

FACTUAL HISTORY

On May 8, 1995 appellant, a 45-year-old nursing assistant, filed a traumatic injury claim alleging that on that date she injured her right shoulder when a closed door fell off a wall unit and hit her right shoulder while she was helping a patient get out of bed. The Office accepted the claim for right shoulder contusion.

On April 30, 1997 appellant filed a claim for a recurrence of disability beginning October 1996. By letter dated August 12, 1997, the Office advised her of the medical information required to support her recurrence claim.

By decision dated April 16, 1998, the Office denied appellant's claim for a recurrence of disability.

In a letter dated May 10, 1998, appellant requested reconsideration.

In a nonmerit decision dated June 11, 1998, the Office denied appellant's request for reconsideration.

On May 27, 2003 the Office received a request for reconsideration by appellant's counsel dated May 12, 2003.² Appellant argued that the February 12, 2003 report by Dr. Marc M. Silverman, a treating Board-certified orthopedic surgeon, was new evidence not previously considered.

On July 18, 2003 the Office received disability certificates and prescriptions by Dr. Silverman.

In a nonmerit decision dated September 18, 2003, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

Appellant filed an appeal with the Board on December 12, 2003, to which the Board assigned Docket No. 04-463. In an order remanding case dated March 26, 2004, the Board set aside the September 18, 2003 decision as the record did not contain a February 12, 2003 report by Dr. Silverman which precluded an informed adjudication by the Board of the appeal. Thus, the Board remanded the case to the Office for reconstruction and proper assemblage of the record and to issue an appropriate decision.³

On August 17, 2004 the Office reissued the September 18, 2003 nonmerit decision which denied her request for reconsideration for her claim for a recurrence of disability. The claims examiner stated, "I am simply attaching this Office's September 18, 2003 decision as it is still applicable but I am providing you, as instructed, with new appeal rights on this date."

² Appellant's counsel noted that appellant filed a claim for an injury sustained on May 10, 1996 which was assigned file number 02-0718115.

³ Docket No. 04-463 (issued March 26, 2004).

Appellant filed an appeal with the Board on November 8, 2004, to which the Board assigned Docket No. 05-265. In an order remanding case dated April 1, 2005, the Board set aside the August 17, 2004 decision as the record did not contain the February 12, 2003 report by Dr. Silverman which precluded further review. Thus, the Board remanded the case to the Office for reconstruction and proper assemblage and to issue an appropriate decision.⁴

On July 29, 2005 the Office received a copy of the February 12, 2003 report by Dr. Silverman who noted that he first saw appellant on June 12, 1996 and that she had sustained employment injuries on May 8, 1995 and May 10, 1996. The 1996 evaluation showed that appellant sustained injuries to both knees. An October 1996 magnetic resonance imaging (MRI) scan revealed a left knee meniscal tear which subsequently required arthroscopic surgery. He reported that appellant began having left shoulder problems in March and April 1997 “due to her other accident.” Dr. Silverman indicated that on November 11, 1999 appellant underwent left shoulder arthroscopic surgery. In regards to her left knee injury, Dr. Silverman attributed it to her May 10, 1996 injury and opined it was a permanent injury. He then reported appellant’s right knee was showing “significant medial joint line arthritis and patellofemoral arthritis” which was worsening while her left knee was stable. On February 19, 2003 appellant underwent right knee arthroscopic surgery. In concluding, Dr. Silverman attributed the right and left knee conditions to her May 1996 employment injury.

By nonmerit decision dated October 31, 2005, the Office denied appellant’s request for reconsideration. In support of this opinion, the Office found the February 12, 2003 report was not relevant to the issue of whether appellant sustained a recurrence of disability on October 1, 1996 due to her May 8, 1996 employment injury.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act,⁵ the Office’s regulations provide that 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) submit relevant and pertinent new evidence not previously considered by the Office.⁶ 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 date of that decision.⁷ 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.⁸

⁴ Docket No. 05-265 (issued April 1, 2005).

⁵ 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that [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.

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ 20 C.F.R. § 10.607(a).

⁸ 20 C.F.R. § 10.608(b).

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.⁹ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹¹

ANALYSIS

The issue in the instant case is whether appellant is entitled to a merit review of the denial of her claim for a recurrence of disability on October 1, 1996 due to her accepted May 8, 1995 right shoulder employment injury. The Office denied reconsideration of appellant's claim, finding that the medical evidence submitted on reconsideration was irrelevant and immaterial. The Board finds that the evidence submitted on reconsideration did not address this issue. Dr. Silverman noted that appellant sustained employment injuries on May 8, 1995 and May 10, 1996. He attributed the right and left knee conditions to her May 1996 employment injury not accepted by the Office in this claim. As his report attributes appellant's left knee conditions to a new injury, it is not pertinent to the issue of whether appellant sustained a recurrence of disability due to the May 8, 1995 employment injury in October 1996. Moreover his diagnosis of a left shoulder injury due to the other injury beginning in 1997 is not pertinent to the issue of whether appellant sustained a recurrence of disability in October 1996 as there is no rationale and the claim was accepted for a right shoulder injury.

Appellant did not show that the Office erroneously applied or interpreted a specific point of law or advance a legal argument not previously considered by the Office. Further, she failed to submit relevant and pertinent new evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, she is not entitled to a merit review.¹²

CONCLUSION

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

⁹ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

¹⁰ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹¹ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

¹² See *James E. Norris*, *supra* note 7.

ORDER

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

Issued: July 13, 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