

FACTUAL HISTORY

This case is before the Board for the third time. In the first appeal, the Board affirmed the Office's May 29 and February 29, 1998 decisions, finding that appellant was not entitled to compensation on or after June 22, 1997 due to her accepted employment injuries of cervical strain, right shoulder strain and right hip strain.² The Board found that the Office met its burden of proof to terminate her compensation benefits based on the report of the Office referral physician. The Board noted that appellant's attending physician, Dr. M. Dennis Wachs, a Board-certified orthopedic surgeon, attributed her disability primarily to lower back problems which were not accepted as due to her employment injury. On the second appeal, the Board affirmed the Office's June 5, 2003 decision, denying modification of its finding that she was not entitled to compensation after June 22, 1997 due to her January 19, 1994 employment injury.³ The Board further affirmed an Office decision dated December 16, 2003, denying appellant's request for reconsideration under section 8128. The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

On April 15, 2005 appellant, through her attorney, requested an oral hearing. Counsel noted that he had originally asked for a hearing on November 6, 2001 but that the Office had not taken action on his request.

By decision dated June 1, 2005, the Office denied appellant's request for a hearing after finding that it did not have jurisdiction to review a decision of the Board.

By letter dated June 8, 2005, appellant, through her attorney, requested reconsideration of her claim. She submitted a report dated August 22, 2005 from Dr. Wachs. He described appellant's current symptoms of "tenderness over her greater trochanteric bursa, her right sacroiliac joint, her sacrum and appellant's lower back." Dr. Wachs noted that she might require surgery on her lower back. He stated:

"I have in the past written to you regarding the etiology of [appellant's] problem and as I have recounted to you, a review of her chart reveals that her back had continued to bother [her] subsequent to the fall and up until the time I saw [appellant] on April 10, 2001, which was before her accident. At her visit of May 21, 2001, [appellant] did have some neck and back pain. The MRI [magnetic resonance imaging] [scan] done after that accident did not really suggest any new change at L5-S1.

"All told, as I have mentioned before, it certainly appears that the original accident is the causative agent and she has had some degenerative change subsequent to that, as would be expected on a natural basis."

² Docket No. 98-2432 (issued September 6, 2000).

³ Docket No. 04-630 (issued July 21, 2004).

By decision dated September 29, 2005, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitive and thus, insufficient to warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

The statutory right to a hearing under section 8124(b)(1)⁴ follows an initial final decision of the Office.⁵ Section 8124 of the Federal Employees' Compensation Act⁶ sets forth the appellate jurisdiction of the Office's Branch of Hearings and Review in holding hearings under the Act in relevant part as follows:

“(a) The Secretary of Labor shall determine and make a finding of facts and make an award for or against payment of compensation under this subchapter....

“(b)(1) Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on [her] claim before a representative of the Secretary....”⁷

The Board has clarified that claimants do not have the right under section 8124(b)(1) of the Act to request hearings in the absence of a final Office decision and has further held that the Office does not have the discretionary authority to grant a request for a hearing immediately following a Board decision.⁸ In *Eileen A. Nelson*, the Board found that the Branch of Hearings and Review may not assume jurisdiction in the claims process absent a final adverse decision by the Office after review by the Board.⁹

ANALYSIS -- ISSUE 1

In this case, following issuance of Office decisions dated June 5 and December 16, 2003, appellant exercised her appellate rights by requesting an appeal to the Board. The Board reviewed the case and issued its decision on July 21, 2004. On April 15, 2005 appellant requested a hearing before the Office's Branch of Hearings and Review. As the last decision in this case was the Board's July 21, 2004 decision, she was requesting that the Office's Branch of Hearings and Review grant a hearing to review the Board's decision. The Board has clarified that claimants do not have the right under section 8124(b)(1) of the Act to request hearings in the absence of a final Office decision and has further held that the Office does not have the

⁴ 5 U.S.C. § 8124(b)(1).

⁵ 5 U.S.C. § 8124(a)(1).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 5 U.S.C. § 8124.

⁸ *Robert N. Thomas*, 51 ECAB 180 (1999).

⁹ 46 ECAB 377 (1994).

discretionary authority to grant a request for a hearing immediately following a Board decision.¹⁰ In *Eileen A. Nelson*, the Board found that the Branch of Hearings and Review may not assume jurisdiction in the claims process absent a final adverse decision by the Office after review by the Board.¹¹ As there was no final decision of the Office left unreviewed by the Board over which the Office's Branch of Hearings and Review could assume jurisdiction to exercise its discretionary appellate authority,¹² the Office properly denied appellant's request for a hearing in its June 1, 2005 decision.¹³

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation.¹⁴ To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁵ the Office's regulations provide 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 arguments not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.¹⁶ 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.¹⁷

ANALYSIS -- ISSUE 2

The medical evidence submitted by appellant in support of her request for reconsideration does not constitute relevant and pertinent new evidence not previously considered by the Office. She submitted a report dated August 22, 2005 from Dr. Wachs, who discussed her current complaints of tenderness in the low back, right sacroiliac joint, sacrum and greater trochanteric bursa. He noted that appellant experienced back problems since her fall and stated, "All told, as I have mentioned before, it certainly appears that the original accident is the causative agent and she has had some degenerative change subsequent to that, as would be expected on a natural basis." Dr. Wachs' August 22, 2005 report, however, is cumulative in nature as he previously expressed a similar opinion in his reports dated November 1, 2002 and August 22, 2003 which

¹⁰ *Robert N. Thomas, supra* note 8.

¹¹ *Eileen A. Nelson, supra* note 9.

¹² The Branch of Hearings and Review indicated in its decision that it had exercised its discretion in denying the hearing request; however, as discussed above, it is not within the Office's discretion whether to grant a hearing immediately following a Board decision.

¹³ *Robert N. Thomas, supra* note 8.

¹⁴ 5 U.S.C. § 8128(a).

¹⁵ *Id.*

¹⁶ 20 C.F.R. § 10.606(b)(2).

¹⁷ 20 C.F.R. § 10.608(b).

were considered by the Office prior to its September 29, 2005 decision. Thus, his report is insufficient to warrant reopening appellant's case for a review of the merits.¹⁸ Additionally, Dr. Wachs failed to address the pertinent issue of whether she is disabled due to her accepted employment injury. 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.¹⁹

As appellant has not shown that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered or submitted relevant and pertinent new evidence, the Office, in its September 29, 2005 decision, properly refused to reopen appellant's claim for a review on the merits.²⁰

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124. The Board further 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).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 29, 2005 and June 1, 2005 are affirmed.

Issued: February 17, 2006
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ *Freddie Mosley*, 54 ECAB 255 (2002) (evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case).

¹⁹ *Ronald A. Eldridge*, 53 ECAB 218 (2001).

²⁰ With her appeal, appellant submitted additional evidence. The Board, however, may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).