

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

A.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Toledo, OH, Employer**

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**Docket No. 08-2013
Issued: February 17, 2009**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 14, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 6, 2008 nonmerit decision denying her request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over this nonmerit decision. The Office's most recent merit decision of record is a July 15, 1999 decision denying appellant's recurrence of disability claim. Because more than one year has elapsed between the 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 denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹ See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

FACTUAL HISTORY

This is the eighth 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 her 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 appellant's 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. In the fifth appeal,⁷ the Board issued an order on August 4, 2005 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. In an August 31, 2005 decision, 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,⁸ the Board issued a July 3, 2006 decision affirming 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 seventh appeal,⁹ the Board issued a September 5, 2007 decision affirming the Office's refusal to reopen appellant's case for further review of the

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

⁸ Docket No. 05-1966 (issued July 3, 2006).

⁹ Docket No. 07-1116 (issued September 5, 2007).

merits pursuant to 5 U.S.C. § 8128(a).¹⁰ The facts of the case up to this point are set forth in the Board's prior decisions and are incorporated herein by reference.

On May 13, 2008 appellant requested reconsideration of her claim. In a May 5, 2008 letter, she argued that her recurrence of disability claim was established by the existing medical evidence of record, including an August 20, 2004 report of Dr. Barber.¹¹ Appellant submitted an April 18, 2008 report in which Dr. Barber stated that she had brought to his attention additional information that she wished to bring to the attention of the appropriate authorities. Dr. Barber noted that appellant reported that, while returning undeliverable mail on June 2, 1993, she engaged in repetitive twisting from side to side which aggravated her original injury of April 7, 1993 "by causing increased swelling and irritation of the S1 nerve root, causing her further pain with radiation down from her back into her hips and down her legs." He stated that these repetitive twisting and turning movements aggravated appellant's original low back injury of April 7, 1993 and were the direct cause of her June 2, 1993 recurrence of disability. Dr. Barber noted, "The constant repetitive twisting movement aggravated her previously existing condition causing increased swelling and irritation of the S1 nerve root and causing further aggravation of pain leading from her low back into her hips, legs and knees, into her feet causing her to stop working as of June 2, 1993."

In a June 6, 2008 decision, the Office denied appellant's request for further review of the merits of her claim.¹²

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹³ 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

¹⁰ The Board found that the Office had properly determined that appellant was not entitled to merit review because the September 20, 2006 report of Dr. Barber she submitted in connection with her reconsideration request was similar to previously submitted reports of Dr. Barber. In his September 20, 2006 report, Dr. Barber 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. He indicated that appellant had an irritating pain in the region of the sciatic nerve and noted that she believed her return to work caused a recurrence of her original April 7, 1993 injury. 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."

¹¹ Appellant also resubmitted a copy of the August 20, 2004 report of Dr. Barber; previously submitted.

¹² In the body of its June 6, 2008 decision, the Office made reference to appellant not showing clear evidence of error in the Office's prior merit decision, a standard for evaluating untimely reconsideration requests. 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3 (January 2004). However, a reading of the decision in full shows that the Office chose to evaluate appellant's reconsideration under the standards for a timely hearing request. *See* 5 U.S.C. § 8128(a).

¹³ 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.¹⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.¹⁵ 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.¹⁶ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.¹⁷

ANALYSIS

The Office accepted that appellant sustained an employment-related acute lumbosacral strain and a right knee strain on April 7, 1993. Appellant alleged a recurrence of disability on June 3, 1993 due to her April 7, 1993 employment injury. The Office denied her claim because she did not submit sufficient medical evidence. In a June 6, 2008 decision, it determined that appellant's May 2008 reconsideration request did not entitle her to further merit review of her case.

In support of her May 2008 reconsideration request, appellant submitted an April 18, 2008 report in which Dr. Barber, an attending Board-certified neurologist, stated that she reported engaging in repetitive twisting from side to side at work on June 2, 1993 which aggravated her original injury of April 7, 1993 "by causing increased swelling and irritation of the S1 nerve root, causing her further pain with radiation down from her back into her hips and down her legs." Dr. Barber stated that these repetitive twisting and turning movements aggravated appellant's original low back injury of April 7, 1993 and were the direct cause of her June 2, 1993 recurrence of disability. He noted, "The constant repetitive twisting movement aggravated her previously existing condition causing increased swelling and irritation of the S1 nerve root and causing further aggravation of pain leading from her low back into her hips, legs and knees, into her feet causing her to stop working as of June 2, 1993."

The Board finds that the submission of the April 18, 2008 report of Dr. Barber does not require the Office to reopen appellant's claim for further review of the merits as it duplicative of reports previously submitted by Dr. Barber.¹⁸ For example, it is similar to a September 20, 2006 report in which Dr. Barber indicated that appellant attributed her claimed June 3, 1993 recurrence of disability to her job duties, including twisting from side to side, which she performed when she returned to work after her April 7, 1993 injury. Dr. Barber stated, "Given that she has identified this injury as the causative injury for her pain and no other, I would

¹⁴ 20 C.F.R. § 10.606(b)(2).

¹⁵ *Id.* at § 10.607(a).

¹⁶ *Id.* at § 10.608(b).

¹⁷ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁸ *See supra* note 17 and accompanying text.

conclude that is the most likely explanation for her pain. The twisting and turning cause[d] irritation of the injury.”¹⁹

Appellant also submitted a copy of an August 20, 2004 report of Dr. Barber. However, this report had previously been submitted to the Office and found insufficient to establish appellant’s claim. In a May 5, 2008 letter, appellant argued that her recurrence of disability claim was established by the existing medical evidence of record, but the Office has already considered and rejected this argument.

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 to 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 properly denied appellant’s request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁹ In his April 18, 2008 report, Dr. Barber stated that appellant had “increased swelling and irritation of the S1 nerve root.” He did not provide any objective evidence of such swelling or support for its relationship to employment factors in either his September 20, 2006 or April 18, 2008 report. Both reports contain similar unrationalized opinions on causal relationship which appear to merely recount appellant’s belief about the cause of her condition.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 6, 2008 decision is affirmed.

Issued: February 17, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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