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

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| **B.B., Appellant** | ) | |
| **and** | ) | **Docket No. 06-434** |
| **DEPARTMENT OF COMMERCE, CENSUS BUREAU, Jefferson, IN, Employer** | ) | **Issued: August 1, 2006** |

*Appearances:*
*Hayes P. Haddox, Esq.,* for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

# DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

## *JURISDICTION*

On December 19, 2005 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated October 4, 2005 which denied merit review. Because more than one year has elapsed between the last merit decision of the Office, finalized September 13, 2004, and the filing of this appeal on December 19, 2005, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board lacks jurisdiction to review the merits of appellant's claim.

## *ISSUE*

The issue is whether the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

## *FACTUAL HISTORY*

On January 6, 2004 appellant, then a 43-year-old statistical clerk, filed a Form CA-2, occupational disease claim, alleging that her job duties caused herniated and bulging discs. In support of her claim, she submitted a January 5, 2004 statement in which she described her job duties and related her medical history and treatment. She also submitted a December 16, 2003

magnetic resonance imaging (MRI) scan which demonstrated degenerative disc disease at L4-5 and L5-S1, a right lateral disc protrusion at L4-5, and a small disc fragment embedded in L5-S1.

By letter dated January 30, 2004, the Office advised appellant of the type of evidence needed to support her claim. This was to include a medical report which was to provide a specific diagnosis and was to address the cause of her condition and its relationship to specific employment factors.

Appellant submitted an additional statement, again describing her work history and duties and medical condition and treatment. She also submitted a December 31, 2003 report in which Dr. Julia A. Brown, Board-certified in family medicine, recommended light duty. In a patient encounter form dated December 31, 2003, Dr. John Guarnaschelli, a Board-certified neurosurgeon, provided a diagnosis of lumbar disc herniation and recommended surgery.

By decision dated February 23, 2004, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish that the claimed condition was causally related to established work-related events. On March 17, 2004 appellant requested a review of the written record and submitted a history and physical report dated December 31, 2003 in which Dr. Guarnaschelli diagnosed an L5-S1 disc herniation and advised that appellant was to be admitted for surgery. In an attending physician's report dated January 16, 2004, Dr. Brown advised that she initially treated appellant on November 6, 2003 for radiating low back pain and opined that appellant's condition "may have been" aggravated by her work. Dr. Guarnaschelli provided an attending physician's report dated February 2, 2004 in which he stated that an injury at work on October 28, 2003 caused intractable pain. He advised that appellant was totally disabled and was awaiting authorization for surgery. In a report dated March 8, 2004, Dr. Daniel L. Hafendorfer, a family practitioner, advised that he had treated appellant for low back pain and sciatica in 1994 but that her symptoms were now far worse and opined that her work activity aggravated her condition. On June 2, 2004 appellant underwent surgery.

In a letter dated June 21, 2004, the employing establishment disagreed with appellant's allegations regarding her work duties and advised that very little lifting, pulling, jerking, twisting, bending or stooping was required in her clerk position and that a laborer was available to assist in any of these functions. A job description was provided.

By decision dated September 7, 2004 and finalized September 13, 2004, an Office hearing representative affirmed the February 23, 2004 decision. On September 3, 2005 appellant, through counsel, requested reconsideration and advised that additional medical evidence would be submitted. Medical evidence submitted subsequent to the September 13, 2004 decision included an April 26, 2004 report in which Dr. Hafendorfer noted that appellant was under his care and off work from April 26 to May 20, 2004. In patient encounter forms dated June 25, July 23, 27 and 30, 2004, Dr. Guarnaschelli noted appellant's diagnosis of a herniated lumbar disc and placed her off work. In a patient encounter form dated August 6, 2004, he additionally noted work restrictions, and in an August 29, 2003 report, noted that the work restrictions were retroactive to August 3, 2004.

By decision dated October 4, 2005, the Office denied appellant's reconsideration request.

## *LEGAL PRECEDENT*

Section 8128(a) of the Federal Employees' Compensation Act[1] vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[2] Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[3] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[4] Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[5]

## *ANALYSIS*

The only decision before the Board in this appeal is the decision of the Office dated October 4, 2005 denying appellant's application for review. Because more than one year had elapsed between the date of the Office's most recent merit decision finalized September 13, 2004 and the filing of her appeal with the Board on December 19, 2005, the Board lacks jurisdiction to review the merits of her claim.[6]

With her September 3, 2005 reconsideration request, appellant merely generally argued that the medical evidence supported entitlement. Appellant thus did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Consequently, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[7]

With respect to the third above-noted requirement under section 10.606(b)(2), while appellant submitted additional evidence, none of the reports contains an opinion regarding the cause of appellant's back condition. The merit issue in this case is whether appellant has submitted sufficient medical evidence to establish that her back condition is causally related to

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[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.608(a).

[4] 20 C.F.R. § 10.608(b)(1) and (2).

[5] 20 C.F.R. § 10.608(b).

[6] 20 C.F.R. § 501.3(d)(2).

[7] 20 C.F.R. § 10.606(b)(2).

factors of her federal employment. 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.[8] Thus, the reports submitted with appellant's reconsideration request are insufficient to warrant merit review as they merely provide diagnoses, and advise that she cannot work or provide work restrictions. They do not address the cause of her condition, the merit issue in the instant case. As appellant did not submit relevant and pertinent new evidence not previously considered by the Office, the Office properly denied her reconsideration request.[9]

## ***CONCLUSION***

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

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 4, 2005 be affirmed.

Issued: August 1, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

[8] *Jacqueline E. Brown*, 54 ECAB 583 (2003).

[9] *Id.*