

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

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C.S., Appellant )

and )

**DEPARTMENT OF THE ARMY, FORT KNOX,** )  
**BARR LIBRARY, Fort Knox, KY, Employer** )

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**Docket No. 07-1767**  
**Issued: February 21, 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  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 20, 2007 appellant filed an appeal of a February 23, 2007 decision of the Office of Workers' Compensation Programs denying her request for a merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision of record was a December 5, 2005 decision denying her claim for recurrence of disability and denying modification of a February 4, 2004 wage-earning capacity determination. As the last merit decision was issued more than one year before appellant filed her appeal, the Board lacks jurisdiction to review the merits of this claim.

**ISSUE**

The issue is whether the Office properly refused to reopen the claim for a merit review pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

The Office accepted that on or before February 22, 2002 appellant, then a 38-year-old library technician, sustained allergic urticaria (hives) due to workplace exposure to mold.

Dr. Arthur W. Loesevitz, an attending Board-certified pediatrician specializing in allergy and immunology at the employing establishment, submitted reports from March 2002 to August 2003 diagnosing urticaria due to exposures in the Barr Library. Appellant was off work until November 17, 2003, when she returned to full-time work as an office automation clerk in Building 2807, a different location from the library. She received compensation for intermittent work absences through December 3, 2004.

In a January 13, 2004 chart note, Dr. Loesevitz noted that appellant experienced hives while working in Building 2807.

By decision dated February 4, 2004, the Office determined that the position of full-time office automation clerk properly represented appellant's wage-earning capacity. The Office further found that she had no loss of wages as her actual earnings as an automation clerk equaled or exceeded the wages of her date-of-injury position as a library technician.

In a February 17, 2004 report, Dr. Loesevitz diagnosed headaches and hives related to workplace mold exposures in Building 2807. He stated that appellant was also allergic to cockroach antigen. Dr. Loesevitz submitted periodic progress reports from May 3, 2004 to January 31, 2005 holding appellant off work for intermittent periods. He recommended that to minimize her workplace exposures, appellant work for 10-hour days each week or work 9 hours a day with alternate Fridays off.<sup>1</sup>

A March 5, 2005 air quality survey performed in appellant's office in Building 2807 showed a possible water stain on a ceiling tile and soot on a wall and ceiling caused by a microwave fire. The ventilation system met appropriate standards. An air sample showed 1,034.2 particles per cubic meter of "pollen, dust grains and some mold fragments consisting of sterile hyphae." It was noted that according to the National Allergy Bureau, a measurement of "1 to 6,499 mold spores was considered low."

In a March 23, 2005 report, Dr. Loesevitz noted that appellant's work area had "no significant mold burden" but that she should not work there.

On March 24, 2005 appellant stopped work and claimed a recurrence of disability commencing that day.

In an April 27, 2005 letter, the Office advised appellant of the additional information needed to establish her claim for recurrence of disability, including proof of allergens in her workplace. The Office afforded her 30 days to submit this information. Appellant did not submit additional evidence prior to May 31, 2005.

By decision dated May 31, 2005, the Office denied appellant's claim for compensation commencing March 24, 2005 on the grounds that the medical evidence did not establish that she sustained a recurrence of disability. The Office noted Dr. Loesevitz' statement that there was no significant mold in appellant's workplace.

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<sup>1</sup> In a January 14, 2005 letter, the employing establishment contended that an alternate work schedule would not help appellant's condition as "40 hours a week is 40 hours a week regardless of how its worked."

In an August 11, 2005 letter, appellant requested reconsideration. She asserted that the employing establishment wrongfully denied a requested schedule change. Appellant submitted additional medical evidence.

In reports from October 1 to December 4, 2001, Dr. Arthur F. White, an attending allergist, diagnosed urticaria and headaches due to workplace mold exposures.

In reports from June 1 to July 18, 2005, Dr. Loesevitz stated that appellant had hives and headaches due to exposures in Building 2807. He monitored appellant's condition at work on July 20 and 21, 2005. After working on July 20, 2005, appellant had a few small hives. After working from 8:30 to 11:00 a.m. on July 21, 2005, she had hives on her arms, legs and torso.

In a September 14, 2005 letter, the employing establishment noted purchasing four air purifiers for appellant's work area in May 2004 and that it cleaned the air vents in June 2004.

In an October 7, 2005 letter, the employing establishment offered appellant a position as a human resources assistant in the Cople Center, an area apart from Building 2807. Appellant accepted the position on October 11, 2005. She explained that during a 60-day detail to the Cople Center, she had no hives or other symptoms. Appellant therefore accepted the permanent job offer.

By decision dated December 5, 2005, the Office denied modification of the May 31, 2005 decision. The Office found that appellant submitted insufficient evidence to establish that the claimed recurrence was due to the accepted exposures and not to new work factors. The Office further found that appellant had not established exposures to mold in Building 2807.

In a December 4, 2006 letter, appellant requested reconsideration. She submitted documents related to a pending Equal Employment Opportunity (EEO) grievance regarding the denial of a requested schedule change. Appellant also submitted copies of Dr. Loesevitz' May 3, November 1 and 8, 2004, January 31, March 23 and June 1, 2005 reports previously of record.

By decision dated February 23, 2007, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitive or irrelevant to the critical issue in the claim. The Office found that the duplicates of Dr. Loesevitz' prior reports were cumulative in nature. The Office further found that the grievance documents were irrelevant to the medical issue in the claim.

## LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>2</sup> section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides 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) submit relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup> Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>4</sup>

In support of her request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>5</sup> Appellant need only submit relevant, pertinent evidence not previously considered by the Office.<sup>6</sup> When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>7</sup>

## ANALYSIS

The Office accepted that appellant sustained allergic urticaria due to workplace exposures on and before February 22, 2002. After appellant returned to full-time work for 60 days as an automation clerk in Building 2807, the Office issued a February 4, 2004 decision finding that the clerk position properly represented her wage-earning capacity. She then claimed a recurrence of disability commencing March 24, 2005 due to workplace exposures in Building 2807. By decision dated May 31, 2005, the Office denied appellant's claim for recurrence of disability,

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.606(b)(2).

<sup>4</sup> *Id.* at § 10.608(b).

<sup>5</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>6</sup> *See* 20 C.F.R. § 10.606(b)(3). *See also* *Mark H. Dever*, 53 ECAB 710 (2002).

<sup>7</sup> *Annette Louise*, 54 ECAB 783 (2003).

finding that she submitted insufficient evidence to establish causal relationship. Appellant requested reconsideration on August 11, 2005. In a December 5, 2005 decision, the Office denied modification on the grounds that the additional evidence failed to establish causal relationship. The Office further found that modification of the February 4, 2004 wage-earning capacity determination was not warranted.

The critical issues at the time of the last merit decision in the case were whether appellant established a recurrence of disability on and after March 24, 2005 and whether the evidence submitted warranted modification of the wage-earning capacity determination. To be relevant, the evidence submitted in support of the December 4, 2006 request for reconsideration must address these issues.

In support of her request, appellant submitted her letter, documents relating to an EEO grievance and copies of medical evidence previously considered by the Office. The EEO documents and appellant's statements regarding the proposed schedule change are irrelevant both to the recurrence issue and the wage-earning capacity determination. Dr. Loesevitz' reports from May 3, 2004 to March 23, 2005 do not address appellant's condition on and after March 24, 2005, they are also irrelevant to both issues. Dr. Loesevitz' June 1, 2005 report did not state that appellant's condition on and after March 24, 2005 was due to substances proven present in Building 2807. Thus, it is also irrelevant to the recurrence issue and the wage-earning capacity issue. The Board has held that the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.<sup>8</sup>

Appellant has not established that the Office improperly refused to reopen her claim for a review of the merits under section 8128(a) of the Act, because she did not 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.<sup>9</sup>

### CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration as she did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2).

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<sup>8</sup> *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

<sup>9</sup> *L.C.*, 58 ECAB \_\_\_\_ (Docket No. 06-1928, issued May 31, 2007) (where the Board held that the standards under 20 C.F.R. § 10.606(b)(2) are applicable in evaluating whether to reopen a wage-earning capacity determination for a merit review).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 23, 2007 is affirmed.

Issued: February 21, 2008  
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