



## **FACTUAL HISTORY**

On June 30, 1999 appellant, then a 33-year-old letter carrier, filed a traumatic injury claim alleging that on June 21, 1999 she sustained lower back pain when a dog appeared while she was delivering the mail. Appellant stated that she turned quickly and injured or reagravated a previous back injury. By letter dated July 15, 1999, the Office accepted appellant's claim for a lumbosacral strain and right shoulder contusion.

The Office received an August 19, 2002 medical report of Dr. Vernon B. Williams, a Board-certified neurologist and appellant's treating physician, in which he opined that appellant was unable to perform her job as a letter carrier but that she was able to perform sedentary work with physical restrictions. Based on Dr. Williams' opinion, the employing establishment, in a letter dated October 18, 2002, offered appellant the position of modified letter carrier.

By letter dated October 22, 2002, the Office informed appellant that the offered position was suitable and that she had 30 days to accept the position or offer her reasons for refusal.<sup>1</sup> Appellant returned to work on November 5, 2002 in the limited-duty position. Within a few days after returning to work, appellant stopped work. She stated that she could not walk to her workstation and requested a cart to help her get to work.<sup>2</sup>

In a January 2, 2003 letter, the Office advised appellant that the offered modified letter carrier position was suitable for her work capabilities. The Office noted that on January 2, 2003 the employing establishment confirmed that the offered position was still available. The Office notified appellant of the penalty provisions of 5 U.S.C. § 8106 and gave her 30 days to accept the position or offer her reasons for refusal.

The Office received a January 16, 2003 medical report of Dr. Samuel Chan, a Board-certified family practitioner and appellant's new treating physician.<sup>3</sup> In this report, Dr. Chan diagnosed cervical sprain/strain, lumbosacral sprain/strain and lumobsacral discopathy. He stated that appellant was temporarily totally disabled and that she could return to modified work as of February 15, 2003. The Office also received Dr. Chan's January 22, 2003 medical report in which he described the June 21, 1999 employment injury and reiterated the diagnosis of cervical sprain/strain, lumbosacral sprain/strain and lumbosacral discopathy. He indicated with an affirmative mark that appellant could perform her usual work.

By decision dated February 11, 2003, the Office terminated appellant's compensation benefits on the grounds that she refused an offer of suitable work. The Office found Dr. Chan's

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<sup>1</sup> On November 22, 2002 Dr. Williams reviewed a description of the offered position and opined that there were no medical conditions which restricted appellant's ability to perform the essential functions of the offered position.

<sup>2</sup> The record reveals that, during the first few weeks after she returned to work, appellant was scheduled to attend training, which required her to walk approximately 270 feet from the employee entrance to the training room. After her training was complete, appellant was required to walk approximately 900 feet from the employee's entrance to her work assignment, 249 feet from the work unit to the restroom and 260 feet from the work unit to the lunchroom.

<sup>3</sup> By letter dated December 4, 2002, the Office approved Dr. Williams' request to be excused as appellant's treating physician.

reports insufficient to establish that appellant was temporarily totally disabled from performing the duties of the modified letter carrier position.

In an undated letter received by the Office on March 6, 2003 appellant requested reconsideration. She contended that she could not work because she was unable to walk the long distance to her work area and the chair she sat in did not have any back support.

By decision dated April 21, 2003, the Office denied appellant's request for modification. The Office found the evidence of record insufficient to establish that she was unable to perform the duties of the offered position.

In an undated letter received by the Office on July 17, 2003, appellant requested reconsideration. She stated that she remained off work because she was unable to walk to her work area without assistance.

In an August 19, 2003 decision, the Office again denied appellant's request for modification. The Office found the evidence of record insufficient to establish that appellant was unable to perform the duties of the offered position.

Following the issuance of the August 19, 2003 decision, the Office received documents regarding a lien on appellant's compensation. The Office also received Dr. Chan's July 23, 2003 medical report in which he provided his findings on physical examination and diagnosed cervical sprain/strain, lumbosacral sprain/strain and lumbosacral discopathy. Dr. Chan stated that appellant would remain off work until September 15, 2003. Unsigned and undated treatment notes revealed appellant's complaints of low back pain radiating to her lower extremity with numbness and aching, findings on physical examination and a treatment plan.

The Office received additional reports from Dr. Chan dated October 1, November 5 and December 15, 2003 and January 26 and June 22, 2004, which reiterated the diagnosis of cervical sprain/strain, lumbosacral sprain/strain and lumbosacral discopathy. Dr. Chan indicated that appellant was able to return to modified work on specific dates during the period covered by his reports. Dr. Chan's reports and return to work slips dated October 1, November 5 and December 15, 2003 and January 26 and April 28, 2004, indicated that appellant could return to modified work with certain physical restrictions on certain dates covered by his reports and return to work slips and that she required a scooter and a back support cushion for her chair due to her back condition.

The Office received appellant's request for a scooter.<sup>4</sup> The Office also received an unsigned report dated June 17, 2003, which contained the typed name of Dr. Jennifer L. Marek, a Board-certified radiologist. This report revealed the results of an x-ray of appellant's lumbar spine, which included discography at three levels with questionable extravasations at L3-4 and L5-S1. Another unsigned report of the same date contained Dr. Marek's typed name and revealed the results of a computerized tomography (CT) scan, which included degenerative disease in the discs at L3-4, L4-5 and L5-S1, no focal tear and no evidence of contrast

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<sup>4</sup> By letter dated February 4, 2004, the Office authorized payment for the purchase of a scooter for appellant.

extravasations although there was a suggestion of minimal extravasations on the plain films at L3-4 and possibly at L5-S1.

A June 17, 2003 report of a physician whose signature is illegible diagnosed painful degenerative disc at L5-S1 and lumbar radiculopathy. Unsigned and undated treatment notes contained discogram findings and recommendation for back surgery.

In a letter dated July 28, 2004, appellant requested reconsideration. She contended that she accepted the offered position and later requested a motor vehicle because she experienced pain in her back and swelling in her legs when she walked from the entrance to her assigned work area. Appellant further contended that, at the time of the termination, there was a miscommunication between the employing establishment and the Office regarding the distance she had to walk and where she could or could not enter to go to her work assignment. She noted that her treating physician removed her from work on January 16, 2003 and that she was released to return to work on October 15, 2003 with the assistance of a scooter and special chair with upper and lower back support. Appellant stated that she received a scooter on March 17, 2004 and returned to work that night. She indicated that she was currently working.

Appellant submitted the Office's February 4, 2004 letter, which authorized a power-operated vehicle. She also submitted an earnings and leave statement. Dr. Chan's August 31, 2004 report indicated that appellant suffered from cervical sprain/strain, lumbosacral sprain/strain and lumbosacral discopathy and that she could return to modified work on September 1, 2004. The Office received documents regarding appellant's request for a chair with a lumbar support cushion.<sup>5</sup>

By decision dated October 6, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not relevant and, thus, insufficient to warrant a merit review of its prior decisions.<sup>6</sup>

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,<sup>7</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>8</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

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<sup>5</sup> On September 22, 2004 the Office approved appellant's request for a chair with a lumbar support cushion.

<sup>6</sup> Following the issuance of the Office's October 6, 2004 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal, which was not before the Office at the time, it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

<sup>7</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>8</sup> 20 C.F.R. § 10.606(b)(1)-(2).

for review within one year of the date of that decision.<sup>9</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 of the merits.

### ANALYSIS

On July 28, 2004 appellant requested reconsideration of the Office's August 19, 2003 decision, denying her request for modification of its decision to terminate her compensation on the grounds that she refused an offer of suitable work. Thus, the relevant underlying issue in this case was whether the Office properly terminated appellant's compensation on the grounds that she refused an offer of suitable work.

Appellant contends that she was unable to work because she could not walk from the entrance of the employing establishment to her work area without the assistance of a scooter and needed a chair with a lumbar support cushion. However, appellant previously made the same argument in connection with her March 6 and July 17, 2003 requests for reconsideration, which was rejected by the Office. The Board has held that the submission of evidence or argument, which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.<sup>10</sup> As the Office previously considered appellant's argument, it is insufficient to warrant further merit review of her claim.

In support of her request, appellant submitted documents regarding a lien on her compensation benefits and her request for a scooter and chair with lumbar support. She also submitted an earnings and leave statement. The Board finds that this evidence does not constitute a basis for reopening the case for further merit review, as it does not address the relevant issue in this case.<sup>11</sup>

Similarly, Dr. Chan's reports which found that appellant sustained a cervical sprain/strain, lumbosacral sprain/strain and lumbosacral discopathy and that she was able to return to modified work on specific dates during the period July 23, 2003 through June 22, 2004 do not address her ability to work on February 11, 2003, the date the Office terminated her compensation for refusing suitable work and are, therefore, not relevant and insufficient to require the Office to reopen appellant's case for further review of the merits of her claim.<sup>12</sup>

Further, Dr. Chan's reports and return to work slips which cover intermittent dates during the period October 1, 2003 through April 28, 2004 and indicate that appellant could return to modified work with certain physical limitations and request that appellant receive a scooter and a

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<sup>9</sup> *Id.* at § 10.607(a).

<sup>10</sup> *Edward W. Malaniak*, 51 ECAB 279 (2000).

<sup>11</sup> *Kevin M. Fatzer*, 51 ECAB 407 (2000).

<sup>12</sup> *Id.*

chair with a back support cushion do not address whether she was able to work on February 11, 2003. Thus, they are insufficient to establish appellant's burden of proof.<sup>13</sup>

Lastly, the unsigned x-ray and CT scan reports and treatment notes and the report from a physician whose signature is illegible regarding appellant's back condition are not relevant as they failed to address whether appellant was unable to perform the duties of the offered position on February 11, 2003.<sup>14</sup> Thus, they do not constitute a basis for reopening appellant's claim for a merit review.

As appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a relevant legal argument not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office, the Board finds that she was not entitled to a merit review.<sup>15</sup>

### **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>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See James E. Norris, 52 ECAB 93 (2000).*

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 6, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 6, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member