

ISSUE

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

FACTUAL HISTORY

This is the fourth appeal in this case. In the first appeal,² the Board issued a decision on February 19, 1998 which affirmed a February 14, 1995 decision of the Office on the grounds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after February 5, 1994 due to her July 17, 1990 employment injury.³ The Office based its decision on the opinion of Dr. Rajindar Sidhu, a Board-certified neurologist who served as an impartial medical specialist. In the second appeal,⁴ the Board issued a decision on September 10, 2001 which affirmed the Office's September 30, 1999 decision on the grounds that appellant did not meet her burden of proof to establish that she sustained an employment-related recurrence of total disability on or after February 5, 1994.⁵ The Board also affirmed the Office's April 7, 2000 decision on the grounds that the Office properly denied appellant's request for merit review.

In the third appeal,⁶ the Board issued a decision on October 21, 2003 which vacated the January 2 and May 23, 2003 decisions of the Office and remanded the case for further review. The Board determined that the Office improperly found that appellant submitted an untimely request for reconsideration and therefore applied an incorrect standard in refusing to review her claim on the merits. The Board directed the Office to appropriately consider appellant's timely September 9, 2002 reconsideration request and any evidence submitted in conjunction with that request. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand the Office evaluated appellant's timely September 9, 2002 reconsideration request and determined that she was not entitled to further merit review of her claim. The Office found that the evidence submitted in connection with the reconsideration request, a March 12, 2002 report of Dr. Clayton W. Wagner, an attending Board-certified orthopedic surgeon, and June 11 and July 22, 2002 reports of Dr. Wayne M. Roznan, an attending Board-certified

² Docket No. 95-1701(issued February 19, 1998).

³ On July 17, 1990 appellant, then a 51-year-old administrative specialist sustained a low back sprain and a cervical strain with radiculopathy due to lifting boxes and pushing furniture at work. She received compensation for periods of total and partial disability. She later claimed that she sustained an employment-related recurrence of total disability on February 5, 1994.

⁴ Docket No. 00-2578 (issued September 10, 2001).

⁵ The Board evaluated additional medical evidence submitted by appellant and determined that the weight of the medical evidence continued to rest with the opinion of Dr. Sidhu.

⁶ Docket No. 03-2102 (issued October 21, 2003). Appellant also filed an appeal which was docketed as No. 03-1957, but it was determined that the appeal was duplicative of the No. 03-2102 appeal and, by order dismissing appeal dated November 3, 2003, the Board dismissed this appeal. Docket No. 03-1957 (issued November 3, 2003).

orthopedic surgeon, were not relevant to the issue in the present case. In a March 12, 2002 report, Dr. Wagner stated that appellant had limited range of motion in his cervical spine on examination and diagnosed cervical spasm and bilateral shoulder pain. In June 11 and July 22, 2002 reports, Dr. Wagner reported findings on examination and diagnosed acute and chronic cervical strain/sprain.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁷ the Office's regulation provides that the evidence or argument submitted by 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.⁸ 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.⁹ 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.¹⁰

ANALYSIS

In connection with her timely September 9, 2002 reconsideration request, appellant submitted a March 12, 2002 report of Dr. Wagner, an attending Board-certified orthopedic surgeon, and June 11 and July 22, 2002 reports of Dr. Roznan, an attending Board-certified orthopedic surgeon.¹¹ However, neither Dr. Wagner nor Dr. Roznan provided any opinion that appellant sustained a recurrence of total disability on or after February 5, 1994 due to her July 17, 1990 employment injury. Therefore, their reports are not relevant to the issue of the present case, *i.e.*, whether appellant submitted sufficient medical evidence to show that she sustained an employment-related recurrence of total disability on or after February 5, 1994. 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.¹² In his March 12, 2002 report, Dr. Wagner merely reported examination findings and diagnosed cervical spasm and bilateral shoulder pain; in his June 11 and July 22, 2002 reports, Dr. Wagner also reported examination findings and diagnosed acute and chronic cervical strain/sprain. Although both physicians indicated that appellant had cervical symptoms, neither physician provided any indication that they

⁷ 5 U.S.C. § 8101 *et seq.* 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).

⁸ 20 C.F.R. §§ 10.606(b)(2).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ 20 C.F.R. § 10.608(b).

¹¹ Appellant did not submit any argument in connection with her reconsideration request.

¹² *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

were related to the employment-related cervical strain sustained more than a decade earlier on July 17, 1990, nor did they provide any opinion on appellant's disability from work.

In the present case, appellant has not established that the Office improperly refused to reopen her claim for merit review, pursuant to 5 U.S.C. § 8128(a), because she did not to 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 present relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 10, 2004
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member