

continuing disability or residuals causally related to the June 10, 1985 employment injury; and (2) 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

On June 25, 1985 appellant, a 57-year-old licensed practical nurse, filed a traumatic injury claim alleging that she injured her back on June 10, 1985 while lifting a patient from a wheelchair to the bed. The Office accepted the claim for exacerbation of sciatica and authorized surgery for decompression at L4-5, L5-S1, which was performed on April 11, 1986. Appellant returned to light-duty work for the period November 26, 1985 through March 13, 1986 working 25 hours per week and received wage-loss compensation for partial disability. She stopped work on March 14, 1986, returned to part-time light-duty work on August 30, 1993, stopped again on September 15, 1993 and has not returned. Appellant was placed on the periodic rolls for temporary total disability on March 14, 1986.

In a report dated February 16, 1998, Dr. Jeffrey M. Hrutkay, a second opinion Board-certified orthopedic surgeon, diagnosed lumbosacral sprain and exacerbation of the left sciatic nerve due to the employment injury, status post 1982 left nerve root compression at L5 and S1,² status post April 1986 lumbar laminectomy at L4-5 and L5-S1 with L4-5 discectomy, failed back syndrome, degenerative lumbar disc disease, history of hands and knees osteoarthritis, history of colon cancer and history of polymyalgia rheumatica and fibromyalgia and macular degeneration. A physical examination revealed that appellant was "able to forward flex at the waist to get her fingertips to the level of her knees, she has limited side bending to the left and the right, "[b]ack extension causes pain," tenderness is noted in the left buttock area and she is able to have 30 degrees right straight leg raising and 30 degrees left leg raising before experiencing pain. Dr. Hrutkay concluded that she was disabled from her employment as a licensed practical nurse due to her nonemployment conditions of a history of back problems, lumbar surgery in 1982, fibromyalgia, polymyalgia rheumatica, cervical arthritis, right upper extremity radicular pain, macular degeneration which resulted in her legal blindness and arthritis in her knees and hands.

By decision dated July 28, 1998, the Office terminated appellant's compensation benefits for wage-loss and medical benefits effective August 15, 1998.

In a decision dated November 23, 1998, the Office hearing representative vacated the July 28, 1998 decision terminating benefits effective August 15, 1998 and instructed the Office to get a copy of medical records from Dr. Robert Hall relating to treatment before and after the August 12, 1982 surgery, as well as a copy of the August 12, 1982 surgical report prior to requesting a supplemental report from Dr. Hrutkay.

Subsequent to the hearing representative's decision, the Office complied with the hearing representative's instructions, obtained the medical records noted by the hearing representative and requested a supplemental report from Dr. Hrutkay

² The record reveals that appellant sustained an injury at work in 1982 when she slipped and fell. The record further reveals that she did not report the incident as she did not want to jeopardize her career at the employing establishment.

In a supplemental report dated September 14, 1999, Dr. Hrutkay opined “that no truly objective change occurred as a result of the [June] 10, [19]85 employment injury.” He found:

“Further diagnostic studies following this injury did not document any truly objective changes with regard to the lower two disc levels and at the time of the surgery by Dr. Fawcett³ on [April] 11, [19]86, the primary finding was that of scarring. No true disc herniation was found. Therefore, although by history the low back and left lower extremity symptoms worsened after the [June] 10, [19]85 lifting injury, no truly objective changes occurred to explain this increase in pain.”

As to objective testing, Dr. Hrutkay noted that the April 5, 1993 magnetic resonance imaging (MRI) scan test showed “chronic degenerative disc disease in the lower lumbar spine, but no current disc herniation.” Based upon these findings, he opined that there was no significant change in the lumbar spine other than normal degeneration caused by aging. With regard to the additional medical evidence from 1982 provided by the Office, he noted:

“[F]indings at that time were of some hypertrophic bone overlying nerve roots, which was debrided. No disc ruptures were noted at the time of the surgery. Subsequent records are available from the office of Gregg Omura, M.D. following the lifting injury of [June] 10, [19]85. These records indicate that following the incident of [June] 10, [19]85, there was some subjective worsening of the chronic back and left lower extremity pain symptoms.”

Dr. Hrutkay noted a second lumbar surgery was performed on April 11, 1986, that “no disc herniation was noted at the L4-5 level” and that appellant “did not get significantly better” following the surgery. Based upon a review of all the medical records, he stated:

“[I]t continues to be my opinion that no truly objective change occurred as a result of the [June] 10, [19]85 lifting injury. Surgery had previously been performed at the lower two lumbar levels in 1982. This surgical procedure had resulted in some scarring in that area. A lifting injury on [June] 10, [19]85, which by history made the low back and left lower extremity symptoms worse. Further diagnostic studies following this injury did not document any truly objective changes with regard to the lower two disc levels.”

Dr. Hrutkay also noted “no true disc herniation was found” and that “no truly objective changes occurred to explain” appellant’s increased pain. He concluded that there was no “evidence of objective findings or material change in [appellant]’s condition since a return to part-time work on [August] 30, [19]93” and he found “no objective neurologic physical findings at the time of my evaluation on [February] 6, [19]98.”

On November 2, 1999 the Office issued a notice of proposed termination of compensation benefits based upon Dr. Hrutkay’s report.

³ Dr. Ronald A. Fawcett, a Board-certified orthopedic surgeon, performed lumbar decompression surgery, laminotomy and discectomy on April 11, 1986.

In a report dated November 24, 1999, Dr. Michael L. Griffith, a treating Board-certified neurological surgeon, indicated that appellant had a history of back problems which began in 1980. A physical examination of the lower extremity lumbar spine revealed tenderness over both buttocks. Dr. Griffith diagnosed chronic low back pain due to the June 10, 1985 employment injury, bilateral sciatica, history of fibromyalgia and polymyalgia rheumatica, peripheral neuropathy, chronic obstructive pulmonary disease (COPD), left carotid bruit with probable carotid stenosis and bilateral leg weakness due to chronic back pain, her work injury, multiple operations and disuse atrophy. Based upon a review of the records, he stated:

“I feel that [appellant’s] original injury is the cause of her current problems. While she did have lumbar surgery in 1982 and a back injury in 1980, she did work for three years prior to her work injury in 1985. I suspect that the scar tissue is a result of [appellant’s] chronic bony stenosis and of the previous surgery. There is no scientific way to delineate whether surgery or the original stenosis caused the maximum amount of scar tissue.”

In a decision dated December 3, 1999, the Office terminated appellant’s compensation benefits effective January 1, 2000, on the grounds that she no longer had any residuals or disability due to her accepted June 10, 1985 employment injury based upon Dr. Hrutkay’s reports.

In a December 22, 1999 letter, appellant submitted a December 8, 1999 report by Dr. Griffith for review. He stated that a November 24, 1999 MRI scan showed “multiple level degenerative changes and post-op surgical changes.” Dr. Griffith diagnosed degenerative disc disease and a bulging disc. He opined that the changes on the MRI scan were due to “[appellant’s] initial injury and subsequent operations.”

Appellant appealed to the Board. In a decision dated June 4, 2002, the Board affirmed the Office’s denial of her request for a hearing on the grounds that she failed to timely file her request for a hearing.⁴ The Board noted that there was an outstanding request for reconsideration relative to the termination of benefits and instructed the Office upon return of the case to review the request.

In a letter dated July 27, 2002, appellant requested reconsideration and submitted a November 24 1999 MRI scan, reports dated March 8, November 29 and December 12, 2000 by Dr. Griffith and a January 3, 2001 report by Dr. Yechiel Kleen, a Board-certified physiatrist, in support of her request.

A November 24, 1999 MRI scan revealed evidence of disc bulge at L4-5 and L3-4 with mild spinal stenosis and L3-4, an essentially normal L2-3 level.

Dr. Griffith, in a March 8, 2000 report, notes that appellant continues to have severe pain in her lower back and neck. He diagnosed “fairly severe degenerative changes in the lower back.” Dr. Griffith, in a November 2000 report, diagnosed “cervical radiculopathy, secondary to

⁴ Docket No. 04-685 (issued June 4, 2002).

long-standing cervical stenosis.” In a December 12, 2000 report, he opined that appellant’s “chronic degenerative changes” were the cause of her pain.

In a November 15, 2000 report, Dr. Kleen noted a medical and injury history, including an unreported 1982 slip and fall injury, a 1982 lumbar decompression laminectomy, the 1985 employment injury and subsequent back surgery on April 11, 1986. He diagnosed fibromyalgia, polymyalgia rheumatic, COPD requiring oxygen, failed back syndrome, significant deconditioning, significant deficit in lumbar range of motion. Dr. Kleen opined that due to the June 10, 1985 employment injury appellant had “residual significant exacerbation of symptoms, to the point of inability to function at work,” laminectomy at L4-5 and L5-S1 and a herniated disc and severe scarring. He noted his disagreement with Dr. Hrutkay’s opinion that appellant no longer had any residuals due to the June 10, 1985 employment injury. Dr. Kleen opined that Dr. Fawcett’s report support that appellant’s “subsequent failed back syndrome and disability are directly and 100 percent related” to the June 10, 1985 employment injury. With regard to her nonemployment-related conditions of polymyalgia rheumatica, COPD and fibromyalgia, he opined that they contribute to her disability, but “this contribution is above and beyond the one sustained as a result of the [June] 10, [19]85 work injury and subsequent surgical intervention on [April] 11, [19]86.”

In a decision dated November 15, 2002, the Office found the evidence insufficient to warrant modification of the December 3, 1999 decision, which terminated appellant’s compensation benefits.

In a letter dated April 8, 2003, appellant, through counsel, requested reconsideration of the termination of her benefits and submitted an April 1, 2003 report by Dr. Griffith in support of her request.

Dr. Griffith, in an April 1, 2003 report, opined that appellant’s “pain is secondary to injury to the nerve roots themselves but also secondary to degeneration of the joints of the lumbar spine which began after her surgery in 1985.” He stated, “the degenerative changes that occurred after her surgery in 1985, produced a type of degenerative arthritis in the lower lumbar spine” which resulted in pain when there is any lower spine movement.

By decision dated July 14, 2003, the Office found the evidence insufficient to warrant modification of the prior decision which terminated appellant’s compensation on the grounds that she no longer had any residuals due to the June 10, 1985 employment injury.

In a letter dated March 12, 2004, appellant’s counsel requested reconsideration. In support of her request, appellant resubmitted reports dated December 8, 1999, March 8, November 29 and December 12, 2000 and April 1, 2003, by Dr. Griffith and also submitted a November 19, 2003 report by him.

In his November 19, 2003 report, Dr. Griffith attributed appellant’s nerve root injury to the 1985 employment injury and subsequent operation. He also concluded that her 1985 employment injury “exacerbated her previous injury in 1982.” Dr. Griffith opined that injuries in 1982 and 1985 “were the beginning and the direct cause of [appellant’s] nerve root injury,” which has been exacerbated by aging and daily living activities.

In a decision dated April 12, 2004, the Office denied appellant's request for merit reconsideration.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁵ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.⁷ In order to prevail, she must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability which continued after termination of compensation benefits.⁸

ANALYSIS -- ISSUE 1

In terminating appellant's compensation, the Office relied on the February 16, 1998 and September 14, 1999 reports of Dr. Hrutkay, an Office second opinion specialist. In his reports, Dr. Hrutkay provided an accurate factual and medical background. He conducted a thorough medical examination and a detailed review of appellant's medical records. On February 16, 1998 Dr. Hrutkay diagnosed lumbosacral sprain and exacerbation of the left sciatic nerve due to the employment injury, status post 1982 left nerve root compression at L5 and S1, status post April 1986 lumbar laminectomy at L4-5 and L5-S1 with L4-5 discectomy, failed back syndrome, degenerative lumbar disc disease, history of hands and knees osteoarthritis, history of colon cancer and history of polymyalgia rheumatica and fibromyalgia and macular degeneration. He opined that appellant had nonindustrial conditions which were the cause of her disability. On September 14, 1999 Dr. Hrutkay further opined that she no longer had any residuals of her June 10, 1985 employment injury. In this regard, he explained "that no truly objective change occurred" as a result of the June 10, 1985 employment injury to explain the complaints of increased pain. Dr. Hrutkay noted that scarring resulted from the 1982 surgery in the lower two lumbar levels, but that there was medical evidence from 1982 and objective studies performed shortly after the injury and in 1993 to support his conclusion. He concluded that appellant was incapable of performing the duties of the position as a licensed practical nurse due to her nonindustrial health conditions. Additionally, Dr. Hrutkay reported that there was no objective findings of material changes following her return to part-time work on August 20, 1993 and no objective neurologic physical findings on examination of February 6, 1998.⁹

⁵ *Joseph A. Brown, Jr.*, 55 ECAB ____ (Docket No. 04-376, issued May 11, 2004).

⁶ *Jaja K. Asaramo*, 55 ECAB ____ (Docket No. 03-1327, issued January 5, 2004).

⁷ *John F. Glynn*, 53 ECAB ____ (Docket No. 01-1184, issued June 4, 2002).

⁸ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

⁹ As the Office had initially referred appellant to Dr. Hrutkay, it was proper for it to request a supplemental opinion from him after having provided him with additional evidence to allow him to resolve the issue of whether appellant had any disability or residuals causally related to her employment injury. See *Mae Z. Hackett*, 34 ECAB

The Board finds that Dr. Hrutkay's opinion is entitled to greater weight in finding that appellant no longer has any residuals or disability due to her June 10, 1985 employment injuries, as it is sufficiently rationalized and based on a proper factual and medical background.

In response to the Office's November 2, 1999 notice of proposed termination, appellant submitted Dr. Griffith's November 24, 1999 report in which he diagnosed chronic low back pain due to the 1985 employment injury and noted bilateral sciatica, fibromyalgia and polymyalgia rheumatica, peripheral neuropathy, chronic obstructive pulmonary disease, left carotid bruit with probable carotid stenosis and bilateral leg weakness due to chronic back pain, multiple operations and disuse atrophy. He opined that her "original injury is the cause of her current problems" and stated he suspected "the scar tissue is a result of [appellant's] chronic bony stenosis and of the previous surgery." Dr. Griffith noted that he could not "delineate whether the surgery or the original stenosis caused the amount of scar tissue." He did not explain how or why appellant's current problems of chronic pain was caused by the June 10, 1985 employment injury. Further, Dr. Griffith attributed her "current problems" consisting of conditions not accepted by the Office as causally related to the June 10, 1985 employment injury. He has provided no rationalized medical opinion explaining the nexus. Therefore, his reports are insufficient to outweigh the probative value of Dr. Hrutkay's second opinion medical report and supplemental report, which specifically concluded that appellant no longer had any residuals or disability causally related to her accepted employment injuries.

After the Office's December 3, 1999 decision terminating her compensation, appellant submitted additional medical evidence. Given that the Board has found that the Office properly relied on the opinion of Dr. Hrutkay in terminating her compensation effective January 1, 2000, the burden shifts to appellant to establish that she is entitled to compensation after that date.

The medical evidence submitted subsequent to the December 3, 1999 decision terminating appellant's compensation, includes reports dated March 8, November 29 and December 12, 2000 by Dr. Griffith, a November 24, 1999 MRI scan and a January 3, 2001 report by Dr. Kleen.

The Board finds that the December 8, 1999 report by Dr. Griffith is not sufficient to support her burden of proof establishing that she has any continuing residuals or disability due to her accepted June 10, 1985 employment injury. In his December 8, 1999 report, Dr. Griffith diagnosed degenerative disc disease and a bulging disc based upon a November 24, 1999 MRI scan. He concluded that the changes shown on the November 24, 1999 MRI scan were due to "[appellant's] initial injury and subsequent operations." However, Dr. Griffith did not explain how or why her degenerative disc disease and bulging disc were caused by or somehow attributed to the June 10, 1995 employment injury. Therefore, his December 8, 1999 report is insufficient to outweigh the probative value of Dr. Hrutkay's second opinion medical report in which he opined that appellant no longer had any residuals or disability causally related to her accepted employment injuries.

Similarly, the Board finds that the remaining reports and MRI scans are insufficient to meet appellant's burden of proof. A November 24, 1999 MRI scan revealed evidence of disc

1471 (1983).

bulge at L4-5 and L3-4 with mild spinal stenosis and L3-4, an essentially normal L2-3 level. Dr. Griffith, in his March 8, 2000 report, diagnosed “cervical radiculopathy secondary to long-standing cervical stenosis.” In his November 29, 2000 report, Dr. Griffith noted that appellant continued to have severe lower back and neck pain and in his December 12, 2000 report, he attributed her pain to her chronic degenerative changes. His March 8, November 29 and December 12, 2000 reports and the November 24, 1999 MRI scan are not sufficient to outweigh the probative value of Dr. Hrutkay’s September 14, 1999 report as they failed to address whether appellant’s conditions were caused by her June 10, 1995 employment injury.

Similarly, Dr. Kleen’s November 15, 2000 opinion that appellant’s June 1985 employment injury caused a herniated disc, severe scarring and failed back syndrome and that she remained disabled, failed to explain how her June 10, 1985 employment injury caused her to have “residual significant exacerbation of symptoms, to the point of inability to function at work.” While Dr. Kleen noted appellant’s nonindustrial-related conditions of polymyalgia rheumatica, COPD and fibromyalgia contributed to her disability, he opined that this contribution is above and beyond the one sustained as a result” of her June 10, 1985 employment injuries and subsequent surgery, Dr. Kleen, however, failed to explain how or why appellant was totally disabled due to her June 10, 1985 employment injury while concluding at the same time that her nonindustrial conditions contributed to her disability. The Board finds that as neither Dr. Griffith nor Dr. Kleen provided a rationalized medical opinion, their reports are insufficient to create a conflict with Dr. Hrutkay’s opinion that appellant no longer had any residuals due to her accepted employment injuries. Accordingly, as she has not submitted additional probative medical opinion evidence establishing that she had continuing residuals or disability causally related to her accepted June 10, 1995 employment injuries, appellant has not met her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees’ Compensation Act¹⁰ vests the Office with discretionary authority to determine whether it will review an award for or against compensation. Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.¹¹

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) constituting relevant and pertinent new evidence not previously considered by the Office.¹² Section 10.608(b) provides that, when an application for reconsideration 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.¹³ Evidence or argument that repeats or duplicates

¹⁰ 5 U.S.C. § 8128(a) (“[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”).

¹¹ *Veletta C. Coleman*, 48 ECAB 367 (1997).

¹² 20 C.F.R. § 10.606(b)(2).

¹³ 20 C.F.R. § 10.608(b).

evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁴ Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁵

ANALYSIS -- ISSUE 2

To support her March 12, 2004 request for reconsideration, appellant did not show that the Office erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by the Office. Instead, she resubmitted the December 8, 1999, March 8, November 29 and December 12, 2000 and April 1, 2003 reports of her treating Board-certified neurological surgeon, Dr. Griffith. As these reports were previously submitted and considered by the Office, they do not constitute a basis for reopening appellant's claim for further merit review.¹⁶ She also submitted a November 19, 2003 report from Dr. Griffith. The only issue for determination, therefore, is whether this report constitutes, under the third standard above, "relevant and pertinent new evidence not previously considered by the Office."

The Board finds that Dr. Griffith's November 19, 2003 report does not satisfy the third standard for obtaining a merit review. While the opinion expressed is clearly relevant to whether appellant has established any continuing disability or residuals due to her accepted June 10, 1985 employment injuries, the reports added nothing new to reports that were previously submitted to and considered by the Office. Dr. Griffith had previously concluded appellant's pain was secondary to nerve root injury and degeneration of the lumbar spines joints which began subsequent to the surgery as a result of the 1985 employment injury. So his November 19, 2003 report merely restates the case that he made in his November 24 and December 8, 1999, March 8, November 29 and December 12, 2000 and April 1, 2003 reports. As the Office has previously considered the substance of Dr. Griffith's November 19, 2003 report, the Board finds that it does not meet the third standard of review as the report is cumulative or duplicative in nature.¹⁷

Because appellant's March 12, 2004 request for reconsideration does not meet at least one of the standards for obtaining a review of the merits of her claim, the Board will affirm the Office's decision denying that request.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective January 1, 2000, on the grounds that she no longer had any residuals or disability causally related to her June 10, 1985 employment injuries. The Board also finds that the Office properly refused to reopen her claim for further merit review under section 8128.

¹⁴ *Helen E. Paglinawan*, 51 ECAB 591 (2000).

¹⁵ *Kevin M. Fatzner*, 51 ECAB 407 (2000).

¹⁶ *Helen E. Paglinawan*, *supra* note 14.

¹⁷ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 14 and April 12, 2003 are affirmed.

Issued: September 23, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board