

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

EVA N. ROGERS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dallas, TX, Employer**

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**Docket No. 05-1691
Issued: July 11, 2006**

Appearances:
Eva N. Rogers, 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 July 18, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' November 16, 2004 merit decision denying her recurrence of disability claim and a July 1, 2005 nonmerit decision denying her request for further review of the merits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.¹

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a recurrence of disability on or after August 1, 1997 due to her September 27, 1980 employment injury; and (2) whether the Office properly denied appellant's request for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ In connection with the present appeal, the Board issued an order on December 27, 2005 directing the Office to reconstruct and properly assemble the case record. On April 24, 2005 the Solicitor of Labor filed a petition to set aside the order remanding case and forwarding the record. On April 27, 2005 the Board issued an order granting petition to reopen the case.

FACTUAL HISTORY

On September 27, 1980 appellant, then a 31-year-old clerk, filed a traumatic injury claim alleging that she sustained a back injury when she attempted to open a jammed door with a crowbar at work on that date. Appellant stopped work on October 1, 1980. The Office accepted that she sustained a lumbosacral strain.²

On August 7, 1997 appellant underwent fusion and discectomy processes with insertion of titanium fixation devices at L4-5 and L5-S1. On February 17, 1998 she underwent a transverse process fusion at L4-S1 with donor bone grafts at the posterior iliac crest. Both surgeries were performed by Dr. Robert J. Henderson, an attending Board-certified orthopedic surgeon.

On September 3, 2004 appellant filed a claim alleging that she sustained a recurrence of disability on August 1, 1997 due to her September 27, 1980 employment injury. Appellant asserted that her August 7, 1997 and February 17, 1998 back surgeries were necessitated by her September 27, 1980 employment injury.

Appellant submitted a December 9, 1998 report in which Dr. Henderson indicated that she had been under his care since June 30, 1997. She presented with ongoing back and leg pain complaints since her “on-the-job injury July 27, 1980.”³ Dr. Henderson indicated that appellant had been totally disabled since coming under his care. She also submitted several brief medical reports, dated beginning in 1998, which discussed the continuing treatment of her back and lower extremity complaints.

By letter dated September 24, 2004, the Office requested that appellant submit additional factual and medical evidence in support of her claim.

Appellant submitted additional reports of Dr. Henderson dated between 1997 and 2004, including a June 30, 1997 report in which Dr. Henderson stated that she had a history of injury “from a work-related event July 27, 1980, trying to open trailer doors with a crowbar.” He noted that appellant had degenerative disc disease at L4-5 and L5-S1.⁴

By decision dated November 16, 2004, the Office denied appellant’s claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a recurrence of disability on or after August 1, 1997 due to her September 27, 1980 employment injury.

² The Office later terminated appellant’s compensation effective May 18, 1990 on the grounds that she had no residuals of her September 27, 1980 employment injury after that date. By decisions dated January 23, 1991 and August 11, 1993, the Board affirmed the Office’s determinations regarding the termination of appellant’s compensation.

³ In a report dated July 21, 1999, Dr Henderson indicated that appellant reported improvement in the status of her back condition and stated that she was walking five miles per day for seven days per week.

⁴ Appellant also submitted the results of diagnostic testing from 1997 showing that she had had degenerative disc disease at L4-5 and L5-S1.

By form report dated June 4, 2005 and received by the Office on June 7, 2005, appellant requested reconsideration of her claim.

Appellant submitted an April 11, 2005 report in which Dr. A.J. Morris, an attending Board-certified orthopedic surgeon, stated that appellant was seen by him on April 11, 2005 for an initial visit “with the acute onset of cervical and lumbar pain secondary to an on-the-job injury September 27, 1980.” He indicated that examination revealed lumbar tenderness with decreased flexion. Dr. Morris diagnosed “lumbar pain/radiculitis -- failed back syndrome” and indicated that appellant could not return to work. Under the heading “treatment and plan” he stated, “Patient has a failed back syndrome from her original injury in 1980.”

By decision dated July 1, 2005, the Office denied appellant’s request for further merit review of her claim.

LEGAL PRECEDENT -- ISSUE 1

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.⁵ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.⁶ Where no such rationale is present, medical evidence is of diminished probative value.⁷

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbosacral strain on September 27, 1980 when she attempted to open a jammed door with a crowbar. Appellant claimed that she sustained a recurrence of disability on August 1, 1997 due to her September 27, 1980 employment injury.⁸

The Board finds that appellant did not submit sufficient medical evidence to establish that her recurrence of disability on or after August 1, 1997 was due to her September 27, 1980 employment injury. Appellant submitted numerous reports, dated between 1997 and 2004, in which attending physicians discussed her back and lower extremity problems. However, these reports are of limited probative value in that they do not contain an opinion on causal

⁵ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

⁶ *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

⁷ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

⁸ Appellant asserted that her August 7, 1997 and February 17, 1998 back surgeries were necessitated by her September 27, 1980 employment injury.

relationship.⁹ They provide no opinion addressing how her disability on or after August 1, 1997 was caused or aggravated by the accepted September 27, 1980 employment injury.

Appellant submitted a December 9, 1998 report in which Dr. Henderson, an attending Board-certified orthopedic surgeon, indicated that she had been under his care since June 30, 1997 when she presented with ongoing back and leg pain complaints since her “on-the-job injury July 27, 1980.” In a report dated June 30, 1997, Dr. Henderson stated that appellant had a history of injury “from a work-related event July 27, 1980, trying to open trailer doors with a crowbar.” Dr. Henderson improperly reported the date of injury as July 27, 1980 rather than September 27, 1980 and provided no opinion that appellant sustained a recurrence of disability on or after August 1, 1997 due to her accepted employment injury.¹⁰ He noted that appellant had degenerative disc disease of the lumbar spine but did not address how the accepted lumbar strain of 1988 would cause or contribute to this degenerative disease.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant’s claimed condition became apparent during a period of employment nor her belief that her condition was aggravated by his employment is sufficient to establish causal relationship.¹¹ Appellant failed to submit rationalized medical evidence establishing that her claimed recurrence of disability is causally related to the accepted employment injury and, therefore, the Office properly denied her claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act,¹² 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.¹³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the

⁹ See *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee’s condition is of limited probative value on the issue of causal relationship).

¹⁰ Dr. Henderson indicated that appellant was disabled due to her degenerative disc disease of the low back but he did not discuss the cause of the condition.

¹¹ See *Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

¹² 5 U.S.C. § 8128(a) states, “[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.”

¹³ 20 C.F.R. § 10.606(b)(2).

date of that decision.¹⁴ 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.¹⁵

The submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁶

ANALYSIS -- ISSUE 2

In support of her reconsideration request, appellant submitted an April 11, 2005 report in which Dr. Morris, an attending Board-certified orthopedic surgeon, stated that appellant presented on that date “with acute onset of cervical and lumbar pain secondary to an on-the-job injury September 27, 1980.” Dr. Morris reported limited findings on examination and diagnosed “lumbar pain/radiculitis -- failed back syndrome.”

The submission of this report would not require reopening of appellant’s claim for further review of the merits because the report is not relevant to the main issue of the present case, *i.e.*, whether appellant submitted sufficient medical evidence to establish that she sustained a recurrence of disability on or after August 1, 1997 due to her September 27, 1980 employment injury.¹⁷ Although Dr. Morris stated that appellant had “a failed back syndrome from her original injury in 1980,” this appears to be a reporting of appellant’s belief that her continuing problems related to the September 27, 1980 injury rather than Dr. Morris’ own opinion that such a causal relationship existed.

In the present case, appellant has not established that the Office improperly denied her request for further review of the merits of its November 16, 2004 decision under section 8128(a) of the Act, because the evidence she submitted did not to 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 appellant did not meet her burden of proof to establish that she sustained a recurrence of disability on or after August 1, 1997 due to her September 27, 1980 employment injury. The Board further 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).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ 20 C.F.R. § 10.608(b).

¹⁶ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁷ *See supra* note 14 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' July 1, 2005 and November 16, 2004 decisions are affirmed.

Issued: July 11, 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