

FACTUAL HISTORY

On May 5, 1980 appellant, then a 38-year-old office operations assistant, filed a traumatic injury claim alleging that she sustained injury to her left foot and ankle on May 1, 1980 when her foot became lodged under a security gate she was closing. She claimed that she sustained another injury to her left foot, ankle and knee on May 2, 1980 when she stepped off a curb into a low area and her left leg buckled. The Office accepted that appellant sustained a left medial meniscus tear, left knee internal derangement, chronic left ankle strain and right knee post-traumatic arthritis, left big toe spur and L4-5 disc herniation secondary to her left leg condition. In August 1980 appellant underwent a left medial meniscectomy which was authorized by the Office.

Appellant received schedule awards for a 51 percent permanent impairment of her left leg. In an August 12, 1988 decision, the Office terminated appellant's compensation based on the opinion of Dr. Robert J. Sawchyn, a Board-certified orthopedic surgeon who served as an Office referral physician. In a decision dated and finalized June 22, 1989, an Office hearing representative reversed the Office's termination of appellant's compensation.²

In August 1996 the Office referred appellant to Dr. Louis C. Sfreddo, a Board-certified orthopedic surgeon, for further evaluation of her medical condition. On August 19, 1996 Dr. Sfreddo stated that appellant was capable of performing the work duties she had when she was injured on May 1, 1980. On September 30, 1996 Dr. Kristi, an attending Board-certified neurologist, posited that appellant was restricted from performing "any type of physical work whatsoever."

The Office determined that there was a conflict in the medical evidence between Dr. Sfreddo and Dr. Kristi regarding appellant's ability to work and referred appellant to Dr. James Elmes, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter. On August 26, 1997 Dr. Elmes determined that appellant could perform sedentary work for 20 hours per week which required lifting up to 20 pounds, but that she should avoid kneeling, bending and twisting. He indicated that appellant could not stand for more than 10 minutes at a time or walk for more than 15 to 20 minutes at a time.

In an April 23, 1999 report, Dr. Donald Troyer, an attending Board-certified family practitioner, indicated that appellant had been totally disabled since 1980. He diagnosed chronic reflex sympathetic dystrophy of the left foot and ankle, deteriorating lumbar discs and left clavicle, fibromyalgia and possible lupus. In a May 26, 1999 report, Dr. James A. Hill, an attending Board-certified orthopedic surgeon, stated that he had seen appellant since 1985 and that her examination on May 26, 1999 was essentially unchanged since her last visit in 1997. He indicated that on examination appellant exhibited crepitus on flexion and extension of her left knee with diffuse tenderness, paralumbar muscle spasms with negative straight leg testing and full range of motion of both shoulders with pain on resistance of her supraspinatus. Dr. Hill recommended that appellant "continue with her prior work restrictions" without specifying the nature of such restrictions.

² In a July 31, 1995 decision, the Board affirmed the Office's August 15, 1994 determination regarding appellant's rate of pay for compensation.

In March 2003 appellant's vocational rehabilitation counselor determined that appellant was able to work in the constructed position of receptionist and that the job was reasonably available in her commuting area. The position was sedentary in nature and required lifting up to 10 pounds.

In a July 30, 2003 report, Dr. Hill stated that appellant had full range of motion of both shoulders with a positive impingement sign and pain on resistance of her supraspinatus and indicated that she had bilateral shoulder impingement syndrome.

On March 11, 2004 the Office advised appellant of the proposed adjustment of her compensation based on its determination that she could work in the constructed position of receptionist for 20 hours per week and that this position represented her wage-earning capacity. Appellant argued that she was not physically or vocationally capable of working as a receptionist. In an April 20, 2004 decision, the Office adjusted appellant's compensation effective April 21, 2004 based on her ability to work as a receptionist for 20 hours per week.

Appellant argued that her medical condition had worsened and that she was unable to work as a receptionist. She also argued that the adjustment of her compensation was improper because the Federal Employees' Compensation Act dictates that no Office compensation shall be paid below the minimal scale for an employee at the GS-1 pay grade. In a July 19, 2005 decision, the Office denied modification of its April 20, 2004 wage-earning capacity decision.

In a February 23, 2006 letter, appellant, through her husband, requested reconsideration of her claim. She argued that the recent medical evidence of record showed that she was totally disabled and that the Act dictates that no Office compensation shall be paid below the minimal scale for an employee at the GS-1 pay grade.

Appellant submitted a February 2, 2006 report in which Dr. Hill stated that he had not seen appellant between August 29, 2001 and February 2, 2006. He indicated that appellant presented on February 2, 2006 with a chief complaint of left shoulder pain. Dr. Hill stated that on examination appellant exhibited full range of passive motion of both shoulders with active abduction on the left limited to 110 degrees and also showed pain on resistance of her left supraspinatus and weakness on left-sided abduction and external rotation. He noted that appellant had no knee effusion and full range of knee motion, but that she had crepitus on flexion and extension of her left knee with diffuse tenderness. Dr. Hill stated that she had paralumbar muscle spasms with negative straight leg testing and no neurological deficit. He indicated that appellant had an unsuccessful left rotator cuff repair, post-traumatic arthritis of her left knee and lumbar disc disease and encourage her to continue her home exercise regimen.³

Appellant also submitted the findings of March 13, 2003 magnetic resonance imaging (MRI) testing which showed she had degenerative changes at L4-5 and L5-S1. She resubmitted an April 23, 1999 report of Dr. Troyer and a May 26, 1999 report of Dr. Hill.

³ Appellant submitted a February 2, 2006 note in which Dr. Hill indicated that she needed a motorized wheelchair and a September 30, 2004 note in which Dr. Kenneth K. Harris, an attending osteopath, prescribed a large wrist splint.

In a May 3, 2006 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).⁴

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁵ 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.⁶ 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 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 The Board has held that the submission of evidence or argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case⁹ and that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰

ANALYSIS

The Office accepted that appellant injured herself on May 1, 1980 when her left foot became stuck under a security gate and on May 2, 1980 when she stepped off a curb into a low area. The Office accepted that she sustained a left medial meniscus tear, left knee internal derangement, chronic left ankle strain, and right knee post-traumatic arthritis, left big toe spur, and L4-5 disc herniation secondary to her left leg condition. In an April 20, 2004 decision, the Office adjusted appellant's compensation effective April 21, 2004 based on her ability to work in the constructed position of receptionist for 20 hours per week. The position was sedentary in nature and required lifting up to 10 pounds. The Office later denied modification of its April 20, 2004 wage-earning capacity determination.

In support of her reconsideration request, appellant submitted a February 2, 2006 report of Dr. Hill, an attending Board-certified orthopedic surgeon, who indicated that he had not seen appellant since August 29, 2001 and noted that she presented on February 2, 2006 with a chief

⁴ Appellant submitted additional evidence after the Office's decision, but the Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

⁵ 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).

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).

⁹ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁰ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

complaint of left shoulder pain. Dr. Hill stated that on examination appellant exhibited full range of passive motion of both shoulders with active abduction on the left limited to 110 degrees and also showed pain on resistance of her left supraspinatus and weakness on left-sided abduction and external rotation. He noted that appellant had no knee effusion and full range of knee motion, crepitus on flexion and extension of her left knee with diffuse tenderness, and paralumbar muscle spasms with negative straight leg testing and no neurological deficit.

The Board notes that the submission of the February 2, 2006 report of Dr. Hill would not require reopening of appellant's claim for further review of the merits because the report is not relevant to the main issue of the present case.¹¹ Dr. Hill did not provide any opinion on appellant's ability to work and therefore his report is not relevant to the question of whether appellant had shown she could not perform the constructed position of receptionist for 20 hours per week, either around the time of the April 21, 2004 adjustment of her compensation or at any point thereafter.¹² The February 2, 2006 note in which Dr. Hill indicated that appellant needed a motorized wheelchair, the September 30, 2004 note in which Dr. Harris, an attending osteopath, prescribed a large wrist splint, and the report of March 13, 2003 MRI testing also are not relevant because they do not address the main issue of this case.

Appellant resubmitted a May 26, 1999 report of Dr. Hill and an April 23, 1999 report of Dr. Troyer, an attending Board-certified family practitioner, which had previously been considered by the Office. The submission of these documents would not require reopening of appellant's case for further review of the merits because the Board has held that the submission of repetitious evidence or argument does not constitute a basis for reopening a case. Appellant argued that the Act dictates that no Office compensation shall be paid below the minimal scale for an employee at the GS-1 pay grade, but the Office already considered and rejected this argument.

Appellant has not established that the Office improperly denied her request for further review of the merits of its July 19, 2005 decision under section 8128(a) of the Act, because the evidence and argument she submitted did not to 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.

CONCLUSION

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

¹¹ See *supra* note 10 and accompanying text.

¹² Moreover, it should be noted that Dr. Hill's report primarily concerns appellant's shoulder condition and the Office has not accepted that appellant had a work-related shoulder condition or a shoulder condition which preexisted her May 1980 employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 3, 2006 decision is affirmed.

Issued: July 24, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board