



that day and returned to limited duty on July 6, 1999. In a report dated March 3, 1999, Dr. Ethan R. Allen, appellant's treating osteopath, stated that appellant sustained an acute lumbar spine strain, a contusion and severe sprain of the left lower thorax, muscle spasm and restriction of motion of the right cervical spine as a result of a January 20, 1999 fall while at work. On April 26, 1999 Dr. Allen stated that appellant had severe left thoracic sprain, lumbar sprain and a fracture at her ninth and tenth ribs caused by a work-related injury on January 20, 1999. On April 30, 1999 Dr. Allen placed appellant on total disability due to severe pain. He also noted the possibility of surgery for her rib injury and recommended further consultation. On April 9, 1999 the Office referred appellant, her medical records, a statement of accepted facts and a list of specific questions to Dr. William Boeck, a Board-certified orthopedic surgeon, for a second opinion evaluation. The statement of accepted facts noted that the Office had accepted appellant's claim for an acute lumbar sprain contusion and severe left lower thoracic sprain, and right cervical spine whiplash.

On May 1, 1999 Dr. Boeck diagnosed appellant with work-related cervical, thoracic and lumbar strain and a left rib cage contusion. He noted appellant's prior 1991 rib injury but added that she had no medical conditions that preexisted the January 20, 1999 work-related injuries. Dr. Boeck stated that x-rays taken on March 30, 1999 did not reveal any discernable rib fracture and opined that appellant would be able to return to light duty in one month and regular duty in two months time.

On June 14, 1999 Dr. Khalid B. Ahmed, a Board-certified orthopedic surgeon, stated that a May 20, 1999 computerized tomography (CT) scan of the chest was read as normal, a magnetic resonance imaging (MRI) scan of the thoracic spine taken on May 21, 1999 was read as normal and a lumbar spine MRI scan taken the same day revealed minimal disc bulge at L5-S1. Upon examination and review of her records, the physician found that appellant had a work-related left rib cage costochondral separation, left-sided intercostal neuralgia, cervical, thoracic and lumbosacral strain. He recommended that appellant return to work at a desk job for four hours a day but that if she were unable to perform these duties she would be placed on total disability.

On June 29, 1999 Dr. Allen released appellant to return to light duty for four hours a day. Appellant returned to light duty on July 6, 1999. On July 15, 1999 appellant alleged a recurrence of disability on July 13, 1999. She left work that day and did not return. On August 6, 1999 the Office advised appellant what evidence she needed to support her claim for a recurrence of disability.<sup>1</sup> In reports dated August 17, 1999, Dr. Allen stated that he treated appellant on July 30 and August 5, 9 and 12, 1999, for a fracture of the left rib and a thoracic condition. On September 1, 1999 Dr. Allen placed appellant on total disability for two months and recommended surgery to repair her rib. He requested authorization for referral to Dr. Ahmed.

On September 2, 1999 the Office referred appellant to Dr. Paul Bouz, an impartial medical examiner, based on a conflict in medical opinion between Dr. Allen and Dr. Boeck. In a report dated September 10, 1999, Dr. Bouz stated that appellant's work-related spine strain and rib fractures had healed but that her pain was taking longer to resolve. He stated that her chest pain would resolve within four to six weeks at which time she would be able to return to her

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<sup>1</sup> The record does not include a decision on this claim.

regular work as an auditor without restrictions. On October 26, 1999 the Office advised Dr. Bouz that appellant's healed rib fractures at the seventh, eighth, ninth and tenth ribs were the result of a nonindustrial injury that occurred in 1991. The Office then noted that it seemed inappropriate for appellant to be off work due to pain caused by nonindustrial injuries. On October 26, 1999 Dr. Bouz advised that appellant was capable of full-time work with no restrictions. On November 29, 1999 Dr. Allen stated that appellant was off work until she could work four hours a day. He continued to treat appellant with a regimen of injections. On January 21, 2000 Dr. Allen again noted his recommendation for a thoracic surgeon consultation.

On January 24, 2000 the Office issued a notice of proposed termination of appellant's compensation benefits and, on April 26, 2000, issued a decision terminating compensation benefits effective that day.

Appellant requested an oral hearing which was held on September 26, 2000. Dr. Allen testified regarding his treatment of appellant since January 1999, for a left foot, right knee, left rib cage and a stiff neck and headache conditions. He noted a gross separation of the tenth rib from her ninth rib which continued to cause pain. Dr. Allen requested authorization for a referral to a thoracic surgeon. He noted a prior left rib fracture which was not related to the work-related injury and noted that the separation between ribs was not observable in an x-ray. Dr. Allen commented that appellant required a surgical procedure to reattach her ribs and that she would not improve apart from surgery. In a decision dated December 21, 2000, the hearing representative found that Dr. Bouz' report had no probative value because he relied on an incorrect statement of accepted facts which noted appellant's prior multiple rib fractures when in fact she sustained only one fracture at the tenth rib. Thus, the hearing representative reinstated appellant's benefits retroactive to April 26, 2000 and remanded the case to the Office for a referral to either a Board-certified thoracic surgeon or a Board-certified orthopedic surgeon as a new impartial medical examiner for evaluation.

The Office then referred appellant, her record, a statement of accepted facts and relevant questions to Dr. James S. Shafer, a Board-certified orthopedic surgeon, for an impartial medical examination. The Office noted a conflict in medical opinion between appellant's treating osteopath, Dr. Allen, who placed appellant on total disability until surgical relief and Dr. Boeck, who opined that appellant could return to four hours of work within a month of his examination and full-time work within two months of the examination. In a report dated May 3, 2001, Dr. Shafer stated that upon examination and review of her records, that appellant did not sustain a rib fracture on January 20, 1999, that her accepted injuries had resolved and that she was able to return to work with no restrictions.

On October 2, 2001 the Office issued appellant a notice of proposed termination of her compensation benefits to which appellant replied on October 20, 2001. By decision dated November 2, 2001, the Office terminated compensation and medical benefits effective October 4, 2001. Appellant, by letter dated December 1, 2001, requested an oral hearing on the Office's November 2, 2001 decision terminating benefits. A hearing was held on June 25, 2002 at the Federal Building in Los Angeles, CA, at which time the hearing representative advised that she would be allowed to present only verbal and written testimony in her behalf. At the hearing, Dr. Allen testified that appellant's disabling condition was the nonattachment of her lower tenth

rib which caused persistent pain. He noted that he no longer treated her for the cervical, thoracic or lumbar sprains.

In a decision dated September 24, 2002, the hearing representative affirmed the Office's November 2, 2001 decision terminating compensation and medical benefits based on the report of Dr. Shafer, the impartial medical examiner. The hearing representative stated that Dr. Shafer's report was rationalized and based on a review of all the medical evidence and a physical examination and was entitled to special weight.

On September 22, 2003 appellant requested reconsideration. Appellant argued that security personnel at the Federal Building did not allow her to carry an audio tape of her examination with Dr. Shafer or video tapes of her examinations with Dr. Allen due to security concerns. Appellant also submitted a September 1, 2003 report from Dr. Ahmed, who stated that he initially treated appellant on June 14, 1999 and again during the summer of 2003. He noted that at the time of his initial evaluation, appellant's clinical findings revealed splinting on expansion of the chest to the left with a palpable defect between the ends of the ribs indicating lysis of the cartilaginous element of the ribs and that she had bursitis of the 10<sup>th</sup> and 11<sup>th</sup> ribs which produced pain and discomfort. Dr. Ahmed stated that there was a physical disruption of the lower end of the rib cage where the cartilage was missing creating symptoms at the front of the ribs. He stated that MRIs and CT scans did not display cartilage and thus would not support his diagnosis. Dr. Ahmed found that appellant's rib cage condition was related to the January 20, 1999 injury and requested authorization to perform corrective surgery.

Appellant also submitted a December 12, 2003 letter from Dr. Allen requesting that the case be reopened and a December 13, 2002 report from Dr. Allen, who noted his disagreement with the characterization of his March 19, 2000 letter in the Office's September 24, 2002 decision. Dr. Allen also stated that none of the physicians examining appellant had taken the time to determine if her 10<sup>th</sup> rib was detached, painful or detectable when compared to the right side. On December 17, 2003 the Office denied review of appellant's request for reconsideration on the grounds that the arguments raised and the evidence submitted was irrelevant and cumulative and did not support a review of the merits of her claim.

### **LEGAL PRECEDENT**

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.<sup>2</sup> Section 10.608(b) provides that when an application for review of the merits of a claim 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.<sup>3</sup> When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the

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<sup>2</sup> 20 C.F.R. § 10.606(b)(2) (2003).

<sup>3</sup> *Annette Louise*, 54 ECAB \_\_\_\_ (Docket No. 03-335, issued August 26, 2003).

Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>4</sup>

### ANALYSIS

In the present case, appellant presented no evidence that the Office erroneously applied or interpreted a point of law, nor did she advance a relevant legal argument not previously considered by the Office.<sup>5</sup> Her assertion that she was not allowed to present a video tape of her examination with Dr. Shafer is not relevant to her burden of proof which was to present evidence that her rib condition was causally related to her work-related injury. The December 13, 2002 letter from Dr. Allen was a disagreement with how a prior letter was characterized in the factual presentation of the Office's September 24, 2002 decision and a complaint that none of the Office's physicians had attempted to determine if appellant's 10<sup>th</sup> rib as still detached. The letter did not allege that the Office erroneously applied or interpreted a point of law, nor did it advance a relevant legal argument not previously considered by the Office.

However, with respect to the third element, the submission of evidence not previously considered by the Office, the record reveals that appellant submitted new evidence which requires a determination as to whether it is relevant and pertinent to the issue in the claim.

In a September 1, 2003 report, Dr. Ahmed stated that he initially treated appellant on June 14, 1999 and again during the summer 2003. He noted in his initial evaluation that appellant's clinical findings revealed a left splinting on expansion of the chest with a defect between the ends of the ribs indicating lysis of the cartilaginous element of the ribs and that the area of maximum symptomology was where the 10<sup>th</sup> and 11<sup>th</sup> ribs were producing bursitis leading to pain and discomfort. Dr. Ahmed stated that appellant's rib cage condition was related to the January 20, 1999 work-related injury. This report essentially repeated evidence previously of record dated June 14, 1999 which the Office received on September 28, 1999 wherein Dr. Ahmed noted that appellant was tender along the left side of the rib cage at the 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> region. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case for further merit review.<sup>6</sup> Appellant, thus, has failed to show that the Office erred in interpreting the law and regulations governing her entitlement to compensation under the Federal Employees' Compensation Act and has not advanced any relevant legal argument not previously considered by the Office. Similarly, she failed to submit relevant or pertinent new evidence not previously considered. Inasmuch as appellant failed to meet any of the three requirements for reopening her claim for merit review, the Office properly denied her reconsideration request on December 17, 2003.<sup>7</sup>

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<sup>4</sup> *Paul R. Reedy*, 45 ECAB 488 (1994).

<sup>5</sup> Appellant argued that she was not allowed to present an audio or video tape at the hearing. However, as noted the hearing representative advised appellant that she would be able to present only verbal and written testimony in her behalf.

<sup>6</sup> *See James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

<sup>7</sup> 20 C.F.R. § 10.606(b)(2).

**CONCLUSION**

The Board finds that the Office properly denied appellant's request for merit review, pursuant to 5 U.S.C. § 8128(a), of its September 24, 2002 decision affirming the Office's termination of her compensation and medical benefits.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 17, 2003 is affirmed.

Issued: September 27, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member