990 appellant, then a 36-year-old medical clerk, sustained an employment-related lumbosacral strain and bulging disc at L4-5. Appellant received compensation from the Office for periods of disability.¹ By decision dated December 3, 1999, the Office terminated appellant's compensation effective December 5, 1999 on the grounds that she had no disability after that date due to her July 10, 1990 employment injury. The Office based its termination on the opinion of Dr. George M. Hill, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion. By decision dated and finalized May 26, 2000, an Office hearing representative affirmed the Office's December 3, 1999 decision. By decision dated June 8, 2001, the Office denied appellant's request for merit review.²

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The only decision before the Board on this appeal is the Office's June 8, 2001 decision denying appellant's request for a review on the merits of its May 26, 2000 decision. Because more than one year has elapsed between the issuance of the Office's May 26, 2000 decision and

¹ On October 10, 1990 appellant underwent a discectomy at L4-5 which was not authorized by the Office. Appellant resigned from the employing establishment effective December 12, 1990.

² Appellant submitted additional evidence after the Office's June 8, 2001 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

June 22, 2001, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the May 26, 2000 decision.³

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ 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.⁵ 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.⁶ 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.⁷

In support of her May 15, 2001 reconsideration request, appellant submitted a May 7, 2001 report of Dr. James T. Barnett, Jr., an attending Board-certified orthopedic surgeon. 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.⁸ Dr. Barnett discussed appellant's back condition and noted that she could perform her regular job, but he did not provide any clear opinion that appellant's employment injury prevented her from working.⁹ Therefore, Dr. Barnett's report is not relevant to the main issue of the present case, *i.e.*, whether the medical evidence shows that appellant had disability after December 5, 1999 due to her July 10, 1990 employment injury. The submission of this report would not require reopening of appellant's claim. Appellant also submitted numerous notes of Dr. Barnett, dated between December 1999 and April 2001. These notes do not contain any opinion that appellant had employment-related disability after December 5, 1999 and therefore they are not relevant to the main issue of the present case. Appellant submitted a statement summarizing her symptoms and medical treatment and argued that she was physically incapable of working. However, this evidence and argument would not be relevant in that the main issue of the present case is medical in nature and should be resolved by the submission of medical evidence.

In support of her May 15, 2001 reconsideration request, appellant submitted a statement which summarized a functional capacity evaluation she underwent in August 1999 and argued that the evaluation was improperly carried out. However, appellant already submitted this statement to the Office and made a similar argument and the Office has already considered and

³ See 20 C.F.R. § 501.3(d)(2).

⁴ 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).

⁵ 20 C.F.R. §§ 10.606(b)(2).

⁶ 20 C.F.R. § 10.607(a).

⁷ 20 C.F.R. § 10.608(b).

⁸ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁹ Dr. Barnett merely indicated that "reconsideration of her work injury claim is warranted."

rejected this evidence and argument. The Board has held that the submission of evidence or argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁰

In the present case, appellant has not established that the Office abused its discretion in its June 8, 2001 decision by denying her request for a review on the merits of its May 26, 2000 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.

The decision of the Office of Workers' Compensation Programs dated June 8, 2001 is affirmed.

Dated, Washington, DC
May 17, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).