

FACTUAL HISTORY

On April 7, 2000 appellant, then a 42-year-old rural letter carrier, filed a traumatic injury claim, Form CA-1, alleging that she sustained a cervical strain, back contusions, neck spasms, back spasms and headache when her postal vehicle was rear-ended. On April 28, 2000 the Office accepted her claim for cervical strain and back contusion and paid appropriate compensation benefits.

On November 20, 2000 the Office proposed termination of appellant's wage-loss benefits on the grounds that she was no longer disabled. The Office relied on the report of the treating physician, Dr. John Dorchak, a Board-certified orthopedic surgeon, who stated that the temporary aggravation of appellant's isthmic spondylosis had resolved and that she was at maximum medical improvement with no physical impairment. Because another of appellant's physicians, Dr. Frank Hampton, a Board-certified family practitioner, would not release appellant to work, the Office referred appellant for a second opinion evaluation.

On March 28, 2001 the second opinion physician, Dr. Harold Alexander, a Board-certified orthopedic surgeon, diagnosed appellant with preexisting minimal Grade 1 spondylosis that was aggravated by her employment injury and mild symptoms of chronic cervical strain. He stated that she could return to light duty with the goal of working up to her date-of-injury duties in a few months. On May 1, 2001 Dr. Hampton disagreed with this report and stated that appellant was unable to work because the aggravation of her spondylosis had not ceased and her pain and other symptoms continued to impair her.

To resolve the conflict in medical opinion, the Office referred appellant to an impartial medical examiner, Dr. Jubal Watts, a Board-certified orthopedic surgeon. In a July 16, 2001 report, Dr. Watts stated that appellant's cervical sprain had resolved. He recommended a functional capacity evaluation to determine if the complaints of pain in her lumbar area and left shoulder would keep her from returning to her normal job. Dr. Watts opined that appellant was unemployable. On August 2, 2001 the Office asked for a clarification of his report. On August 6, 2001 Dr. Watts stated that appellant had no disability related to her cervical strain, but he continued to recommend a functional capacity examination to determine her level of disability related to her lumbar spine.

On September 20, 2001 the Office determined that Dr. Watts had not clarified his opinion. On September 26, 2001 it referred appellant to a second impartial medical examiner to resolve the conflict in the medical evidence. Appellant was examined by Dr. Charles Hubbard, a Board-certified orthopedic surgeon, on November 9, 2001. Dr. Hubbard diagnosed minimal degenerative changes in appellant's lumbar spine and noted that any aggravation arising from the employment injury had resolved. He stated that she was physically capable of returning to work. On June 17, 2002 the Office provided Dr. Hubbard with an investigative report prepared by the employing establishment showing appellant driving and performing yard work and asked for a clarification of his opinion. On September 23, 2002 Dr. Hubbard stated: "Assuming that the videotape and pictures that you provided me are true representations of this individual, I think they clearly confirm my clinical impression.... I am persuaded that this is a clear cut case of misrepresentation and malingering." On October 18, 2002 he confirmed his opinion that appellant's work-related back contusions and neck sprain had resolved.

By decision dated November 18, 2002, the Office terminated appellant's compensation and medical benefits effective November 15, 2002 on the basis of Dr. Hubbard's opinion. On December 15, 2002 appellant requested an oral hearing, which was held on August 27, 2003.

By decision dated November 14, 2003, the Office hearing representative vacated and remanded the Office's November 18, 2002 decision. She found that the opinion of Dr. Hubbard did not carry the weight of the medical evidence because he was associated in practice with Dr. Watts, the first impartial medical examiner.

On December 23, 2003 the Office referred appellant to Dr. Michael Kalson, a Board-certified orthopedic surgeon, to resolve the conflict of medical evidence. Dr. Kalson conducted an examination on January 26, 2004 and determined that appellant no longer had neck complaints and that any temporary aggravation of her lumbar spine had resolved within a year of her employment injury. He also noted that magnetic resonance imaging (MRI) scans showed that there had been no worsening of appellant's spondylosis. Dr. Kalson stated that appellant had significant psychological overlays and that she would need a work hardening program to return to work above the sedentary level. He did not find the employing establishment's investigative report to be probative. On March 15, 2004 the Office sought clarification of Dr. Kalson's opinion. On March 22, 2004 he responded that appellant's work-related conditions had resolved and that her psychological condition was not related to her April 5, 2000 injury.

On April 7, 2004 the Office proposed termination of appellant's medical and wage-loss benefits on the grounds that Dr. Kalson's opinion established that she had no disability or residuals related to her employment injury. On May 5, 2004 appellant submitted arguments challenging the termination. She argued that the medical evidence of record established her disability, that the Office acted maliciously and deliberately to terminate her benefits by doctor shopping, and that the Office failed to restore her benefits after the previous termination had been vacated.

By decision dated May 21, 2004, the Office terminated appellant's wage-loss and medical benefits.

On June 8, 2004 appellant requested an oral hearing, which was held on March 18, 2005. At the hearing, she and her representative raised arguments related to the handling of the impartial medical examiner opinions and the employing establishment's investigative report. Following the hearing, appellant submitted a report from Dr. Hampton, who opined that appellant's extruding L5-S1 disc and compacted right L5 nerve root were caused by her employment injury.

By decision dated August 22, 2005, the Office hearing representative affirmed the termination of appellant's wage-loss and medical benefits. She also found that appellant had submitted insufficient medical evidence sufficient to establish that she had disability or residuals related to her employment injury.

On August 17, 2006 appellant filed a request for reconsideration, arguing that the Office hearing representative misconstrued the facts of the case and relied on inaccurate information from the employing establishment investigator. She contended that the Office mishandled the

impartial medical examiner opinions, concealed records, relied on a fraudulent investigative report from the employing establishment and ignored findings of post-traumatic stress syndrome.

By decision dated September 11, 2006, the Office denied further review of the merits of appellant's case. The Office found that appellant's arguments were immaterial or repetitive of those raised earlier and that she had submitted no new medical evidence to establish ongoing disability.

LEGAL PRECEDENT

Under section 8128(a) of the Federal Employees' Compensation Act, the Office has the discretion to reopen a case for review on the merits.¹ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that: (i) shows that the Office erroneously applied or interpreted a specific point of law; (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 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

The Board finds that appellant met none of the regulatory requirement for a review of the merits of the Office's August 22, 2005 decision. Her August 17, 2006 request for reconsideration stated several points of disagreement with the merit decision, but did not raise new arguments or present evidence that the Office erroneously applied or interpreted a specific point of law. The Board notes that appellant's contentions regarding the appointment of the three impartial medical examiners and the employing establishment's investigative report were considered in previous decisions by the Office and Office hearing representatives and do not warrant a merit review.⁴ Appellant's other contentions, related to the Office's handling of her case, do not establish that the Office erroneously applied or interpreted a specific point of law. The allegation that the Office deliberately concealed records is of no reasonable color of validity as she neither presented a proffer of proof nor did she rely upon documentary evidence.⁵ The allegation that the Office ignored evidence of post-traumatic stress disorder is irrelevant as that condition was not accepted in this case. The Board therefore finds that appellant is not entitled to further review on the merits of her case under section 10.606(b)(2)(i).

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.606(b)(2).

³ 20 C.F.R. § 10.608(b).

⁴ Material which is repetitious or duplicative of that already in the case record does not constitute a basis for reopening the case on the merits. See *Eugene F. Butler*, 36 ECAB 393 (1984).

⁵ See *Annette Louise*, 54 ECAB 783 (2003); *Daniel O'Toole*, 1 ECAB 107 (1948).

Appellant also did not advance any relevant legal arguments or submit any pertinent new evidence or relevant evidence not previously considered by the Office. The Board therefore finds that she is thus not entitled to further review on the merits of his case under the last two subsections of section 10.606(b)(2).⁶

CONCLUSION

The Board finds that the Office properly denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 11, 2006 is affirmed.

Issued: August 16, 2007
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

⁶ 20 C.F.R. § 10.606(b)(2)(ii) and (iii).