

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

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**DIANA L. FURE, Appellant**

**and**

**DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE,  
Chicago, IL, Employer**

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**Docket No. 05-174  
Issued: April 20, 2005**

*Appearances:*  
*Diana L. Fure, 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  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On October 21, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 29, 2004 nonmerit decision denying her request for merit review of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of the Office was a January 10, 2003 decision, which was issued more than one year prior to the date appellant filed her appeal. Therefore the Board does not have jurisdiction over this the merits of this case.<sup>1</sup>

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<sup>1</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2). The record also contains an August 4, 2003 decision of the Board. In the absence of further review by the Office on the issue addressed by the decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). Appellant did not seek reconsideration of the Board's decision pursuant to 20 C.F.R. § 501.7(a). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

## **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 second appeal in this case. In the prior appeal, the Board issued a decision on August 4, 2003 affirming the Office's December 4, 2002 and January 10, 2003 decisions.<sup>2</sup> The Board found that appellant did not establish that her September 15, 2002 request for reconsideration of the Office's denial of her occupational disease claim was untimely and failed to show clear evidence of error. The Board also found that appellant did not establish that she sustained a back injury on January 22, 2001 during a physical examination carried out by Dr. Michael D. Kornblatt, a Board-certified orthopedic surgeon, who served as an impartial medical specialist.

In her occupational disease claim, filed on March 5, 2000, appellant alleged that after returning to work on November 12, 1996 she sustained a lumbar strain to her lower back from sitting and working at her desk for long periods and that she sustained disability from January 6 through February 7, 1997 as a result.<sup>3</sup> The Office determined that there was a conflict in the medical evidence regarding whether appellant's claimed condition and disability resulted from her employment and referred her to Dr. Kornblatt for an impartial medical examination and opinion on this matter. On May 21, 2001 appellant filed a claim for a traumatic injury alleging that she sustained a lumbar strain and sciatica in her left leg due to straight leg raising testing carried out by Dr. Kornblatt on January 22, 2001.<sup>4</sup> The facts and circumstances of the case up to the point of the Board's August 4, 2004 decision are set forth in that decision and are incorporated herein by reference.

Appellant later requested reconsideration of her claim in a letter dated June 21, 2004. She also submitted a July 24, 2004 letter in which she extensively discussed the progression of her back injuries, the medical treatment for these injuries and her attempts to obtain ergonomic accommodation for her condition.

Appellant submitted medical notes dated between 1998 and 1999 of Dr. Frank Minardi, an attending osteopath, as well as numerous medical notes dated between 2001 and 2004 of

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<sup>2</sup> Docket No. 03-830 (issued August 4, 2003).

<sup>3</sup> On November 1, 1996 appellant, then a 42-year-old "AIMS" coordinator aide, alleged that she sustained an injury at work on October 11, 1996 when she entered an elevator, which jerked down and then up; the Office accepted her claim for a lumbar strain. On July 27, 1998 appellant sustained another back injury at work when she sat in a nonergonomic chair one morning with only one break. The Office accepted her claim for a lumbar strain for that injury.

<sup>4</sup> By decision dated September 20, 2001, the Office denied appellant's claim finding that the evidence of record did not show that she sustained a consequential injury due to her examination with Dr. Kornblatt on January 22, 2001. By decisions dated December 4, 2002 and January 10, 2003, the Office affirmed its September 20, 2001 decision.

Dr. Violeta D. Avramov, a physician specializing in neurology. These notes discussed the periodic treatment of appellant's low back condition.<sup>5</sup> She also submitted a July 1, 2004 report of Dr. David L. Spencer, an attending Board-certified orthopedic surgeon, a January 27, 2004 report of Dr. Scott L. Heller, an attending Board-certified neurosurgeon and several reports dated between 2002 and 2004 of Dr. Juozas Gurevicius, an attending physician specializing in internal medicine.<sup>6</sup> Appellant further supplemented the record to include the findings of electromyogram (EMG) testing obtained in March 1999, September 2002 and January 2004 and the findings of the magnetic resonance imaging (MRI) scan testing obtained in January 1997 and May 2001.<sup>7</sup>

Appellant submitted copies of several reports which had previously been submitted and considered by the Office including May 2, 2001 and August 19, 2002 reports of Dr. Avramov and a November 9, 2001 report of Dr. Robert Mutterperl, an attending osteopath.

She also submitted excerpts from articles concerning the treatment of low back conditions and the use of ergonomic practices to prevent injuries and documents regarding the dates she stopped work and the grievances she filed against the employing establishment.

By decision dated September 29, 2004, the Office denied appellant's request for further merit review of her claim.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>8</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>9</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>10</sup> 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.<sup>11</sup>

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<sup>5</sup> The record also includes a July 15, 2004 report in which Dr. Avramov mentioned appellant's July 27, 1998 employment injury.

<sup>6</sup> Appellant submitted several reports of Dr. Robert L. Potempa, an attending podiatrist. It does not appear that appellant filed a claim for an employment-related foot injury. She also submitted notes of attending physical therapists and nurses.

<sup>7</sup> The MRI scan testing showed signs of a disc protrusion at L4-5.

<sup>8</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>9</sup> 20 C.F.R. §§ 10.606(b)(2).

<sup>10</sup> 20 C.F.R. § 10.607(a).

<sup>11</sup> 20 C.F.R. § 10.608(b).

## ANALYSIS

Appellant filed a claim alleging that after returning to work on November 12, 1996 she sustained a lumbar strain to her lower back from sitting and working at her desk for long periods and that she sustained disability from January 6 through February 7, 1997 as a result. She also filed a claim for a traumatic injury alleging that she sustained a lumbar strain and sciatica in her left leg due to straight leg raising testing carried out on January 22, 2001 by Dr. Kornblatt, a Board-certified orthopedic surgeon, who served as an impartial medical specialist. By decision dated September 29, 2004, the Office determined that appellant's June 2004 reconsideration request regarding these claims did not require reopening of her case for further merit review.

In support of her reconsideration request, appellant submitted numerous medical reports and notes dated between 1998 and 2004 of several attending physicians, including Dr. Minardi, an attending osteopath, Dr. Avramov, a physician specializing in neurology, Dr. Spencer, a Board-certified orthopedic surgeon, Dr. Heller, a Board-certified neurosurgeon and Dr. Gurevicius, a physician specializing in internal medicine. Although a number of these documents mentioned appellant's low back problems, they are not pertinent to the relevant issues of the present case because they do not contain an opinion that appellant sustained an employment injury as alleged.<sup>12</sup> As noted above, the relevant issue of the present case are whether appellant submitted sufficient medical evidence to show that she sustained an employment-related occupational injury causing disability in early 1997 or an employment-related traumatic injury on January 22, 2001. 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.<sup>13</sup>

Appellant submitted the findings of EMG and MRI scan testing obtained between 1997 and 2004. Although the MRI scan testing showed signs of a disc protrusion at L4-5, these reports would not be relevant to the merit issues of the present case in that none of the findings indicated that the observed conditions were related to employment factors. Appellant submitted several reports of Dr. Potempa, an attending podiatrist, but it does not appear that she filed a claim for an employment-related foot injury. She also submitted numerous notes of attending physical therapists and nurses, but the reports of a nonphysician would not be relevant to the medical issues of this case.<sup>14</sup>

Appellant submitted excerpts from articles concerning the treatment of low back conditions and the use of ergonomic practices to prevent injuries, but these materials would not be relevant to the merit issues of the present case because, due to their generalized nature, excerpts from medical texts and other publications are of no evidentiary value in establishing the necessary causal relationship between a claimed condition and employment factors.<sup>15</sup> Appellant

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<sup>12</sup> See *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988). In a July 15, 2004 report, Dr. Avramov mentioned appellant's July 27, 1998 employment injury, but this matter is not currently before the Board.

<sup>13</sup> See *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>14</sup> See *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993).

<sup>15</sup> See *William C. Bush*, 40 ECAB 1064, 1075 (1989).

also submitted records regarding the dates she stopped work and the grievances she filed against the employing establishment, but these nonmedical documents would not be relevant to the medical issues of this case.

Appellant submitted reports of Dr. Avramov and Dr. Mutterperl, an attending osteopath, which had previously been submitted and considered by the Office. However, the Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>16</sup> Moreover, the July 24, 2004 letter, appellant submitted in connection with her reconsideration request did not articulate a relevant new legal contention which has a reasonable color of validity.<sup>17</sup>

Appellant has not established that the Office improperly refused to reopen her claim for further review on the merits 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.

### **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).

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<sup>16</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

<sup>17</sup> *See John F. Critz*, 44 ECAB 788, 794 (1993).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' September 29, 2004 decision is affirmed.

Issued: April 20, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member