

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

M.C., Appellant

and

**DEPARTMENT OF THE ARMY, SENECA
ARMY DEPOT, Romulus, NY, Employer**

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**Docket No. 08-1574
Issued: December 8, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 12, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 7, 2008 nonmerit decision denying her request for reconsideration. The last merit decision of the Office was its December 12, 2006 decision denying appellant's recurrence claim. Because more than one year has elapsed between the Office's last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.¹

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ See 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

On August 13, 1996 appellant, a 33-year-old housing management assistant, filed a traumatic injury claim alleging that she injured her left shoulder and lower back on July 29, 1996. The Office accepted appellant's claim for chronic lumbosacral strain and degenerative disc disease at L4-5 and L5-S1. On June 19, 2006 appellant submitted a claim for a recurrence of disability, alleging that, on June 16, 2004, she woke up with severe pain radiating down her left shoulder. She stated that the pain was identical to that associated with her 1996 injury.

In a September 15, 2006 report, Dr. Elaine Tunaitis, a Board-certified internist, stated that appellant had a chronic condition in her lower back, neck and left shoulder when she began working at the U.S. Postal Service in 1998. She indicated that the left shoulder condition was "referred from the neck."

In an August 10, 2006 statement, appellant contended that her shoulder condition was a direct result of her 1996 injury. She reiterated that she experienced a recurrence on June 16, 2004, when she awoke with severe pain in her left shoulder.

Appellant submitted reports from her treating physician, Dr. Helen Wong, a Board-certified orthopedic surgeon. On June 30, 2006 Dr. Wong treated appellant for back and neck complaints, which she stated were related to the 1996 accepted injury. Although not quite as severe as appellant's back pain originally, her neck pain allegedly flared up two years prior to the visit. Dr. Wong diagnosed chronic neck and lower back pain secondary to spondylosis and degenerative changes.

In an August 21, 2006 report, Dr. Wong stated that she had been treating appellant since June 29, 2004 for chronic cervical strain with spondylosis. On June 27, 2004 appellant awoke with severe pain in her left shoulder blade, which related back to the original July 1996 injury when she lifted a lawnmower into a truck. On September 15, 2006 Dr. Wong diagnosed cervical spondylosis with degenerative changes, noting that appellant had persistent neck pain on the left side down to the trapezius muscles.

By decision dated December 12, 2006, the Office denied appellant's claim, finding that the evidence of record failed to demonstrate that the claimed recurrence of disability was causally related to the accepted July 29, 1996 injury.

Appellant submitted a March 12, 2007 statement from Faye M. Jensen, R.N., who worked at the employing establishment on the date of appellant's accepted injury. Ms. Jensen stated that appellant had responded to the initial incident, when she injured her back and left shoulder. In a statement dated March 13, 2007, Stephen Absolon, installation manager for the employing establishment, indicated that, on July 29, 2006, appellant reported to him that she had injured her lower back and left shoulder while lifting a lawn mower. In a May 24, 2007 statement, appellant contended that her shoulder injury should be included in her claim.

In a November 22, 2006 report, Dr. Carrie Z. O'Neill, a podiatrist, diagnosed chronic right foot pain. The record contains a September 29, 2004 report of a magnetic resonance imaging (MRI) scan of the cervical spine.

Appellant submitted medical records from Dr. Wong dated June 23 and November 16, 2006 for treatment of neck complaints, "maybe related to the weather," and a diagnosis of chronic cervical spondylosis. From November 30, 2006 to April 20, 2007, appellant was seen for back complaints. Dr. Wong diagnosed chronic low back pain secondary to degenerative changes.

On May 3, 2007 Dr. Wong opined that appellant's neck and left shoulder conditions were related to the July 29, 1996 injury. She noted that appellant was experiencing significant pain and spasm in the left trapezius and rhomboid area.

In a May 24, 2007 narrative report, Dr. Wong stated that she examined appellant on June 29, 2004 for left shoulder pain. She related appellant's report that she had awakened two days earlier with severe pain in her left shoulder blade, radiating up the back of her neck. Examination of appellant at that time revealed limited range of motion. Dr. Wong stated that she had been treating appellant for the past three years for left shoulder and neck conditions. She diagnosed cervical spondylosis, confirmed by an MRI scan, which showed multilevel degenerative disease at C3-6. Dr. Wong opined that appellant was disabled from June 29 to December 2, 2004, and from August 19 to October 28, 2005, and that her condition was an exacerbation of her July 29, 1996 injuries. In an accompanying attending physician's report, she diagnosed degenerative disc disease. Dr. Wong indicated, by placing a checkmark in the "yes" box, that appellant's condition was caused or aggravated by employment activity. She included a notation to the effect that appellant had no previous history until the lawn mower injury, after which she experienced low back and left shoulder pain.

On November 14, 2007 Dr. Wong stated that she treated appellant for back pain on January 20, 2000. She diagnosed degenerative cervical disc disease and cervical spondylosis, indicating that appellant's original injury occurred in July 1996, when she injured her neck, left shoulder and lower back while lifting a lawn mower. Dr. Wong related again that she had treated appellant on June 29, 2004 for severe left shoulder pain, which she opined was an exacerbation of her original 1996 injury. She noted that appellant had experienced no new injury, and there was spasm on the left trapezius and rhomboid areas. In a December 13, 2007 follow-up report, Dr. Wong stated that appellant continued to experience low back pain secondary to disc disease, with progression of symptoms.

On December 2, 2007 appellant requested reconsideration of the December 12, 2006 decision. She noted that she had reported an injury to her shoulder at the time she filed her traumatic injury claim.

In a February 7, 2008 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant further merit review. It found that Dr. Wong's reports were substantially similar to the evidence of record that was previously considered.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office 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.³ 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.⁴ 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.⁵

The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁶

ANALYSIS

Appellant's December 2, 2007 request for reconsideration neither alleged, nor demonstrated, that the Office erroneously applied or interpreted a specific point of law. She did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of her request for reconsideration, appellant submitted reports from Dr. Wong. However, Dr. Wong did not address the relevant issue of how appellant's claimed shoulder condition was causally related to the accepted July 29, 1996 injury. She restated her opinion that appellant's left shoulder condition "related back" to the accepted injury. However, Dr. Wong's reports merely reiterated information contained in evidence previously received and reviewed by the Office. The evidence submitted by appellant is cumulative and duplicative in nature.⁷ The Board finds that Dr. Wong's reports do not constitute relevant and pertinent new evidence not previously considered by the Office.⁸ The Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

² 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).

³ 20 C.F.R. § 10.606(b)(2).

⁴ 20 C.F.R. § 10.607(a).

⁵ 20 C.F.R. § 10.608(b).

⁶ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁷ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value, and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

⁸ *See Susan A. Filkins*, 57 ECAB 630 (2006).

The remaining evidence submitted by appellant included statements from an employing establishment nurse and an installation manager; a November 22, 2006 report from a podiatrist, who diagnosed chronic right foot pain; and a September 29, 2004 report of an MRI scan of the cervical spine. This evidence is not relevant to the issue on which her claim was denied and, thus, insufficient to warrant merit review.⁹

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied her March 14, 2007 request for reconsideration.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2008
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

⁹ *Edward Matthew Diekemper, supra* note 6.