

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

G.C., Appellant)

and)

**DEPARTMENT OF DEFENSE, NATIONAL
IMAGERY & MAPPING AGENCY,
Bethesda, MD, Employer**)

**Docket No. 07-1138
Issued: September 12, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 21, 2007 appellant filed a timely appeal of a January 30, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. Because more than one year has elapsed between the most recent merit decision dated November 19, 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(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for a merit review of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 1, 2003 appellant then a 61-year-old office coordinator, filed an occupational disease claim alleging that she sustained a back and hip injury due to riding a scooter at work that was not properly adjusted for her use. She first became aware of these injuries and realized

that they were caused or aggravated by her employment on April 4, 2003. Appellant submitted several medical reports of Dr. Peter I. Kenmore, a Board-certified orthopedic surgeon, dated May 19 and November 28, 1994, February 8 and October 9, 1995 and September 23, 1996. Dr. Kenmore provided a history of injuries involving appellant's legs, knees, back and left hip which she sustained while working at the employing establishment on September 12 and December 12, 1988 and November 2, 1994. He diagnosed a ruptured intervertebral disc with right sciatica, traumatic synovitis of the right knee, a torn meniscus, severe flexion contracture of the right knee, mild flexion contracture of the left knee and traumatic arthritis of both knees and left hip. A February 19, 1994 report of Dr. Brian G. Evans, a Board-certified orthopedic surgeon, found that appellant sustained significant osteoarthritis in her hip. Dr. Evans opined that this condition may have been exacerbated by a 1994 work-related injury. He recommended total hip replacement surgery. In disability certificates dated April 28 and May 12, 2003, Dr. Pritam S. Saini, a Board-certified internist, opined that appellant was totally disabled from April 7 to May 27, 2003 due to back pain.

By letter dated June 19, 2003, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It further advised her about the additional factual and medical evidence she needed to submit. On June 19, 2003 the Office also requested that the employing establishment provide comments regarding appellant's allegation, her position description including physical requirements and whether it had provided her with a light-duty job offer.

Appellant submitted Dr. Saini's May 27, 2003 disability certificate which found that she was totally disabled from May 27 to June 10, 2003 due to back pain. Dr. Saini's June 12, 2003 disability certificate found that appellant was totally disabled due to a work-related hip injury. In reports dated December 27, 2002 and July 15, 2003, Dr. Saini stated that appellant suffered from severe arthritis, high blood pressure, diabetes mellitus II and stress. He further stated that she sustained a work-related ankle injury on December 8, 2000 which caused chronic pain and difficulty with walking and a work-related hip injury in 1988 and 1994. Dr. Saini stated that appellant's stress condition was also work related. An undated report from John C. Waxham, a physical therapist, stated that appellant was evaluated for back pain with lumbar disc disease. Mr. Waxham indicated that appellant's left hip pain had not been evaluated as employment related. In a January 23, 1995 report, Dr. Joseph Del Rosso, a chiropractor, found that appellant sustained degeneration of the lumbar intervertebral disc at L4-5 and L5 sacrum as a primary condition. Secondary diagnoses included pain of the sciatic nerve, degeneration of the lumbar intervertebral disc, subluxation/misalignment of the thoracic and cervical spines, other allied disorders of the spine and neuromuscular pain.

By decision dated August 25, 2003, the Office found that appellant did not sustain an injury while in the performance of duty. The evidence of record was insufficient to establish that the incident occurred as alleged and that appellant sustained a medical condition caused by the alleged incident.

In an October 23, 2003 report, Dr. Evans stated that appellant had a long-standing history of arthritis initiated by a prior work-related injury. He further noted that in April 2003 she sustained another injury at work while using a maladjusted scooter that caused pain radiating

down along her leg and in her back. Dr. Evans opined that this injury exacerbated appellant's preexisting work-related injury due to osteoarthritis in her hips and knees.

By letter dated August 19, 2004, appellant requested reconsideration of the Office's August 25, 2003 decision. She submitted an unsigned report dated April 18, 2003 from the office of a physical therapist which found that she had back spasms and lumbar disc disease.¹

By decision dated November 19, 2004, the Office denied modification of the August 25, 2003 decision. The evidence of record failed to establish that appellant sustained an injury causally related to factors of her federal employment.

Appellant submitted duplicate copies of Dr. Kenmore's October 9, 1995 and September 23, 1996 reports, Dr. Evans' February 19, 2002 report and Dr. Saini's December 27, 2002 and July 15, 2003 reports. A February 16, 2000 report of Dr. Michael Tritto, a Board-certified podiatrist, revealed that appellant was evaluated on June 12, 1999 regarding complaints of pain and swelling in her right foot and ankle. Appellant related no history of injuring this area other than a prior hip problem on the left side. Dr. Tritto diagnosed a neglected posterior tibial tendon rupture and chronic posterior tibial tendinitis. He opined that appellant's history of having a previous problem with her left hip and subsequent increase in pressure on her right limb from changing her gait, most likely caused damage to the posterior tibial tendon. In an October 5, 2004 treatment note, Dr. Paul S. Cooper, a Board-certified orthopedic surgeon, provided a preoperative consultation for appellant's progressive right foot deformity. Dr. Cooper opined that she had a marked asymmetric flat foot which was currently causing her increased ankle and medial knee pain.

In a letter dated November 17, 2005, appellant further described her current alleged employment-related back and hip injuries. She stated that she sustained a prior hip injury which resulted in difficulty sitting on low surfaces. Appellant indicated that her November 17, 2005 letter was accompanied by additional medical evidence in support of her claim.²

On July 25, 2006 appellant and her attorney telephoned the Office about her November 17, 2005 request for reconsideration. The Office advised them that this letter was not tracked as a reconsideration request. Appellant stated that her letter did not specifically state that it was a request for reconsideration. The Office advised her to submit another letter specifically requesting reconsideration. By letter dated August 22, 2006, appellant requested reconsideration of the Office's November 19, 2004 decision.

In a decision dated January 30, 2007, the Office denied appellant's request for reconsideration on the grounds that it neither raised substantive legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant a merit review of the claim.

¹ Appellant stated that Dr. Evans' June 4, 2003 letter accompanied her August 19, 2004 request for reconsideration. However, the Board notes that this letter is not contained in the case record.

² The Board notes that it does not appear that any medical evidence accompanied appellant's November 17, 2005 letter.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,³ the Office's regulation provide that 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.⁴ 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.⁵ 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 of the merits.

ANALYSIS

By letter dated August 26, 2006, appellant disagreed with the finding that she did not sustain hip and back injuries while in the performance of duty because the medical evidence of record did not establish that the claimed injuries were causally related to her federal employment. The relevant issue in this case is whether appellant's hip and back injuries were sustained in the performance of duty.

Appellant resubmitted Dr. Kenmore's October 9, 1995 and September 23, 1996 reports, Dr. Evans' February 19, 2002 report and Dr. Saini's December 27, 2002 and July 15, 2003 reports. These reports, however, were already of record at the time appellant requested reconsideration and had been considered by the Office previously. The Board finds, therefore, that as the evidence submitted is repetitious or duplicative of that previously submitted and considered, it is insufficient to reopen appellant's claim for a merit review as it is duplicative and cumulative of evidence already of record.⁶

Dr. Tritto's February 16, 2000 report found that appellant had a neglected posterior tibial tendon rupture and chronic posterior tibial tendinitis. He opined that her prior history of a left hip problem and subsequent increase in pressure on the right limb from changing her gait most likely caused damage to her posterior tibial tendon. Although Dr. Tritto's report constitutes new evidence, it is insufficient to reopen appellant's claim for a merit review. He failed to address the relevant issue of whether appellant's current hip problem was sustained in the performance of duty.

Similarly, Dr. Cooper's October 5, 2004 treatment note constitutes new evidence but is not relevant to the issue in this case. He found that appellant had a marked asymmetric flat foot

³ 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).

⁴ 20 C.F.R. § 10.606(b)(1)-(2).

⁵ *Id.* at § 10.607(a).

⁶ See *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

which was currently causing her increased ankle and medial knee pain is not relevant to the issue in this case. Dr. Cooper did not state whether appellant's foot condition was caused or aggravated by her work duties.

Appellant did not submit any relevant and pertinent new evidence not previously considered by the Office in support of her request for reconsideration. Further, she did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that the Office properly denied merit review.⁷

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 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

⁷ See *James E. Norris*, 52 ECAB 93 (2000).