

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

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L.L., Appellant )  
and ) Docket No. 09-209  
U.S. POSTAL SERVICE, POST OFFICE, ) Issued: July 10, 2009  
Mount Desert Island, ME, Employer )  
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)

*Appearances:*

*Bradley M. Lown, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 27, 2008 appellant, through her attorney, filed a timely appeal from the Office of Workers' Compensation Programs' decision dated October 17, 2008 which denied her request for merit review. Because more than one year has elapsed between the last merit decision dated September 22, 2006 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.

**ISSUE**

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

**FACTUAL HISTORY**

On November 22, 2004 appellant, then a 55-year-old part-time flexible clerk, filed an occupational disease claim for lumbar spine stenosis and bilateral knee osteoarthritis due to standing, walking, bending, lifting, twisting and sitting in the performance of duty. She submitted a form report dated November 22, 2004 from Dr. Starie Seay, a family practitioner,

diagnosing spinal stenosis. Dr. Seay stated that repetitive lifting and bending had likely caused or contributed to this condition.

The Office requested additional factual and medical information in a letter dated December 2, 2004. In a report dated December 8, 2004, Dr. Seay stated that appellant's work activities at the employing establishment had resulted in a severe increase in her preexisting low back pain and progressive worsening of her symptoms. She opined that appellant's work had both contributed to her underlying medical condition and exacerbated her symptoms. Appellant submitted a statement on December 13, 2004 and detailed her employment activities, including pulling cages and bending over and lifting items weighing up to 70 pounds. She noted that her back pain began on October 1, 2001.

By decision dated February 23, 2005, the Office denied appellant's claim finding that she failed to submit the necessary medical opinion evidence to establish a causal relationship between her diagnosed back condition and her employment duties.

Appellant requested an oral hearing on March 10, 2005. In a report dated June 14, 2005, Dr. Seay recommended that appellant maintain low level physical activity with short walks. She opined that appellant was totally disabled for her date-of-injury position and recommended a surgical evaluation. On November 16, 2005 Dr. Julie A. Long, a Board-certified orthopedic surgeon, indicated that appellant was partially disabled and could sit with opportunities to stand and move as needed.

Appellant testified at the oral hearing on July 11, 2006. She stated that she began working at the employing establishment in 1989 lifting up to 70 pounds, standing and bending. Appellant stopped work on November 22, 2004. Following the oral hearing, she submitted the March 30 and April 6, 2005 notes from Dr. Gary J. Correnti, a Board-certified neurosurgeon, who diagnosed spinal stenosis at L4-5 and central disc herniation at L5-S1 with bilateral lumbar radiculopathy. Dr. Correnti stated that appellant's findings were degenerative in nature and unrelated to a specific injury. He recommended surgery. In a report dated July 18, 2006, Dr. Karyn L. Woelflein, Board-certified in physical medicine and rehabilitation, diagnosed chronic pain syndrome, chronic low back pain and spinal stenosis.

By decision dated September 22, 2006, the hearing representative affirmed the January 23, 2005 decision. Although appellant established that she performed the specific employment duties alleged, she did not submit sufficient rationalized medical opinion evidence to establish a causal relationship between her back condition and her accepted employment duties.

In letters dated December 1, 2006 and received by the Office on December 5, 2006 and October 23, 2007, appellant, through her attorney objected to the hearing representative's decision. On July 21, 2008 counsel requested reconsideration on behalf of appellant. He alleged that the hearing representative failed to mention all of appellant's treatments, inaccurately summarized medical reports regarding her knee conditions, improperly concluded that the record did not contain rationalized medical opinion evidence in support of her claim and inaccurately described when appellant's supervisor was aware of her back condition. Appellant resubmitted Dr. Seay's November 22 and December 8, 2004 reports.

By decision dated October 17, 2008, the Office declined to reopen appellant's claim for consideration of the merits finding that the outstanding issue in the claim was whether the medical opinion evidence was sufficiently rationalized to meet her burden of proof.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

### **ANALYSIS**

The Office denied appellant's occupational disease claim for spinal stenosis and bilateral knee osteoarthritis on February 23, 2005. The hearing representative affirmed this decision on September 22, 2006. Counsel disagreed with this decision but failed to specifically mention any of the available appeal rights. He requested reconsideration on July 21, 2008. The Office proceeded to treat his request as a timely request for reconsideration.

Appellant's attorney alleged numerous factual errors in the hearing representative's September 22, 2006 decision. As noted, however, perceived factual errors are not sufficient to require the Office to reopen appellant's claim for reconsideration of the merits. Counsel also resubmitted the November 22 and December 8, 2004 reports of Dr. Seay. These reports were considered by the Office in reaching the February 23, 2005 and September 22, 2006 decisions and do not constitute relevant and pertinent new evidence. The remainder of the medical evidence submitted did not provide an opinion on the causal relationship between appellant's back or knee conditions and her employment duties and was therefore not relevant to the underlying issue of the case. As appellant failed to submit either relevant legal argument or relevant and pertinent new evidence, the Office properly declined to reopen her claim for consideration of the merits.

### **CONCLUSION**

The Board finds that the Office properly declined to reopen appellant's claim for consideration of the merits.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193, § 8128(a).

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

<sup>3</sup> *Id.* at § 10.608(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 17, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 10, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board