

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

AUGUSTA A. KIRK, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Toledo, OH, Employer**

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**Docket No. 05-1966
Issued: July 3, 2006**

Appearances:

*Alan J. Shapiro, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 26, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 31, 2005 nonmerit decision, denying her request for further merit review of her claim. 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 the Office was its July 15, 1999 decision, denying appellant's claim for an employment-related recurrence of disability. This decision was issued more than one year prior to the filing of the present appeal and, therefore, the Board does not have jurisdiction over this decision.¹

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).

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

FACTUAL HISTORY

This is the sixth appeal in the present case. In the first appeal,² the Board issued a decision on October 2, 1998 which affirmed the October 1, 1996 decision of the Office finding that appellant had not sustained a recurrence of disability on or after June 3, 1993 causally related to her April 7, 1993 employment injury.³ In the second appeal,⁴ the Board issued a decision on January 2, 2001 which affirmed a July 15, 1999 decision of the Office, again denying a recurrence of disability on or after June 3, 1993 causally related to her April 7, 1993 employment injury. In these decisions, the Board found that the medical reports of record, including the reports of Dr. Ted Barber, an attending Board-certified neurologist, were not sufficient to establish her claim. In the third appeal,⁵ the Board issued a decision on May 23, 2002 which affirmed the April 27 and June 28, 2001 decisions of the Office finding that it properly refused to reopen her case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

In the fourth appeal,⁶ the Board issued a decision on January 26, 2004, affirming the July 1, 2003 decision of the Office on the grounds that it properly refused to reopen appellant's case for further merit review as her application was not timely filed and failed to present clear evidence of error.⁷ On September 19, 2004 she requested reconsideration of her claim and submitted an August 20, 2004 report in which Dr. Barber discussed her April 7, 1993 injury and the treatment she received since that date. Dr. Barber stated:

“After all those treatments and further treatments [appellant] continued to have complaint of pain in the sciatic distribution on the right. She did not have this pain prior to her fall and has only complained of the pain ever since her fall.

² Docket No. 97-631 (issued October 2, 1998).

³ On April 7, 1993 appellant, then a 51-year-old letter carrier, sustained an employment-related acute lumbosacral strain and a right knee strain. She began working in a limited-duty position for the employing establishment after April 7, 1993. Appellant stopped work and was terminated from the employing establishment effective June 3, 1993. She alleged that she sustained a recurrence of disability on June 3, 1993 causally related to her April 7, 1993 employment injury.

⁴ Docket No. 99-2541 (issued January 2, 2001).

⁵ Docket No. 01-2130 (issued May 23, 2002).

⁶ Docket No. 03-2088 (issued January 26, 2004).

⁷ The Board found that the Office properly determined that the reports of Dr. Barber were not sufficiently well rationalized to establish that appellant sustained a recurrence of disability on June 3, 1993 causally related to her April 7, 1993 employment injury. In a February 19, 2003 report, Dr. Barber stated that appellant's “present problem of back pain is proximately related” to the April 7, 1993 employment injury. He noted that she reported no pain prior to April 7, 1993 and consistently complained of the same pain after that date and related it to the April 7, 1993 injury. In a report dated March 19, 2003, Dr. Barber stated that appellant had sciatica, with aggravation by movement, confirmed by a September 11, 2002 computerized tomography (CT) scan, which caused pain in her back and lower extremities. He noted that appellant did not have such pain prior to April 7, 1993, but had it after that date. Dr. Barber indicated that the April 7, 1993 injury was “the direct cause of the sciatica.”

Given [appellant's] report of injury and her physical findings of pain at the sciatic notch along with a prolonged H [r]eflex on her EMG [electromyogram], it is my opinion and I think it is reasonable to conclude, that her pain and sciatica are the direct and proximal result of the injury of April 7, 1993. That type of injury would result in those kinds of objective findings of physical examination and EMG.... In that the pain has gone on for over 10 years, it is my opinion that the pain is now permanent. The objective evidence to cite to make the diagnosis lies in her EMG and CT scanning which shows multilevel [facet] arthrosis affecting L1-2, L4-5 and L5-S1.”⁸

By decision dated November 16, 2004, the Office denied appellant's request for further review of the merits of her claim.

In the fifth appeal,⁹ the Board issued an order setting aside the Office's November 16, 2004 decision and remanded the case to the Office for proper assemblage of the case record.¹⁰ The facts and the circumstances of the case up to that point are set forth in the Board's prior decisions and are incorporated herein by reference.

On remand the Office reassembled the case record to include the relevant documents as requested by the Board.¹¹ By decision dated August 31, 2005, the Office reissued its November 16, 2004 decision, finding that appellant's September 2004 reconsideration request did not entitle her to further merit review of her case.

LEGAL PRECEDENT

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 his or her application for review within one year

⁸ Dr. Barber indicated that appellant's symptoms fit the clinical description of sciatica in the medical treatises and stated, “from my training, experience and review of the literature, [she] does fit this profile for sciatica and her injury is consistent with her history of injury described as of April 7, 1993.”

⁹ Docket No. 05-620 (issued August 4, 2005).

¹⁰ The Board indicated that the record was missing certain documents including medical records before mid 1993 and various Office and Board decisions.

¹¹ The Solicitor of Labor filed a May 22, 2006 petition to set aside order remanding case and submission of the record. On June 12, 2006 the Board issued an order granting petition for reconsideration and reinstating appeal.

¹² 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).

¹³ 20 C.F.R. § 10.606(b)(2).

of the 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 Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁶

ANALYSIS

The Office accepted that appellant sustained an employment-related acute lumbosacral strain and a right knee strain on April 7, 1993. She alleged a recurrence of disability on June 3, 1993 causally related to her April 7, 1993 employment injury. The Office denied appellant's claim because she did not submit sufficient medical evidence. By decision dated August 31, 2005, the Office determined that appellant's September 2004 reconsideration request did not entitle her to further merit review of her case.

In support of her reconsideration request, appellant submitted an August 20, 2004 report in which Dr. Barber, an attending Board-certified neurologist, discussed her April 7, 1993 injury and the treatment she received since that date. He indicated that the results of physical examination and diagnostic testing showed that appellant had sciatica and stated:

“She did not have this pain prior to her fall and has only complained of the pain ever since her fall. Given her report of injury and her physical findings of pain at the sciatic notch along with a prolonged H reflex on her EMG is my opinion and I think it is reasonable to conclude, that [appellant's] pain and sciatica are the direct and proximal result of the injury of April 7, 1993.”

The submission of this report does not require reopening of appellant's claim because it contains an opinion on causal relationship which is similar to those contained in prior reports of Dr. Barber and previously considered by the Office.¹⁷ For example, in a previously submitted February 19, 2003 report, Dr. Barber stated that appellant's “present problem of back pain is proximately related” to the April 7, 1993 employment injury. He noted that she reported no pain prior to April 7, 1993 and consistently complained of the same pain after that date and related it to the April 7, 1993 injury. In a previously submitted March 19, 2003 report, Dr. Barber stated that appellant's sciatica was confirmed by diagnostic testing and noted that she did not have back and lower extremity pain prior to April 7, 1993, but had it after that date. He indicated that the April 7, 1993 injury was “the direct cause of the sciatica.”

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ 20 C.F.R. § 10.608(b).

¹⁶ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁷ See *supra* note 16 and accompanying text.

In the present case, appellant has not established that the Office improperly denied her request for further review of the merits of her claim, because her reconsideration request 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.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 31, 2005 decision is affirmed.

Issued: July 3, 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