



## **FACTUAL HISTORY**

This is the third appeal to the Board. On the first appeal the Board affirmed decisions of the Office which terminated appellant's compensation benefits effective July 19, 1998.<sup>1</sup> The Board considered appellant's argument that Dr. M.I. Malik, a Board-certified orthopedic surgeon and impartial medical examiner, was not entitled to special weight as a referee physician due to complaints filed against him with a state licensing board as well as judgments against him for malpractice. The Board found that Dr. Malik was properly selected as an impartial medical specialist and that his medical report was the weight of the medical evidence. In a February 2, 2004 decision, the Board affirmed Office decisions finding that appellant had no disability causally related to her accepted employment injuries after July 19, 1998.<sup>2</sup> The facts and the history contained in the prior Board decisions are incorporated herein by reference.

The prior history includes a June 10, 1998 report from Dr. Zack R. Stearns, a Board-certified orthopedic surgeon. He advised that appellant had essentially no change in her symptoms and that he did not feel that there was "any doubt that her symptoms are a result of the injury she sustained" at work and that given the long-standing nature of appellant's condition and lack of response to treatment, it was unrealistic to expect that her symptoms would resolve to the point where she could perform any normal activities.

By letter dated January 31, 2005, appellant's representative requested reconsideration. Counsel contended that appellant continued to experience residuals and developed complications as part of the "natural progression" of her January 25, 1989 employment-related injury. He enclosed a December 14, 2004 report from Dr. Bobby J. Brooks, a Board-certified family practitioner, who noted appellant's history of injury and treatment. Dr. Brooks conducted an examination and advised that "there was no reason to put [appellant] through diagnostic tests since [she] had previously had numerous workups." He noted that appellant related that her pain had worsened through the years and opined that she had significant inflammation in that area of the back that could be treated, but returned with any exertion. Dr. Brooks noted that appellant was "unable to perform her previous position at the [employing establishment] or any daily work position." He opined that appellant was totally disabled and that her disability was related to her "job-related injury."

By decision dated August 17, 2005, the Office denied modification of the July 7, 1998 decision.

On May 1, 2006 the Office received appellant's April 27, 2006 request for reconsideration. In separate letters dated April 25, 2006, appellant repeated her allegations that the denial of her claim should be overturned and Dr. Malik should not be given the weight of the medical evidence. She submitted a statement also dated April 25, 2006, titled "Exhibit I." Appellant reiterated her previous concerns regarding Dr. Malik's credentials which included that his report should not have carried the weight of the evidence. She referenced materials from the

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<sup>1</sup> Docket No. 01-1763 (issued April 24, 2002).

<sup>2</sup> Docket No. 03-2252 (issued February 2, 2004).

Kentucky Board of Medical Licensure, which included that Dr. Malik voluntarily agreed to accept probation on April 14, 1999, a February 21, 2005 complaint regarding the license of Dr. Malik and his July 18, 2005 voluntary agreement to surrender his license to practice in Kentucky.

Appellant also submitted an April 25, 2006 statement entitled "Exhibit V" in which she listed what she believed to be several errors in her case. She alleged that the impartial medical examiner, Dr. Malik was under restrictions from the Kentucky Board of Medical Licensure at the time he examined her on March 19, 1998. Appellant also alleged that the April 1989 magnetic resonance imaging (MRI) scan was illegible and enclosed a copy of the Office's April 25, 2001 letter requesting a copy. She alleged that there were errors in the statement of accepted facts which included that she did not stop working shortly after her injury, but rather, appellant attempted to return to work on several occasions. Appellant contended that she had scapular complaints documented as early as January 26, 1989 and enclosed a copy of treatment notes from an individual whose signature cannot be identified which appear to pertain to that time frame and other earlier treatment notes which were previously of record. She also enclosed copies of previously received treatment notes dated March 2, 1989 from another physician who noted pain in the scapula and whose signature is illegible.

In a January 23, 2006 report, Dr. Stearns noted appellant's history of injury and treatment. He noted that appellant's history, subjective findings and radiographic examinations showed evidence that her condition was due to the injury that occurred on January 25, 1989. Dr. Stearns opined that "all residual pain, discomfort and resulting disability" were "a direct result of the injury that appellant sustained in the course of her employment." He also noted that the June 30, 1999 MRI scan offered "evidence of continuing work-related findings consistent with appellant's original injury." Dr. Stearns enclosed a copy of his treatment notes from his November 30, 2005 examination. He noted that "there has been very little change in appellant's condition since she was last seen in 1998." Dr. Stearns added that she was still disabled and opined that it was unlikely that appellant could return to any occupation in the future.

In a January 31, 2006 report, Dr. Brooks noted that he saw appellant for an injury to the thoracic and left scapular area of the back. He noted that appellant had a prior injury on January 25, 1989 when she lifted a box that weighed approximately 33 pounds. Dr. Brooks noted that appellant related that she reported the accident to management and saw her family physician the following day. He noted that appellant was diagnosed with thoracic and left scapular muscle strain. Dr. Brooks opined that appellant continued to have "no improvement with her impairment." He conducted a physical examination and opined that appellant's condition remained unchanged and she was still disabled. Dr. Brooks advised that appellant's condition could be treated, but that with any exertion, it returned and was difficult to control. He advised that appellant was only capable of bending or stooping for short periods. Dr. Brooks indicated that repetitive arm movements such as rotation movements, lifting, pushing or left hand activities and raising arms above the shoulder levels resulted in extreme discomfort. He opined that appellant was totally disabled as a result of her job injury of January 25, 1989.

In a statement dated January 4, 2006, Robert Davis, a private investigator, noted that he accompanied appellant on February 10, 2005 to the office of Dr. Malik who refused to see or examine appellant or discuss her case.

The Office also received a copy of a March 19, 1998 letter from appellant regarding her examination with Dr. Malik.

By decision dated July 21, 2006, the Office denied appellant's request for reconsideration without further review of the merits. It found that her request neither raised substantial legal questions nor included new and relevant evidence and, thus, was insufficient to warrant review of its prior decision.

### **LEGAL PRECEDENT**

Under section 8128(a) of the Federal Employees' Compensation Act,<sup>3</sup> 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 of Workers' Compensation Programs]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office].”<sup>4</sup>

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.<sup>5</sup>

### **ANALYSIS**

Appellant requested reconsideration on April 27, 2006. The underlying issue on reconsideration is medical in nature, whether she established that she had disability after July 19, 1998 is causally related to her accepted employment injuries. However, appellant did not submit any relevant or pertinent new evidence on the issue of whether she had disability causally related to her accepted employment injuries, nor did she show that the Office erroneously applied or

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b).

<sup>5</sup> 20 C.F.R. § 10.608(b).

interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office.

In her April 27, 2006 request for reconsideration, appellant reiterated her previous arguments of record. She repeated her allegations that Dr. Malik should not have been accorded the weight of the medical evidence. Appellant noted that he agreed to surrender his license to practice medicine in Kentucky on July 17, 2005. However, this argument was previously made and considered in the Board's February 2, 2004 decision.<sup>6</sup> Appellant also submitted several letters dated April 25, 2006 and exhibits I and V. She contended that her prior denials should be overturned, that Dr. Malik's opinion should not be given special weight and that he was under restrictions from the Kentucky Board of medical licensure. These contentions were previously considered and are not a basis for reopening the claim. Appellant resubmitted copies of materials regarding Dr. Malik's license, his voluntary agreement to surrender his license dated July 18, 2005 and copies of other documents. The Board also notes that her arguments and evidence are cumulative and have been previously considered.<sup>7</sup>

Appellant also submitted a statement from Mr. Davis, a private investigator dated January 4, 2006, who noted that he accompanied appellant to see Dr. Malik on February 10, 2005. However, this is not relevant termination of her benefit on July 19, 1998, as Dr. Malik was the physician selected to conduct an impartial medical examination seven years prior. As noted, the underlying issue is medical in nature and a statement from a private investigator is not relevant to the medical issues in this case. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>8</sup>

Appellant also submitted several reports from physicians which included reports dated January 31, 2006 from Dr. Brooks and a January 23, 2006 report from Dr. Stearns. While they opined that appellant's disability was related to her work-related injury and that she continued to have strains and remained totally disabled, they are similar reports previously of record and are cumulative in nature. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing the claim and does not constitute a basis for reopening a case for further merit review.<sup>9</sup>

Consequently, the evidence and argument submitted by appellant on reconsideration does not constitute new and relevant evidence, nor does it show that the Office erroneously applied or interpreted a specific point of law or advance a relevant new argument not previously submitted. Therefore, the Office properly denied her request for reconsideration.

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<sup>6</sup> See *Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

<sup>7</sup> See *id.*; see also *David J. McDonald*, 50 ECAB 185 (1998); *John Polito*, 50 ECAB 347 (1999); *Khambandith Vorapanya*, 50 ECAB 490 (1999).

<sup>8</sup> *Robert P. Mitchell*, 52 ECAB 116 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>9</sup> See *supra*, note 6.

**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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 21, 2006 is affirmed.

Issued: June 21, 2007  
Washington, DC

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

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

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