

FACTUAL HISTORY

This is the seventh appeal in the present case. In the first appeal,² the Board affirmed the Office's finding that appellant had not sustained a recurrence of disability on or after June 3, 1993 due to her April 7, 1993 employment injury.³ In the second appeal,⁴ the Board again affirmed the Office's denial of appellant's claim for a recurrence of disability on or after June 3, 1993 due to her April 7, 1993 employment injury. In these decisions, the Board found that the medical reports of record, including the reports of Dr. Ted Barber, an attending Board-certified neurologist, were not sufficient to establish her claim. In the third appeal,⁵ the Board affirmed the Office's refusal to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

In the fourth appeal,⁶ the Board issued a decision on January 26, 2004 affirming the Office's refusal to reopen appellant's case for further merit review as her application was not timely filed and failed to present clear evidence of error.⁷ On September 19, 2004 appellant requested reconsideration of her claim and submitted an August 20, 2004 report of Dr. Barber.⁸ By decision dated November 16, 2004, the Office denied appellant's request for further review of the merits of her claim.

² Docket No. 97-631 (issued October 2, 1998).

³ On April 7, 1993 appellant, then a 51-year-old letter carrier, sustained an employment-related acute lumbosacral strain and a right knee strain. She stopped her limited-duty work and was terminated from the employing establishment effective June 3, 1993. Appellant alleged that she sustained a recurrence of disability on June 3, 1993 due to her April 7, 1993 employment injury.

⁴ Docket No. 99-2541 (issued January 2, 2001).

⁵ Docket No. 01-2130 (issued May 23, 2002).

⁶ Docket No. 03-2088 (issued January 26, 2004).

⁷ The Board found that the reports of Dr. Barber submitted on reconsideration did not show clear evidence of error in the Office's prior decisions. In a February 19, 2003 report, Dr. Barber stated that appellant's back pain was proximately related to the April 7, 1993 employment injury. He noted that she reported no pain prior to April 7, 1993 and consistently complained of the same pain after that date and related it to the April 7, 1993 injury. In a report dated March 19, 2003, Dr. Barber stated that appellant had sciatica, with aggravation by movement, confirmed by a September 11, 2002 computerized tomography (CT) scan, which caused pain in her back and lower extremities. He noted that appellant did not have such pain prior to April 7, 1993, but had it after that date. Dr. Barber indicated that the April 7, 1993 injury was the direct cause of the sciatica.

⁸ In the August 20, 2004 report, Dr. Barber discussed appellant's April 7, 1993 injury and stated, "After all those treatments and further treatments [appellant] continued to have complaint of pain in the sciatic distribution on the right. She did not have this pain prior to her fall and has only complained of the pain ever since her fall. Given [appellant's] report of injury and her physical findings of pain at the sciatic notch along with a prolonged H [r]eflex on her EMG [electromyogram], it is my opinion and I think it is reasonable to conclude, that her pain and sciatica are the direct and proximal result of the injury of April 7, 1993. That type of injury would result in those kinds of objective findings of physical examination and EMG. In that the pain has gone on for over 10 years, it is my opinion that the pain is now permanent. The objective evidence to cite to make the diagnosis lies in her EMG and CT scanning which shows multilevel [facet] arthrosis affecting L1-2, L4-5 and L5-S1."

In the fifth appeal,⁹ the Board issued an order setting aside the Office's November 16, 2004 decision and remanded the case to the Office for proper assemblage of the case record. The Board found that the record was missing certain documents including medical records before mid 1993 and various Office and Board decisions. On remand the Office reassembled the case record to include the relevant documents as requested by the Board. By decision dated August 31, 2005, the Office reissued its November 16, 2004 decision, finding that appellant's September 2004 reconsideration request did not warrant further merit review of her case. In the sixth appeal,¹⁰ the Board issued a decision on July 3, 2006 affirming the Office's refusal to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a). The facts and circumstances of the case up to this point are set forth in the Board's prior decisions and are incorporated herein by reference.

In an October 6, 2006 letter, appellant, through her attorney, again requested reconsideration of her claim. Appellant submitted a September 20, 2006 report in which Dr. Barber indicated that he saw her on that date at which time she provided a description of the April 7, 1993 employment injury and reported that she had been in constant pain since that time. Dr. Barber stated:

“[Appellant] stated that she was unable to carry mail and return to work and was given a job returning undeliverable mail. The job required her to do quite a bit of twisting from side to side, which further irritated her pain. [Appellant] stated that it is an irritating pain in the region of the sciatic nerves, and states that the return to work caused recurrence of her original injury of 1993. She has tried treatment since that time with no improvement. Given that [appellant] has identified this injury as the causative injury for her pain and no other, I would conclude that is the most likely explanation for her pain. The twisting and turning cause[d] irritation of the injury.¹¹

In a February 20, 2007 decision, the Office refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹² 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

⁹ Docket No. 05-620 (issued August 4, 2005).

¹⁰ Docket No. 05-1966 (issued July 3, 2006).

¹¹ Appellant also submitted copies of Dr. Barber's August 20, 2004 report and an undated factual statement that she previously submitted to the Office.

¹² 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).

considered by the Office.¹³ 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.¹⁴ 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.¹⁵ The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁶

ANALYSIS

The Office accepted that appellant sustained an employment-related acute lumbosacral strain and a right knee strain on April 7, 1993. She alleged a recurrence of disability on June 3, 1993 due to her April 7, 1993 employment injury. The Office denied appellant's claim because she did not submit sufficient medical evidence. By decision dated February 20, 2007, the Office determined that her October 2006 reconsideration request did not entitle her to further merit review of her case.

In support of her October 2006 reconsideration request, appellant submitted a September 20, 2006 report of Dr. Barber who noted that appellant reported being in constant pain since her April 7, 1993 employment injury and indicated that she attributed her claimed recurrence of disability to her job duties, including twisting from side to side. Dr. Barber stated, "Given that she has identified this injury as the causative injury for her pain and no other, I would conclude that is the most likely explanation for her pain. The twisting and turning cause[d] irritation of the injury." The Board notes, however, that the submission of Dr. Barber's September 20, 2006 report would not require reopening of appellant's claim because this report is similar to previously submitted reports of Dr. Barber. In his September 20, 2006 report, as well as his prior reports,¹⁷ Dr. Barber appeared to have based his opinion on the cause of appellant's continuing medical problems on her long-term pain complaints and her own assertion that her claimed recurrence of disability was employment related.¹⁸

Appellant has not established that the Office improperly denied her request for further review of the merits of its July 15, 1999 decision under section 8128(a) of the Act, because the evidence and argument she submitted did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered

¹³ 20 C.F.R. § 10.606(b)(2).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ 20 C.F.R. § 10.608(b).

¹⁶ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁷ Dr. Barber's September 20, 2006 report is similar to his February 19, March 19, 2003 and August 20, 2004 reports which were previously considered by the Office. The Board notes that Dr. Barber's September 20, 2006 report contains even less medical rationale regarding the cause of appellant's continuing medical problems than his prior reports.

¹⁸ Appellant also submitted copies of Dr. Barber's August 20, 2004 report and an undated factual statement, but these documents had previously been submitted and considered by the Office.

by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.¹⁹

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).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' February 20, 2007 decision is affirmed.

Issued: September 5, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹⁹ See *supra* note 16 and accompanying text.