

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

SUSAN K. CROGHAN, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Indianapolis, IN, Employer**

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**Docket No. 05-1170
Issued: March 14, 2006**

Appearances:
Susan K. Croghan, pro se
Miriam D. Ozur, Esq., for the Director

Oral Argument February 2, 2006

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 3, 2005 appellant filed a timely appeal of the February 1, 2005 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. Because more than one year has passed between the Office's most recent merit decision of February 23, 2004 and the filing of this appeal, the Board does not have jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

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

FACTUAL HISTORY

This case is on appeal to the Board for a second time.¹ On January 2, 1985 appellant, then a 41-year-old clerk, filed an occupational disease claim alleging that she sustained injuries to her neck, right shoulder and right arm as a result of her federal employment duties. The

¹ Docket No. 03-155 (issued June 9, 2003).

Office accepted appellant's claim for a herniated nucleus pulposus (HNP) at the C5-6 level and provided appropriate compensation. On December 31, 1985 appellant was again injured when she pulled out a drawer which subsequently fell out and onto the floor. The Office accepted the conditions of herniated C5-6, cervical and lumbar strains, chronic pain syndrome and fibrositis. Appellant eventually returned to the employing establishment working four hours a day. The Office has accepted various recurrences as being causally related to her approved work conditions. Appellant retired on disability effective December 1, 2002, but was reactivated for federal employment as of February 28, 2003.

By decision dated June 9, 2003, the Board affirmed the Office's July 17 and February 5, 2002 decisions terminating appellant's compensation effective March 9, 2000. The Board found that the weight of the medical evidence rested with the impartial medical specialist, Dr. Ho, a Board-certified orthopedic surgeon. He found appellant's work-related conditions had resolved and that her current diagnoses of cervical spondylosis and fibromyalgia were not causally related to her work injuries. The Board found that the additional evidence submitted by appellant was insufficient to overcome the weight of the evidence accorded to Dr. Ho. The Board also found that the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration of the merits of her claim. The facts and the history surrounding the prior appeal are set forth in the initial decisions and are hereby incorporated by reference.

In a letter dated December 8, 2003, appellant requested reconsideration and submitted additional evidence. By decision dated February 23, 2004, the Office denied modification of its prior decision.

In a letter dated December 28, 2004, appellant requested reconsideration. She argued that the weight of the medical evidence should rest with Dr. Denise K. Thornberry, a rheumatologist, and not Dr. Ho, as her condition was mainly a rheumatology disorder. Appellant also stated that she felt the modified distribution clerk offer was not a suitable job offer as her background was in secretarial/stenographer-type duties.

In an October 9, 2004 report, Dr. Thornberry noted that she had seen appellant in 1986 and reviewed her medical history, noting that Dr. Neucks and Dr. Cooper opined that appellant was unable to work due to chronic pain. She noted that appellant had recently been in physical therapy for low back pain radiating into the right lower extremity. Appellant's chief complaint was of musculoskeletal pain involving her neck with pain when abducting her left shoulder. Physical examination findings were provided as well as results of laboratory studies performed on May 25, 2004. Dr. Thornberry's impressions were of cervical spondylosis, lumbar spondylosis, fibromyalgia and osteoarthritis of the left shoulder, with left shoulder pain felt to be related to cervical radiculopathy and osteoarthritis. X-rays of appellant's left shoulder and chest, a lumbar spine magnetic resonance imaging (MRI), and a positive ANA tests were discussed. She opined that appellant was unable to work in her former job as a distribution clerk, but was able to work in a position which did not require prolonged sitting, standing and walking, and any motion of her neck or lifting. Dr. Thornberry remained of the opinion that the fibromyalgia (formally referred to as fibrositis) was a consequence of appellant's neck injuries in 1984. Physical therapy was recommended for appellant's left shoulder condition. In a June 5, 1987 report, Dr. Thornberry stated that appellant was under her care for treatment of fibrositis

complicating a work-related herniated cervical disc at C5-6. She recommended appellant be placed in a program which emphasized physical therapy.

Copies of diagnostic testing of August 27, 2004 and December 14, 2004 mammogram, a chest x-ray of August 30, 2004, a September 2, 2004 MRI of the lumbar spine and a March 29, 2004 x-ray of the right hip were submitted to the record. A November 22, 2004 physical therapy report referenced hip and shoulder range of motion measurements. Copies of physical therapy reports addressed treatment for the hip and left shoulder conditions for the period September 22 to November 2, 2004 and for bilateral knee pain and right hip pain, for the period June 28 to August 17, 2004. In a November 19, 2004 letter, Dr. Steven H. Neucks transferred appellant's care to Dr. Thornberry.

By decision dated February 1, 2005, the Office denied reconsideration finding that the medical evidence submitted was irrelevant and of no evidentiary value to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides 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 argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.² 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.³

ANALYSIS -- ISSUE 1

The Board notes that appellant's compensation benefits were terminated on March 9, 2000 on the basis that the weight of the medical evidence was represented by Dr. Ho, the impartial medical examiner. He opined that the accepted work-related conditions of cervical and lumbar strains, herniated disc at C5-6, chronic pain syndrome and fibrositis had resolved and her current diagnosis of cervical spondylosis and fibromyalgia were not causally related to her work injuries.

Appellant's December 28, 2004 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. In her December 28, 2004 request for reconsideration, appellant alleged that Dr. Thornberry should be accorded greater weight than Dr. Ho, as her condition was mainly of a rheumatology disorder. She also stated that the modified distribution clerk offer was not a suitable job offer as her background was in secretarial/stenographer-type duties. The evidence of file reflects that the Office had previously addressed the argument pertaining to the relevancy of

² 20 C.F.R. § 10.606(b)(2).

³ 20 C.F.R. § 10.608(b).

Dr. Ho's credentials with respect to a physician certified in rheumatology in its February 23, 2004 decision. Thus, appellant's argument pertaining to the credentials of her physician was previously considered by the Office and is repetitious of earlier arguments. Appellant's assertions and material submitted pertaining to the type of work she is medically and vocationally qualified is irrelevant to the underlying issue in this case. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).⁴

Appellant submitted various medical documents consisting of objective studies, diagnostic reports and physical therapy notes, which pertained to conditions involving the knees, hip, chest and degenerative lumbar problems. The underlying issue of whether appellant has a medical condition or disability causally related to her employment is medical in nature. None of these medical documents contain an opinion on causal relationship of such conditions to her employment injuries. The additional medical evidence is not new and relevant because it did not address how appellant's accepted injuries of 1985 caused or aggravated the diagnosed conditions. 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.⁵ Furthermore, physical therapy notes are not competent medical evidence as a physical therapist is not a physician for the purposes of the Federal Employees' Compensation Act.⁶

In an October 9, 2004 report, Dr. Thornberry stated that appellant had fibromyalgia (formally referred to as fibrositis) was a consequence of her neck injuries in 1985. She diagnosed cervical spondylosis, lumbar spondylosis, fibromyalgia and osteoarthritis. In a 1987 report, Dr. Thornberry opined that appellant's fibrositis was related to her neck injuries. These reports are insufficient to require a merit review as they essentially repeat evidence previously of record. The Board notes that Dr. Thornberry's June 5, 1987 report was previously of record, stating that appellant's fibrositis complicated a work-related herniated cervical disc at C5-6. In her October 9, 2004 report, Dr. Thornberry repeated her opinion that fibromyalgia (formally referred to as fibrositis) was a consequence of appellant's neck injuries in 1985. Thus, the most recent report is duplicative of Dr. Thornberry's reports previously of record. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case for further merit review.⁷ Furthermore, in an October 9, 2004 report, Dr. Thornberry failed to provide an opinion on the causal relationship of appellant's current conditions of cervical spondylosis, lumbar spondylosis, fibromyalgia and osteoarthritis. As previously noted, the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁸

⁴ 20 C.F.R. § 10.608(b)(2)(i) and (ii).

⁵ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁶ *See Jennifer L. Sharp*, 48 ECAB 209 (1996).

⁷ *See James A. England*, 47 ECAB 115 (1995); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

⁸ *See Edward Matthew Diekemper*, *supra* note 5.

Appellant did not submit relevant and pertinent new evidence. She is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).⁹

As appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as appellant failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 14, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

⁹ 20 C.F.R. § 10.608(b)(2)(iii).