

FACTUAL HISTORY

This case has previously been before the Board on appeal.² The facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference. The facts and history of the case relevant to this appeal are set forth below.

On December 7, 1995 appellant, then a 40-year-old clerk, filed an occupational disease claim alleging that she developed tendinitis and myositis due to pushing bundles of mail onto utility carts and into sacks. On March 23, 1996 the Office accepted her claim for bilateral fibromyositis.

Appellant's attending physician, Dr. Jonathan E. Cooper, a Board-certified physiatrist, continued to support appellant's diagnosis of fibromyalgia and limited ability to work. The Office referred her to Dr. Patrick J. Hughes, a Board-certified neurologist, for a second opinion evaluation on November 9, 2000. In his December 10, 2000 report, Dr. Hughes concluded that appellant had only subjective complaints of pain and no objective evidence of disability. He opined that she did not require modified duty or medical treatment.

The Office proposed to terminate appellant's compensation benefits by letter dated January 24, 2001 relying on Dr. Hughes' report. Appellant responded on February 20, 2001 and disagreed with the proposed termination. Due to the disagreement between Drs. Cooper and Hughes regarding her continuing employment-related condition and disability, the Office referred her for an impartial medical evaluation with Dr. Kevin Barron, a Board-certified neurologist, who examined her on October 30, 2001 and reviewed the medical history. Dr. Barron specifically noted an emergency department record dated October 28, 1998 which stated that appellant's fibromyalgia was diagnosed in 1985. He found that appellant had no continuing employment-related condition or disability.

By decision dated January 23, 2002, the Office terminated appellant's compensation and medical benefits effective that date. Appellant requested a review of the written record. By decision dated June 27, 2002, the Branch of Hearings and Review affirmed the Office's January 23, 2002 decision.

Appellant requested reconsideration on May 10, 2003 and submitted additional medical evidence diagnosing fibromyalgia due to her employment injury. By decision dated July 28, 2003, the Office reviewed the merits of her claim but denied modification of the July 27, 2002 termination decision.

Appellant again requested reconsideration on April 14, 2004. By decision dated July 29, 2004, the Office denied modification of its prior decisions. It vacated this decision on August 20, 2004 as it contained incorrect appeal rights, but again denied modification of the July 23, 2002 termination decision attaching correct appeal rights.

Appellant requested reconsideration on July 26, 2005 and submitted additional medical evidence. By decision dated October 31, 2005, the Office declined to reopen her claim for

² Docket No. 06-1318 (issued December 18, 2006).

consideration of the merits. It concluded that the medical evidence submitted was not relevant as it was not based on a complete factual background. The Board set aside this decision on December 18, 2006 and remanded appellant's claim for review of the merits.³

Following the December 18, 2006 decision of the Board, the Office reviewed appellant's claim on the merits on April 20, 2007 and declined to modify the prior decisions. It found that the weight of the medical opinion evidence rested with Dr. Barron, the impartial medical examiner, who found that appellant had no employment-related disability. The Office stated, "[A]ll your physicians appear to be proceeding from an inaccurate appreciation of your overall medical condition in assigning a causal relationship between the claimed fibromyalgia and the accepted work injury, unlike Dr. Barron who states 'there was an emergency department record, St. Peter's Hospital, October 28, 1998, by Michael Cullen, M.D.' He stated that fibromyalgia 'has been diagnosed as far back as 1985.'" It found that the reports of appellant's physicians were of diminished probative value as they attributed her condition solely to her accepted 1995 employment injury.

Appellant requested reconsideration on April 18, 2008 and stated that her condition started a bilateral tendinitis and developed into fibromyalgia as accepted by the Office in 1996. She submitted a statement that her fibromyalgia was diagnosed in 1995. In support of this statement, appellant submitted a note from her nurse practitioner stating that the practice had treated her since 1991 and that she was initially diagnosed with fibromyalgia on December 15, 1991. She resubmitted a copy of the October 28, 1998 emergency department record and alleged that the date of 1985 was a typographical error. Appellant requested that the hospital correct this error.

Appellant submitted several reports from Dr. Cooper. On January 9 and 30, 2007 as well as May 9, 2007 Dr. Cooper diagnosed myofascial pain syndrome and fibromyalgia. He stated that she had a traumatically-induced work-related soft tissue rheumatism or myofascial pain syndrome evolving into fibromyalgia. Dr. Cooper stated that the October 28, 1998 report contained an error as all of appellant's records indicated that her symptoms of fibromyalgia began in 1995. He also completed a form report on January 30, 2007 and opined she had chronic persistent somatic pain involving the upper extremities beginning in 1995.

Dr. Richard Wilmot, a Board-certified internist, examined appellant on June 27, August 27 and October 11, 2007 as well as January 7, 2008 diagnosing fibromyalgia, sleep dysfunction and fatigue. He completed a form report on January 8, 2008. Dr. Dorota Hausner-Sypek, a Board-certified rheumatologist, diagnosed fibromyalgia and myofascial pain syndrome on December 13, 2006.

By decision dated July 28, 2008, the Office denied modification of its prior decisions finding that the weight of the medical evidence rested with Dr. Barron.

Appellant again requested reconsideration on July 15, 2009 and stated that she would require medical treatment for the rest of her life and requested medical benefits. In a separate letter, she argued that Dr. Barron did not have an accurate medical history at the time of his

³ *Id.*

examination as there was a typographical error regarding the onset of her condition in the 1998 report. Dr. Hausner-Sypek completed reports on June 2 and October 8, 2008 as well as April 8, 2009 finding multiple soft tissue tender points and diagnosing fibromyalgia and myofascial pain syndrome. On July 7, September 2 and December 1, 2008 as well as March 2, 2009 Dr. Wilmot repeated his diagnoses of fibromyalgia, sleep dysfunction and fatigue. He also noted that appellant was experiencing stress at work.

By decision dated September 29, 2009, the Office declined to reopen appellant's claim for consideration of the merits. It found that the new evidence submitted was repetitious of previous reports and did not contain relevant and pertinent new evidence. The Office further found that appellant had not submitted an argument warranting merit review as she had not presented a corrected copy of the 1998 report which listed her condition as beginning in 1985. It stated, "[T]here is no way to allow for assessment of this argument to determine its pertinence." On October 6, 2009 the Office reissued this decision with appropriate appeal rights.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides in section 8128(a) that the Office may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.⁴ Section 10.606(b) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that the Office erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by the Office; or includes relevant and pertinent new evidence not previously considered by the Office.⁵ Section 10.608 of the Office's regulations provide that when a request for reconsideration is timely, but does not meet at least one of these three requirements, the Office will deny the application for review without reopening the case for a review on the merits.⁶

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁷

ANALYSIS

The Office terminated appellant's compensation and medical benefits effective January 23, 2002. Appellant disagreed with this decision and requested reconsideration on

⁴ 5 U.S.C. §§ 8101-8193, 8128(a).

⁵ 20 C.F.R. § 10.606.

⁶ *Id.* at § 10.608.

⁷ *M.E.*, 58 ECAB 694 (2007).

July 15, 2009. She submitted a series of reports from her physicians, Drs. Wilmot, Cooper and Hausner-Sypek. These reports were similar to reports previously considered by the Office and did not offer any new medical support for appellant's continuing employment-related condition or disability.

Appellant argued that the report of Dr. Barron, a Board-certified neurologist and impartial medical examiner, was based on an incorrect factual background. She argued that, as he relied on a 1998 emergency department report, which stated that her diagnosed condition of fibromyalgia began in 1985, a typographical error according to her, his report was not based on a proper factual background. The Office declined to reopen appellant's claim on the grounds that she did not submit a corrected version of the 1998 report.

Appellant has not raised a relevant legal argument not previously considered by the Office. In the July 28, 2008 decision, the Office had previously considered her implicit argument, that the impartial medical examiner's report was based on an improper factual background. Prior to that decision appellant submitted medical records alleging that her fibromyalgia did not develop until after her employment injury as well as a copy of the 1998 emergency room report which indicated that she developed fibromyalgia in 1985. The Board finds that her contention is not new, as the Office previously considered this issue, and thus the argument is not sufficient to require the Office to reopen her claim for consideration of the merits.

CONCLUSION

The Board finds that the Office properly denied appellant's request for merit review, pursuant to 5 U.S.C. § 8128(a), as she failed to comply with the requirements of section 10.606(b)⁸ of the Office's regulations.

⁸ 20 C.F.R. § 10.606(b).

ORDER

IT IS HEREBY ORDERED THAT October 6, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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