

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

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**MARY S. BROCK, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Los Angeles, CA, Employer**

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**Docket No. 05-856  
Issued: January 10, 2006**

*Appearances:*  
*Mary S. Brock, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On March 1, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 14, 2005 nonmerit decision, denying her request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's November 13, 2003 decision concerning appellant's wage-earning capacity and pay rate for compensation. Because more than one year has elapsed between the last merit decision and the filing of this appeal on March 1, 2005, the Board lacks jurisdiction to review the merits of this claim.<sup>1</sup>

**ISSUE**

The issue is whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

## **FACTUAL HISTORY**

On December 17, 1980 appellant, then a 32-year-old injury compensation specialist, filed an occupational disease claim alleging that she sustained an employment-related aggravation of her intestinal condition. The Office accepted that she sustained a temporary aggravation of Crohn's disease.<sup>2</sup> The Office later accepted in 1984, that appellant sustained severe depression due to employment factors.<sup>3</sup>

In October 1989, appellant began to participate in a vocational rehabilitation program designed to return her to work. In 1993 she attempted to gain earnings for herself by starting a graphic design business which produced artwork, calendars, greeting cards and other graphic works. Over the next few years, appellant only had sporadic earnings in connection with this venture.

In early 2000, appellant again began to participate in a vocational rehabilitation program.<sup>4</sup> In November 2000 appellant successfully completed a six-month training program in desktop publishing, which included coursework in computer graphics and business practices.

In a report dated June 6, 2002, Dr. Irvin D. Godofsky, an attending Board-certified psychiatrist and neurologist, stated that appellant was capable of working four to six hours per day.

By decision dated July 1, 2002, the Office adjusted appellant's compensation based on its determination that she was capable of performing the constructed position of graphic designer for four hours per day.<sup>5</sup>

In statements dated July 20, September 4 and October 3, 2002, appellant argued that the Office improperly adjusted her compensation based on her ability to perform the constructed position of graphic designer. She argued that the determination did not take into consideration all the residuals of her injury, all significant preexisting impairments and all pertinent nonmedical factors such as her age and prior job experience. She contended that she did not have the necessary vocational skills to work as a graphic artist because her training program was not comprehensive; that employers were only looking for full-time workers with advanced skills to work as graphic designers; and that her emotional condition and the physical effects of her

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<sup>2</sup> Appellant later claimed that she sustained employment-related polyarteritis nodosa, but the Office denied her claim and the Board affirmed the Office's denial by decisions dated January 31, 1989 and December 6, 1990.

<sup>3</sup> Appellant stopped work for various periods and received appropriate disability compensation from the Office. She last worked for the employing establishment in October 1982 and retired on disability retirement effective March 16, 1983.

<sup>4</sup> The Office received a report from appellant's attending clinical psychologist, Dr. Henry Levy, indicating that she could work four hours per day.

<sup>5</sup> Appellant's vocational rehabilitation counselor determined that the position which involved designing art and copy layouts for visual communications media, was reasonably available in her commuting area and paid \$15.00 dollars per hour. The Office applied the principles set forth in the *Shadrick* decision to determine the pay rate for appellant's compensation. See *Albert C. Shadrick*, 5 ECAB 376 (1953).

Crohn's disease were not adequately considered. Appellant also argued that the June 6, 2002 report of Dr. Godofsky contained caveats regarding her ability to work and that her previous experience in desktop publishing did not prepare her to work as a graphic artist. She alleged that the Office made errors in the *Shadrick* calculations it used to determine her wage-earning capacity in that the \$15.00 per hour rate of pay chosen for the graphic designer position was too high and should have been based on actual wages of \$10.00 per hour; that an improper figure was used for the current salary of the position she held when injured; and that consideration was not given to the fact that she would have received merit based and step increases in salary if she had not stopped work due to her employment injury.

Appellant submitted numerous medical reports and documents regarding her job duties, earnings, past job performance and job search efforts.

An Office hearing representative performed a review of the written record and, by decision dated and finalized November 26, 2002, affirmed the July 1, 2002 decision. The Office hearing representative considered appellant's arguments in her decision.

By letter dated October 28, 2003, appellant requested reconsideration of her claim and repeated a number of the arguments she had made in her July 20, September 4 and October 3, 2002 statements.

Appellant submitted additional evidence in support of her claim, including medical reports, documents concerning entitlement to Medicare benefits, lists of appointments for physical and emotional ailments, as well as more documents regarding her job duties, earnings, past job performance and job search efforts.<sup>6</sup>

By decision dated November 13, 2003, the Office affirmed its prior decisions regarding appellant's wage-earning capacity and pay rate for compensation.

By letter dated November 10, 2004, appellant requested reconsideration of her claim. She again argued that she did not have the necessary vocational skills to work as a graphic artist; that employers were only looking for full-time workers with advanced skills to work as graphic designers; that her age and her emotional and physical conditions were not adequately considered; that the \$15.00 per hour rate of pay chosen for the graphic designer position was too high; and that consideration was not given to the fact that she would have received merit-based and step increases in salary if she had not stopped work due to her employment injury.

Appellant submitted documents concerning entitlement to Medicare benefits, records regarding a loan application, a Form EN1032 concerning her work activities, lists of appointments for physical and emotional ailments, an unsigned summary of diagnostic tests performed between 1984 and 2004, as well as more documents regarding her job duties, earnings, past job performance and job search efforts.

Appellant also submitted medical records which had previously been submitted to the Office, including a June 6, 2002 report of Dr. Godofsky and a diagnostic testing report from

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<sup>6</sup> Appellant had previously submitted many of these documents to the Office.

September 2002. The record was also supplemented to contain a November 10, 2004 report in which Dr. Alvin Trotter, an attending Board-certified internist, indicated that he saw her on September 9, 2004 and stated that she was “considered disabled” and “unable to work” due to “impaired use of her extremities.”

By decision dated January 14, 2005, the Office denied appellant’s request for merit review of her claim.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act,<sup>7</sup> the Office’s regulations provide that the evidence or argument submitted by 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 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 on the merits.<sup>10</sup>

### **ANALYSIS**

The Office accepted that appellant sustained an employment-related temporary aggravation of Crohn’s disease and severe depression. By decision dated July 1, 2002, the Office adjusted her compensation based on its determination that she was capable of performing the constructed position of graphic designer for four hours per day. By decision dated January 14, 2005, the Office denied appellant’s request for merit review of her claim.

In connection with her November 10, 2004 reconsideration request, appellant argued that she did not have the necessary vocational skills to work as a graphic artist; that employers were only looking for full-time workers with advanced skills to work as graphic designers; that her age and her emotional and physical conditions were not adequately considered; that the \$15.00 per hour rate of pay chosen for the graphic designer position was too high; and that consideration was not given to the fact that she would have received merit-based and step increases in salary if she had not stopped work due to her employment injury.

However, the submission of these arguments would not require the Office to perform a merit review of appellant’s claim because she already advanced these arguments and the Office

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<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)(2).

<sup>9</sup> 20 C.F.R. § 10.607(a).

<sup>10</sup> 20 C.F.R. § 10.608(b).

had rejected them in its prior merit decisions. Appellant made these same arguments in previously submitted statements dated July 20, September 4, October 3, 2002 and October 28, 2003. The Board has held that the submission of evidence or argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>11</sup>

Appellant submitted documents concerning entitlement to Medicare benefits, records regarding a loan application, a Form EN1032 concerning her work activities, lists of appointments for physical and emotional ailments, as well as documents regarding her job duties, earnings, past job performance and job search efforts. The vast majority of these documents had previously been submitted to the Office or were similar to previously submitted documents. Some of the documents while new, such as the records regarding a loan application, but are not relevant to the merit issue of this case, *i.e.*, the Office's adjustment of appellant's wage-earning capacity based on the constructed position of graphic designer and the resultant calculation of her pay rate for compensation. 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.<sup>12</sup>

Appellant also submitted a June 6, 2002 report of Dr. Godofsky, an attending Board-certified psychiatrist and neurologist, and a diagnostic testing report from September 2002, but these documents were previously submitted to the Office. She also submitted a November 10, 2004 report in which Dr. Trotter, an attending Board-certified internist, indicated that he saw appellant on September 9, 2004 and stated that she was "considered disabled" and "unable to work" due to "impaired use of her extremities." However, this report would not be relevant to the main issue of the present case as Dr. Trotter did not provide a clear opinion that she could not physically perform the constructed position of graphic designer at the time of the Office's wage-earning capacity determination.<sup>13</sup>

In the present case, appellant has not established that the Office improperly denied her request for further review of the merits of its November 13, 2003 decision under section 8128(a) of the Act, because the evidence and argument she submitted did not show that the Office erroneously applied or interpreted a specific point of law; advance a relevant legal argument not previously considered by the Office; or constitute relevant and pertinent new evidence not previously considered by the Office.

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>11</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

<sup>12</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>13</sup> Appellant also submitted an unsigned summary of diagnostic tests performed between 1984 and 2004. It is unclear who prepared this document and, given that it would not constitute medical evidence, it would not be relevant to the main issue of this case. See *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993) (finding that the report of a nonphysician cannot be considered by the Board in adjudicating a medical issue).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' January 14, 2005 decision is affirmed.

Issued: January 10, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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