

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

DARLENE Y. BRASINGTON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Grand Rapids, MI, Employer**

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**Docket No. 06-312
Issued: March 20, 2006**

Appearances:
Darlene Y. Brasington, 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 November 21, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated August 16, 2005, denying her request for reconsideration. Because more than one year has elapsed between the most recent merit decision dated August 24, 2004 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

On May 20, 2002 appellant, then a 55-year-old modified central forwarding system (CFS) clerk, filed an occupational disease claim alleging that she sustained cervical spondylosis, degenerative joint disease (DJD), degenerative disc disease (DDD) referable to cervical spine, right bicipital and right lateral epicondylitis, right bicipital tendinitis, chronic shoulder girdle and

strain in the performance of duty. She first became aware of the injury and its relation to her work on May 1, 2002. Appellant stopped work on May 1, 2002.¹

In a statement dated June 5, 2002, the employing establishment advised that appellant accepted the modified clerk position in CFS on March 29, 2002. It noted that the position complied with work restrictions related to appellant's prior claim.² The employing establishment advised that, after working in the position for approximately 18 hours, of which only 4.18 were due to keying over a 2.5-day period, appellant claimed that the repetitive nature of her work aggravated her original injury and stopped work. It noted that the current diagnosis of cervical spondylosis was not an accepted condition of her previous claim.

In an August 15, 2001 report, appellant's treating physician, Dr. Stephen LaChance, an osteopath, diagnosed cervical spondylosis to include degenerative disc disease referable to the cervical spine. He also noted that appellant had facet arthritis and generalized tendonosis of the right shoulder.

By decision dated August 21, 2002, the Office denied appellant's claim as the medical evidence of record failed to support a causal relationship between the claimed aggravation of appellant's preexisting conditions and factors of her modified position.

By letter dated August 28, 2002, appellant indicated that her condition was caused by the CFS position as it required constant repetitive use of her upper extremities. She also included an August 28, 2002 report from Dr. LaChance, who reviewed appellant's history of injury and treatment. He stated that, when he saw appellant on May 13, 2002, she related that she had recently begun working in the CFS department and related that her duties required numerous repetitive activities, including keyboarding, sitting for long periods of time, continuous twisting, continuous photocopying, lifting and grasping. He opined that her "symptoms are most definitely related to her original injury of [August 22, 1986]."

By letter dated September 14, 2002, appellant requested a hearing, which was held on June 21, 2004. She cited numerous difficulties with regard to her claim. Appellant also referred to the report dated August 28, 2002 of Dr. LaChance.

In an April 24, 2003 report, Dr. LaChance repeated his findings. He opined that his diagnosis was fully supported by the injury appellant sustained on August 22, 1986 and that her job duties of April 29 through May 1, 2002 aggravated her injury.

By decision dated August 24, 2004, the Office hearing representative affirmed the Office's August 21, 2002 decision. The Office hearing representative determined that appellant had established that she worked 18.05 hours from April 29 to May 1, 2002 and did repetitive tasks involving the right upper extremity. However, the Office advised appellant that she had

¹ Appellant accepted early retirement on or about May 1, 2002.

² Office File No. 09-0321872. That claim was accepted for chronic right shoulder girdle strain, right lateral epicondylitis, chronic postoperative. The prior claim is not before the Board on the present appeal.

not submitted rationalized medical evidence establishing that her work caused or aggravated any cervical or right upper extremity condition.

By letter dated July 30, 2005, appellant requested reconsideration. In support of her request, appellant submitted arguments alleging that the Office's decision was erroneous because her modified position violated her physician's restrictions. She alleged that, after a few hours of working, she experienced pain that aggravated her original injury.

In support of her request, she submitted a February 5, 2005 report from Dr. LaChance, who opined that "the 18 hours served to aggravate an established degenerative disc, facet arthrosis and periarticular fibromyotosis of shoulder." He indicated that he would "not provide the extensive pathophysiological process -- this involves years of intensive study." Dr. LaChance added his educational background.

By decision dated August 16, 2005, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act,³ the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

"(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

"(ii) Advances a relevant legal argument not previously considered by the Office; or

"(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office]."⁴

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁵

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b).

⁵ 20 C.F.R. § 10.608(b).

ANALYSIS

Appellant claimed that her return to work at modified duty aggravated her accepted conditions and resulted in her disability on and after May 1, 2002. The underlying issue on reconsideration -- whether appellant's preexisting cervical and right upper extremity conditions were caused or aggravated by employment factors from April 29 to May 1, 2002 -- is medical in nature. However, appellant did not provide any relevant or pertinent new evidence to the issue of whether her accepted conditions were aggravated by employment factors from April 29 to May 1, 2002.

In her request for reconsideration, appellant alleged that her work restrictions violated her physical limitations and that the Office's decision was in error. However, this argument is not relevant to the underlying issue -- whether the medical evidence was sufficient to establish that her work duties aggravated the accepted condition. The Office accepted that appellant worked modified duty, but denied her claim of disability on the basis that the reports of Dr. LaChance were not well rationalized.

Appellant submitted a report from Dr. LaChance dated February 5, 2005. He repeated his previous findings that stated appellant's work served to aggravate an established degenerative disc, facet arthrosis and periarticular fibromyotosis of shoulder. However this report, while new, is not relevant or pertinent as his opinion was duplicative of his previously considered reports. In fact, he specifically refused to provide any further explanation on causal relationship. As his opinion on causal relationship in this report was duplicative of that contained in his prior reports, it does not constitute relevant new evidence sufficient to require the Office to reopen the claim.⁶

Consequently, appellant has not shown that the Office erroneously applied or interpreted a specific point of law, advanced a relevant new argument not previously submitted, or submitted relevant and pertinent new evidence not previously considered by the Office. Therefore, the Office properly denied her request for reconsideration without conducting a merit review of the claim.

CONCLUSION

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

⁶ *Khambandith Vorapanya*, 50 ECAB 490 (1999); *John Polito*, 50 ECAB 347 (1999); *David J. McDonald*, 50 ECAB 185 (1998) (the submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 16, 2005 is affirmed.

Issued: March 20, 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