

**United States Department of Labor
Employees' Compensation Appeals Board**

ELENA M. SPENCE, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bend, OR, Employer**

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**Docket No. 04-1433
Issued: October 14, 2004**

Appearances:
Elena M. Spence, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 7, 2004 appellant filed a timely appeal of the April 22, 2004 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration. The Office issued its most recent merit decision on April 9, 2003. Because appellant filed here appeal more than one year after the Office's April 9, 2003 merit decision, the Board does not have jurisdiction over the merits of the claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the only decision properly before the Board is the Office's April 22, 2004 decision denying reconsideration.

ISSUE

The issue is whether the Office properly denied appellant's request for a review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 18, 2002 appellant, then a 47-year-old rural carrier, filed an occupational disease claim for muscle pain, fatigue and sleep deprivation due to pain. She identified

November 11, 2001 as the date she first realized her condition was related to her employment. Appellant explained that she knew for months that her physically demanding job was aggravating her body in many ways and that she was extremely fatigued at the end of every workday. She stopped working September 6, 2002.

Appellant's claim was accompanied by a September 5, 2002 report from Dr. Kent D. Yundt, a neurosurgeon, who diagnosed L5-S1 degenerative spondylosis, cervicalgia and fibromyalgia. She also submitted treatment records covering March 26, 1997 to September 25, 2002 for various conditions including tendinitis, low back pain, thoracic outlet syndrome, hypokalemia, depression, fibromyalgia, cervical strain and bursitis.

On November 1, 2002 the Office advised appellant of the need for additional factual and medical evidence. The Office afforded appellant 30 days within which to submit the requested factual and medical information.

In a report dated December 5, 2002, Dr. Nancy H. Maloney, a Board-certified physiatrist, indicated that appellant suffered from L5-S1 degenerative spondylosis and fibromyalgia. The spondylosis resulted in limited lumbar flexibility and the fibromyalgia resulted in limited cervical mobility. Additionally, Dr. Maloney explained that extended reaching and awkward sustained neck positions as well as trunk stooping increased myalgia within the cervical, periscapular and lumbogluteal sites. She also noted that heavy lifting and carrying, extended reaching and vigorous pushing and pulling provided axial loading of the spine, which affected appellant's known L5-S1 spondylosis.

In a decision dated April 9, 2003, the Office denied appellant's claim on the basis that she failed to establish that the claimed medical conditions were causally related to her accepted occupational exposure.

On November 20, 2003 appellant filed another occupational disease claim for the same condition that the Office had previously denied. Appellant specifically stated on her claim form that she had already filed a claim, which had been denied and this was "a new claim on the same disease/illness." Additionally, appellant submitted a May 13, 2003 report from Dr. Maloney, in which she reiterated verbatim her previous report dated December 5, 2002. The only additional information provided was the doctor's statement that "[t]he job aggravates [appellant's] condition."

On December 23, 2003 the Office advised appellant that because she had not worked since September 6, 2002, she had not experienced any new work factors upon which to base a new claim. Accordingly, the Office associated the newly submitted information with appellant's prior claim and advised her that if she disagreed with the denial of her original claim she should pursue her appeal rights that accompanied the April 9, 2003 decision.

On April 8, 2004 appellant requested reconsideration. She advised that she had an upcoming appointment with Dr. Maloney and that additional medical evidence would be submitted in approximately four weeks. Although appellant did not submit any additional evidence with her request, the Office had previously received a copy of Dr. Maloney's

February 26, 2004 treatment records and a request for authorization for a work capacity evaluation.

In a decision dated April 22, 2004, the Office denied appellant's request for reconsideration. The Office stated that appellant's reconsideration request neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act, the Office has the discretion to reopen a case for review on the merits.¹ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (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.² Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.³

ANALYSIS

Appellant's April 8, 2004 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).⁴

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted Dr. Maloney's May 13, 2003 report and treatment records dated February 26, 2004. The treatment note included a diagnosis of fibromyalgia and L5-S1 spondylosis, but did not address the etiology of appellant's diagnosed conditions. The relevant issue on reconsideration is whether appellant's claimed conditions are employment related. Because the February 26, 2004 treatment note does not address the cause of appellant's diagnosed conditions, it is not relevant to the issue on reconsideration and therefore insufficient to warrant merit review.

Dr. Maloney's May 13, 2003 report is also insufficient to warrant reopening the claim for merit review. The report is essentially identical to her December 5, 2002 report. It was apparent from the prior report that Dr. Maloney believed that appellant's work aggravated her condition.

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.606(b)(2) (1999).

³ 20 C.F.R. § 10.608(b) (1999).

⁴ 20 C.F.R. §§ 10.606(b)(2)(i) and (ii) (1999).

The December 5, 2002 report was found to be deficient because Dr. Maloney failed to provide objective evidence of how appellant's employment duties materially changed her underlying conditions. The May 13, 2003 statement that "[t]he job aggravates [appellant's] condition" did not substantially enhance Dr. Maloney's prior opinion. The Board finds that the May 13, 2003 report is repetitious of evidence previously of record. Consequently, this evidence is insufficient to warrant reopening the claim for merit review.⁵ Because appellant did not submit any "relevant and pertinent new evidence," she is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).⁶

As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Office properly denied the April 8, 2004 request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's April 8, 2004 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the April 22, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 14, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ Evidence that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening the claim. *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

⁶ 20 C.F.R. § 10.606(b)(2)(3) (1999).