

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

ARVAY SMITH, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Chicago, IL, Employer**

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**Docket No. 04-996
Issued: February 24, 2005**

Appearances:
Arvay Smith, pro se
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument Held February 8, 2005

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On February 28, 2004 appellant filed a timely appeal of a December 2, 2003 decision of the Office of Workers' Compensation Programs, finding that appellant's request for reconsideration was insufficient to warrant merit review of the claim under 5 U.S.C. § 8128. Pursuant to 20 C.F.R. § 501.3(d)(2), the Board's jurisdiction is limited to final decisions of the Office issued within one year of the filing of the appeal. The only decision within one year of the filing of the appeal is the December 2, 2003 decision and therefore the Board's jurisdiction in this case is limited to the denial of reconsideration issue.

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

FACTUAL HISTORY

The case has been before the Board on prior appeals. In a decision dated May 31, 1988, the Board affirmed decisions of the Office dated April 1 and September 18, 1986, finding that the weight of the medical evidence established that appellant's intermittent disability for work on

or after April 9, 1981 was not causally related to her employment injuries of January 30, 1975 and October 6, 1977.¹ The Board found that the weight of the medical evidence was represented by the reports of Dr. Michael R. Treister, a Board-certified orthopedic surgeon selected as an Office referral physician. In a separate decision dated May 31, 1988, the Board affirmed the May 19, 1987 Office decision finding that appellant did not sustain a disabling medical condition as a result of a November 4, 1986 employment incident.² By decision dated March 29, 1999, the Board affirmed the April 15, 1996 Office decision, finding that appellant had not established disability after April 9, 1981 causally related to an employment injury, nor had she established a November 4, 1986 employment injury.³ In a decision dated August 20, 2002, the Board affirmed the July 5, 2000 Office decision finding that the March 28, 2000 request for reconsideration was insufficient to warrant merit review of the claim.⁴ The history of the case is set forth in the Board's prior decisions and is incorporated herein by reference.

In a letter dated August 14, 2003, appellant requested reconsideration of her claim. Appellant argued that a referral physician in the case, Dr. Treister, was biased as he had an association with an Office medical adviser in the case, Dr. Dominick Renga. The record indicates that Dr. Renga served as an Office medical adviser in 1983 and provided an opinion that the medical evidence did not establish continuing employment-related disability. The Office referred appellant to Dr. Treister on November 23, 1983 for an opinion on causal relationship between appellant's condition and the January 30, 1975 and October 6, 1977 employment injuries. Dr. Treister submitted reports dated December 12, 1983, January 10 and February 28, 1984.

Appellant submitted information from the American Medical Association's web site in 2003 regarding Dr. Treister and Dr. Renga. The evidence indicated that both Dr. Renga and Dr. Treister had admitting privileges at St. Elizabeth's Hospital in Chicago, Illinois, and Dr. Treister was the chairman of the department of surgery at St. Elizabeth's Hospital.

By decision dated December 2, 2003, the Office denied the request for reconsideration without merit review of the claim. The Office found that the request for reconsideration and the evidence submitted were insufficient to require merit review of the claim.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁵ the Office's regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or

¹ Docket No. 87-676 (issued May 31, 1988).

² Docket No. 87-1627 (issued May 31, 1988).

³ Docket No. 96-2288 (issued March 29, 1999).

⁴ Docket No. 02-248 (issued August 20, 2002).

⁵ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

interpreted a specific point of law, or (2) advancing a relevant legal argument not previously considered by the Office, or (3) constituting relevant and pertinent new evidence not previously considered by the Office.⁶ Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.⁷

While the reopening of a case may be based 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.⁸

ANALYSIS

In the present case, appellant argued on reconsideration that the Office had erred in selecting Dr. Treister to provide an opinion in 1983, because he had an association with an Office medical adviser, Dr. Renga. Although appellant referred to Dr. Treister as an impartial medical specialist, the record indicated that he was selected as an Office second opinion referral physician. As the Board has noted, the reasons for using a referral physician and an impartial medical specialist are distinguishable, and there are safeguards regarding the selection of an impartial medical specialist that do not extend to referral physicians.⁹ Although a claimant may allege that a referral physician was biased, there must be evidence in the record of actual bias or unfairness on the part of the physician used by the Office as a referral physician.¹⁰

The Board finds that appellant's argument has no reasonable color of validity and is not sufficient to warrant merit review of the claim. The evidence presented with respect to an association between Dr. Treister and Dr. Renga consists of membership information provided by the American Medical Association available as of 2003. The Board notes that Dr. Treister was selected as a referral physician in 1983, and no evidence was presented relevant to that time. Moreover, the only association between the physicians appeared to be that they shared admitting privileges at the same hospital. There is no probative evidence that Dr. Treister was unable to render an appropriate medical opinion as a referral physician in this case.

Appellant did not submit any new medical evidence with her request for reconsideration. The Board finds that she did not show that the Office erroneously applied or interpreted a point of law, advance a new and relevant legal argument or submit new and relevant evidence. Since she did not meet the requirements of section 10.606(b)(2), the Office properly refused to reopen the claim for merit review.

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁸ *See Robert P. Mitchell*, 52 ECAB 116, 119 (2000).

⁹ *See Harold Burkes*, 42 ECAB 199 (1990) for a discussion as to the distinction between Office referral physicians and a physician selected as an impartial medical specialist.

¹⁰ *See Anthony La-Grutta*, 37 ECAB 602, 607 (1986).

CONCLUSION

The Board finds that appellant's request for reconsideration did not meet the requirements of 20 C.F.R. § 10.606(b)(2) and therefore the Office properly refused to reopen the claim for merit review.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 2, 2003 is affirmed.

Issued: February 24, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member