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

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| **D.H., Appellant** | ) | |
| **and** | ) | **Docket No. 07-1162** |
| | ) | **Issued: January 10, 2008** |
| **U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer** | ) | |

*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 26, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 25, 2006 merit decision denying his request for reimbursement of aquatic therapy expenses and the Office's December 21, 2006 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

### ***ISSUES***

The issues are: (1) whether the Office abused its discretion by denying appellant's request for reimbursement of aquatic therapy expenses; and (2) whether it properly denied his request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### ***FACTUAL HISTORY***

The Office accepted that on December 28, 1990 appellant, then a 53-year-old mail carrier, sustained an acute lumbar strain and a sprain of his right fifth finger. It also accepted that on December 3, 1991 he sustained a lumbar strain due to lifting mail from a container.

Appellant began to work in limited-duty positions for the employing establishment and the Office paid appropriate compensation for periods of disability.[1]

On February 13, 1991 Dr. Bong S. Lee, a Board-certified orthopedic surgeon, performed a fitness-for-duty examination for the employing establishment. He indicated that examination of appellant's lower back "did not reveal any significant findings to reflect recent traumatic pathology" and recommended work restrictions based on a sprain of the proximal interphalangeal joint of his right fifth finger.

On July 17, 1991 Dr. Paul M. Shipkin, an attending Board-certified neurologist, stated that appellant reported low back pain radiating into his legs, mostly on the right, since his December 28, 1990 fall.[2] Dr. Shipkin diagnosed "resolving right post-traumatic lumbosacral radicular syndrome, much greater on the right." On April 8, 1992 Dr. Shipkin indicated that appellant continued to suffer from "protracted bilateral lumbosacral radicular syndrome (by history) and probable muscle tension headaches (possibly related to a right cervical radicular syndrome)."

In March 1992, the Office determined that there was a conflict in the medical evidence between Dr. Shipkin and Dr. Lee and referred appellant to Dr. Noubar Didizian, a Board-certified orthopedic surgeon, for an impartial medical examination. On April 23, 1992 Dr. Didizian stated that appellant had a permanent fixed deformity of 20 degrees flexion contracture of the proximal interphalangeal joint of his right fifth finger with boutonniere hyperextension deformity of the distal joint. He indicated that appellant had excessive subjective complaints and stated, "Based on today's clinical examination, it is my medical opinion that [appellant's] symptomatology seems to be more of a deconditioned back rather than neurogenic. I can not find any evidence of individual nerve compression in the lumbar or cervical spine."

The Office asked Dr. Didizian to provide clarification of his April 23, 1992 report. On June 10, 1992 Dr. Didizian stated that appellant had a permanent deformity in the form of a boutonniere deformity of the right fifth finger and noted that he had a "deconditioned back mechanically without any evidence of nerve compression." He indicated that the normal length of time for pain symptoms after a soft-tissue back injury would be five or six months and noted that appellant's right fifth finger condition was a "very minimal deformity" which represented "a very minimal disability."[3] On July 29, 1992 Dr. Didizian stated that appellant had subjective complaints without any evidence of objective findings to substantiate that he had an ongoing strain or sprain of the low back and noted, "Therefore, in my opinion, whatever soft tissue injuries [appellant] sustained in December 1990 were resolved at the time of my evaluation from a soft tissue point of view."

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[1] Appellant stopped work on May 20, 1992 and was separated from the employing establishment effective October 2, 1992.

[2] Dr. Shipkin stated that magnetic resonance imaging (MRI) scan showed a mild L3-4 bulge with hypertrophic changes and that electromyogram (EMG) testing from February 1991 revealed a mild bilateral radiculopathy. It does not appear that these testing results are included in the present record.

[3] Dr. Didizian indicated that appellant could lift up to 50 pounds and stated that there were no restrictions on work with his hands including simple grasping and fine manipulation.

In a September 22, 1992 decision, the Office terminated appellant's compensation effective April 4, 1992 on the grounds that he had no disability due to his employment injuries after that date. It found that the weight of the medical evidence rested with the opinion of Dr. Didizian. The Office determined that the evidence showed that appellant sustained a permanent boutonniere deformity of the right fifth finger due to the December 28, 1990 fall. It found that appellant was entitled to receive medical benefits for this condition but not for any other condition.[4]

On July 19, 2006 appellant requested reimbursement for aquatic therapy he believed was required by his employment injuries. He stated, "I have been receiving therapy since 1990 and have been paying for it since 1992." Appellant noted that his cost for therapy received between 2005 and 2006 was $378.00 and indicated that he also incurred expenses for travel to and from his therapy sessions. He submitted a January 14, 1992 form report in which Dr. Shipkin recommended appellant undergo "aquatic therapy" to "recondition" his employment-related low back condition and lessen his low back pain. In a July 7, 1993 note, Dr. Shipkin stated, "Physical therapy, diagnosis left lower back pain" and, in a note with an illegible date, he stated, "Aquatic therapy." In a January 30, 1992 letter, a manager at appellant's fitness center detailed the cost of an aquatic therapy program and, in a January 31, 2006 letter, the director of his fitness center stated that appellant was a member in good standing.

In an August 25, 2006 decision, the Office denied appellant's request for reimbursement of aquatic therapy expenses including travel to and from therapy sessions. It stated: "[Y]our physical therapy was covered from 1990 to 1992. The Office determined that you were no longer eligible for benefits on September 22, 1992; hence, your benefits were terminated. This office recently determined that you were entitled to a schedule award but this does not entitle you to medical benefits."

On October 8, 2006 appellant requested reconsideration of the Office's August 25, 2006 decision. He argued that the aquatic therapy was necessitated by the December 29, 1990 employment injury to his back and criticized the opinion of Dr. Didizian. Appellant submitted a July 4, 2006 request for reimbursement of expenses related to aquatic therapy received between 1992 and 2006 along with other documents detailing his therapy expenses. He also resubmitted a number of the documents that he submitted in July 2006.

In a December 21, 2006 decision, the Office denied appellant's reconsideration request indicating that the evidence and argument he submitted was repetitious or irrelevant.

[4] In May 1996, appellant requested a hearing before an Office hearing representative and in a June 25, 1998 decision the Office denied his hearing request as untimely. On August 11, 2006 appellant received a schedule award for a nine percent permanent impairment of his right arm. In an October 30, 1998 decision, the Office denied appellant's reconsideration request because it was untimely and failed to present clear evidence of error. In a December 5, 2000 decision, the Board affirmed the Office's June 25 and October 30, 1998 decisions on the grounds that the Office properly denied appellant's request for a hearing and properly denied his reconsideration request because it was untimely and failed to present clear evidence of error.

## ***LEGAL PRECEDENT -- ISSUE 1***

Section 8103(a) of the Federal Employees' Compensation Act states in pertinent part: "The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."[5]

The Board has found that the Office has great discretion in determining whether a particular type of treatment is likely to cure or give relief.[6] The only limitation on the Office's authority is that of reasonableness.[7] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[8]

## ***ANALYSIS -- ISSUE 1***

The Office accepted that appellant sustained an acute lumbar strain and a sprain and boutonniere deformity of his right fifth finger due to a December 28, 1990 fall and a lumbar strain due to a December 3, 1991 lifting incident. In a September 22, 1992 decision, it terminated appellant's compensation effective April 4, 1992 on the grounds that he had no disability due to his employment injuries after that date. The Office found that appellant was entitled to receive medical benefits for his right fifth finger condition but not for his back condition.

The Board finds that the Office did not abuse its discretion when it denied appellant's request for reimbursement for expenses related to aquatic therapy received between 1992 and 2006. Appellant submitted several brief reports and notes of Dr. Shipkin, an attending Board-certified neurologist, including a January 14, 1992 report in which he recommended "aquatic therapy" to lessen his employment-related low back pain and a July 7, 1993 note in which he stated, "Physical therapy, diagnosis left lower back pain." However, these reports do not provide a detailed description of the type of recommended therapy and they do not contain any explanation of the medical process through which this therapy would be likely to cure appellant's employment-related back condition, give relief from the condition, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.[9] The Board further notes that effective April 4, 1992 the Office terminated appellant's entitlement to

[5] 5 U.S.C. § 8103.

[6] *Vicky C. Randall*, 51 ECAB 357 (2000).

[7] *Lecil E. Stevens*, 49 ECAB 673, 675 (1998)

[8] *Rosa Lee Jones*, 36 ECAB 679 (1985).

[9] *See supra* note 5 and accompanying text. Appellant also submitted letters from employees at his fitness center but these nonmedical documents would not be relevant to the question of whether his claim for reimbursement of aquatic therapy expenses should have been approved.

receive medical benefits for his back condition and it appears that his request for reimbursement relates to a period starting after April 4, 1992.[10]

The Office has great discretion in determining whether a particular type of treatment is likely to cure or give relief.[11] Given the above-described circumstances, the Office's denial of appellant's request for reimbursement of aquatic therapy expenses would not constitute an abuse of discretion.

## ***LEGAL PRECEDENT -- ISSUE 2***

To require the Office to reopen a case for merit review under section 8128(a) of the 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 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 or argument which repeats or duplicates evidence or argument already in the case record[16] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[17]

## ***ANALYSIS -- ISSUE 2***

In support of his October 2006 reconsideration request, appellant submitted a July 4, 2006 request for reimbursement of expenses related to aquatic therapy received between 1992 and 2006 along with other documents detailing his therapy expenses. The submission of these documents would not require reopening of his claim for merit review because these nonmedical

[10] The matter of the termination of appellant's disability compensation and compensation for back-related medical benefits is not currently before the Board. It should be noted that appellant has not submitted any medical evidence showing that he had residuals of an employment-related back condition after April 4, 1992.

[11] *See supra* note 7 and accompanying text.

[12] 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).

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

documents are not relevant to the question of whether the aquatic therapy was medically indicated.[18] Appellant also resubmitted a number of the documents that he first submitted in July 2006 and repeated the arguments he presented at that time. However, the submission of previously considered evidence and argument would not require reopening of his claim for merit review.[19]

Appellant has not established that the Office improperly denied his request for further review of the merits of its August 25, 2006 decision under section 8128(a) of the Act, because the evidence and argument he submitted 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.

## ***CONCLUSION***

The Board finds that the Office did not abuse its discretion by denying appellant's request for reimbursement of aquatic therapy expenses. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[18] *See supra* note 17 and accompanying text.

[19] *See supra* note 16 and accompanying text.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' December 21 and August 25, 2006 decisions are affirmed.

Issued: January 10, 2008
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