

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARY V. ROBERTS and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION HOSPITAL, Loma Linda, Ca

*Docket No. 02-1753; Submitted on the Record;  
Issued June 6, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, 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 February 21, 1990 claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The only decision before the Board on this appeal is the Office's March 4, 2002 decision denying appellant's request for a review on the merits of its February 26, 1999 decision terminating appellant's compensation. Because more than one year has elapsed between the issuance of the Office's February 26, 1999 decision and June 3, 2002, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the February 26, 1999 decision.<sup>1</sup>

Appellant was a histology technician who injured her back on February 21, 1990 when the elevator she was riding in came to a sudden halt. Her medical history included a concurrent nonwork-related condition of degenerative changes of the spine and back pain.

In a June 12, 1990 decision, the Office accepted appellant's claim for herniated lumbar disc.

In his June 4, 1998 report, Dr. Sharma diagnosed a chronic right sacroiliac strain, chronic lumbosacral strain and sprain and chronic pain syndrome. He opined that appellant's subjective complaints were "way beyond her objective findings. He found no evidence of pain in any affected extremity, that her pain does not conform to nerve roots or dermatome, that there was no sensory loss and that there was no loss of muscle tone, strength or power. He concluded that "I believe [appellant's] injury caused a temporary aggravation of underlying degenerative disc disease, which has subsequently resolved."

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<sup>1</sup> See 20 C.F.R. § 501.3(d)(2).

In a February 26, 1999 decision, the Office terminated appellant's compensation finding that the weight of the medical evidence rested with the impartial medical examiner, Dr. Nick K. Sharma, a Board-certified orthopedic surgeon.

In support of her March 3, 2000 reconsideration request,<sup>2</sup> appellant submitted medical reports already part of the record and a letter from the Office of Personnel Management (OPM) denying her civil service retirement benefits.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> 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) constitute 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, 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.<sup>6</sup>

The Board has held that the submission of evidence that repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>7</sup> The Board has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>8</sup> While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>9</sup>

In the present case, appellant has not established that the Office abused its discretion in its March 4, 2002 decision by denying her request for a review on the merits of its February 26, 1999 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 constitute relevant and pertinent new evidence not previously considered by the Office.

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<sup>2</sup> The Board notes that the Office treated the March 3, 2000 request as timely after appellant sent her request to the wrong address.

<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).

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

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>7</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

<sup>8</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>9</sup> *John F. Critz*, 44 ECAB 788, 794 (1993).

The letter from OPM is not probative medical evidence of appellant's continuing disability; nor is it relevant. The critical issue is the sufficiency of the medical evidence and the medical evidence appellant submitted with her reconsideration request was already part of the record and had been previously considered.

The March 4, 2002 decision by the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
June 6, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member