

FACTUAL HISTORY

The Office accepted that on February 10, 2003 appellant, then a 44-year-old rural carrier, sustained lumbar and thoracic strains when her delivery vehicle was struck by a car, causing it to flip over. Immediately after the accident, she received emergency room treatment for a head injury, contusions and lacerations of the abdomen and all extremities, and lumbar and thoracic strains. Appellant remained off work for extended periods through February 27, 2005, returned to work on February 28, 2005 and again stopped work. The Office paid wage-loss compensation on the periodic rolls.

Beginning in May 2003, appellant was followed by Dr. Scott A. Kelly, an attending Board-certified physiatrist,¹ who submitted periodic reports through November 2007 diagnosing degenerative disc disease at L5-S1, a very small central L5-S1 disc herniation and intermittent left-sided L5-S1 radiculopathy without consistent neurologic signs. Dr. Kelly attributed these conditions to the February 10, 2003 injuries.

Appellant participated in a vocational job placement effort from May to September 2007. She returned to work on September 14, 2007 as a lobby greeter. The Office closed vocational rehabilitation on November 19, 2007, after appellant performed the job successfully for 60 days.

On January 22, 2008 the Office obtained a second opinion from Dr. Alexander Doman, a Board-certified orthopedic surgeon, who advised that the accepted lumbar and thoracic strains had resolved without residuals. Dr. Doman attributed appellant's lumbar pain to diabetes mellitus, morbid obesity and idiopathic degenerative disc disease.

Dr. Kelly submitted January 14 and April 14, 2008 reports diagnosing left-sided lumbar radiculopathy with no sensory deficits.

The Office found a conflict of medical opinion between Dr. Doman, for the government, and Dr. Kelly, for appellant, regarding the nature and extent of any residuals related to the accepted injuries. To resolve this conflict, it referred her to Dr. Charles T. Hopkins, a Board-certified orthopedic surgeon, as the impartial medical examiner. Dr. Hopkins found, in a May 29, 2008 report, that appellant had no residuals of the accepted lumbar and thoracic strains. He attributed her symptoms to diabetes and morbid obesity.

By notice dated August 12, 2008, the Office proposed to terminate appellant's compensation on the grounds that the medical evidence established that the accepted injuries had ceased without residuals. It afforded appellant 30 days to submit additional evidence and argument.

Appellant responded by September 4, 2008 letter, contending that medical evidence established continuing residuals. She submitted August 4, 22 and 29, 2008 reports from Dr. Kelly finding symptoms of lumbar radiculopathy without neurologic deficits. Appellant also submitted a September 2, 2008 report from Dr. R. Kolanu, an attending Board-certified

¹ In a June 1, 2004 report, Dr. Philip G. Ploska, an attending Board-certified orthopedic surgeon, diagnosed lumbar degenerative disc disease with a nonanatomic pattern of sensory loss in the left lower extremity.

neurologist, who advised that the February 10, 2003 injuries “probably” aggravated preexisting degenerative disc disease.

By decision dated October 3, 2008, the Office terminated appellant’s wage-loss and medical compensation benefits effective September 28, 2008 on the grounds that the accepted injuries had ceased without residuals. It accorded Dr. Hopkins the weight of the medical evidence.

In an October 28, 2008 letter, appellant requested reconsideration. She submitted an October 28, 2008 statement alleging that Dr. Hopkins had been rude to another patient. Appellant also provided an October 17, 2008 report from Dr. Kolanu opining that the herniated L5-S1 disc was “likely the result of or ... aggravated by” the 2003 motor vehicle accident. She also submitted an August 29, 2008 duty status form from Dr. Kelly.

By decision dated November 18, 2008, the Office denied modification of the October 3, 2008 decision on the grounds that the new evidence submitted was insufficiently rationalized to outweigh Dr. Hopkins’ opinion.

In an August 31, 2009 letter, appellant requested reconsideration, noting she had applied for disability benefits under the Social Security Act. She submitted an October 28, 2008 medical appointment form, her November 17, 2008 letter requesting job accommodations and a letter regarding work limitations. Appellant also provided a January 2009 handicapped parking form and July 13 and August 17, 2009 medical reports from Dr. Kelly diagnosing degenerative lumbar disc disease and left-sided lumbar radiculopathy. He permanently restricted appellant to sedentary duty.

By decision dated October 27, 2009, the Office denied reconsideration on the grounds that the new evidence submitted was cumulative or irrelevant, did not demonstrate legal error by the Office or advance new, relevant evidence or argument.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,² 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) constitute relevant and pertinent new evidence not previously considered by the Office.³ 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.⁴ When reviewing an Office decision denying a merit review, the function of the Board is to determine

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.608(b). *See also D.K.*, 59 ECAB 141 (2007).

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.⁵

ANALYSIS

The Office accepted that appellant sustained thoracic and lumbar strains in a February 10, 2003 motor vehicle accident. Based on the opinion of Dr. Kelly, an attending Board-certified physiatrist, the Office paid wage-loss compensation for extended work absences through December 2007. The Office terminated appellant's compensation by October 3, 2008 decision, based on an impartial medical report by Dr. Hopkins, a Board-certified orthopedic surgeon. The Office denied modification by a November 18, 2008 decision as additional medical evidence was insufficiently rationalized to establish continuing disability.

Appellant requested reconsideration on August 31, 2009, submitting additional evidence. The critical issue at the time of the last merit decisions in the case was whether the Office properly found that the medical evidence established that the accepted injuries had ceased without residuals as of September 28, 2008. To be relevant, the evidence submitted supporting the request for reconsideration must address whether the accepted February 10, 2003 injury disabled appellant for work on and after September 28, 2008 due to the accepted conditions.

Appellant submitted her request for reconsideration, noting her application for social security disability benefits.⁶ She also provided an appointment form, work limitations letter, request for job accommodations and a handicapped parking application. These documents do not address the relevant issue of whether appellant had continuing work-related residuals on and after September 28, 2008. Therefore, this evidence does not comprise a basis for reopening the case.⁷

Appellant also submitted July 13 and August 17, 2009 reports from Dr. Kelly reiterating his previous diagnoses of degenerative disc disease and lumbar radiculopathy and affirming prior work restrictions. These reports are duplicative of his reports previously of record. Evidence or argument which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.⁸

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. She did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not

⁵ *Annette Louise*, 54 ECAB 783 (2003).

⁶ The Board notes that decisions of other agencies regarding disability are not binding on the Office. The standards for establishing work-related disability under the Act, which governs the Office and the Board, are not the same as the standards set for disability retirement or social security benefits. See *Raj B. Thackurdeen*, 54 ECAB 396 (2003).

⁷ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

⁸ *Denis M. Dupor*, 51 ECAB 482 (2000).

previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

On appeal, appellant asserts that she remained disabled for work due to the accepted lumbar and thoracic strains. However, causal relationship is not at issue on the present appeal. Rather, the relevant issue is whether the Office properly denied reconsideration. As stated, the evidence submitted in support of the August 31, 2009 request for reconsideration was cumulative or irrelevant. It was insufficient to warrant a merit review of the claim. Therefore, the Office's October 27, 2009 decision was proper under the facts and circumstances of this case.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 27, 2009 is affirmed.

Issued: December 9, 2010
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