

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

E.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dallas, TX, Employer**

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**Docket No. 09-1182
Issued: January 26, 2010**

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 31, 2009 appellant filed a timely appeal from the February 6, 2009 decision of the Office of Workers' Compensation Programs denying her request for merit review. The last merit decision of record was the November 16, 2004 decision of the Office 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 on March 31, 2009, the Board lacks jurisdiction to review the merits of this claim, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision.

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).

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision on July 11, 2006 in which it affirmed a November 16, 2004 decision of the Office finding that appellant did not

establish that she sustained a recurrence of disability on or after August 1, 1997 due to her September 27, 1980 employment injury.¹ The Board found that she did not submit sufficient medical evidence to establish that she sustained a work-related recurrence of disability.² The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On April 13, 2007 appellant requested reconsideration of the Office's denial of her claim. In an April 5, 2007 report, Dr. Morris described her September 27, 1980 injury and detailed her medical treatment since that time. He stated, "The recurrence of injury that occurred on or about August 1, 1997 exacerbated her original injury of September 27, 1980.... This recurrence/exacerbation of her injury and all procedures performed are directly related to her original injury dated September 27, 1980."

In a June 19, 2007 decision, the Office denied appellant's April 2007 request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On July 11, 2007 appellant requested reconsideration of the Office's denial of her claim. In a July 10, 2007 report, Dr. Morris detailed her medical history, including her surgeries, findings on diagnostic testing and current clinical findings. He stated:

"I still believe her current medical condition is a result of the recurrence of injury on or about August 1, 1997, which exacerbated her original injury of September 27, 1980 supported by the above-stated clinical findings and current symptomatology. The rationale in medicine and the human body is that in all medical probability the stated injury resulted in these injuries. [Appellant's] previously accepted lumbar case resulted in surgery with residual symptoms requiring additional medical treatment which she is being deprived from."

In an October 10, 2007 decision, the Office denied appellant's July 2007 request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹ The Office accepted that on September 27, 1980 appellant, then a 31-year-old clerk, sustained a lumbosacral strain when she attempted to open a jammed door with a crowbar at work on that date. On August 7, 1997 and February 17, 1998 appellant underwent fusion surgeries at L4-5 through L5-S1 which were performed by Dr. Robert J. Henderson, an attending Board-certified orthopedic surgeon. In a December 9, 1998 report, Dr. Henderson stated that she had been under his care since June 30, 1997 when she presented with ongoing back and leg pain complaints since her "on-the-job injury July 27, 1980." In a June 30, 1997 report, he stated that appellant had a history of injury "from a work-related event July 27, 1980, trying to open trailer doors with a crowbar."

² The Board also affirmed the Office's July 1, 2005 decision on the grounds 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). Appellant had submitted an April 11, 2005 report in which Dr. A.J. Morris, an attending Board-certified orthopedic surgeon, stated that she was seen by him on April 11, 2005 for an initial visit "with the acute onset of cervical and lumbar pain secondary to an on-the-job injury September 27, 1980." Dr. Morris indicated that examination revealed lumbar tenderness with decreased flexion. He diagnosed "lumbar pain/radiculitis -- failed back syndrome" and indicated that appellant could not return to work. Under the heading "treatment and plan" Dr. Morris stated, "Patient has a failed back syndrome from her original injury in 1980."

On June 12, 2008 appellant requested reconsideration of the Office's denial of her claim. She submitted a June 10, 2008 report in which Dr. Morris described her medical history, including her current clinical symptoms. Dr. Morris stated, "The above objective findings correlate with her complaints of continued pain and discomfort. [Appellant's] recurrence of injury on or about August 1, 1997 to the cervical, lumbar and bilateral knee pain is directly related to her original injury of September 27, 1980."

In a September 17, 2008 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On November 12, 2008 appellant requested reconsideration of her claim. She submitted a November 5, 2008 report from Dr. Morris who stated that he had evaluated his medical narratives in an attempt to provide as much medical rationale as he could concerning her medical condition. Dr. Morris indicated that appellant's medical condition would deteriorate if approval of her treatment continued to be denied and stated:

"Her [computerized tomography] scan performed on May 2, 2008 revealed a broad-based disc bulge at L3-L4 and facet arthrosis with disc degeneration at L3-L4 as a result of recurrence (August 1, 1997) as directly related to her original injury (September 27, 1980) causing damage to the lumbar and cervical spine clearly substantiates and supported by these findings.

"The objective findings and her subjective complaints correlate with her continued pain and discomfort to her lumbar, cervical and bilateral knee areas.

"As previously stated on June 10, 2008, her recurrence of injury on/or about August 1, 1997 is directly related to her original injury of September 27, 1980 which occurred during the course and scope of employment while employed by the U.S. Postal Service."

In a February 6, 2009 decision, the Office denied appellant's November 2008 request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ 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.⁴ 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

³ 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).

⁴ 20 C.F.R. § 10.606(b)(2).

of the date of that decision.⁵ 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.⁶ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record⁷ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁸

ANALYSIS

The Office accepted that on September 27, 1980 appellant sustained a lumbosacral strain when she attempted to open a jammed door with a crowbar at work on that date. It denied her claim that she sustained a recurrence of disability on or after August 1, 1997 due to her September 27, 1980 employment injury on the grounds that she did not submit sufficient medical evidence to establish that she sustained such a work-related recurrence of disability.

In connection with her November 12, 2008 reconsideration request, appellant submitted a November 5, 2008 report of Dr. Morris, an attending Board-certified orthopedic surgeon, described the findings of May 2008 diagnostic testing of appellant's low back and stated that these findings revealed that on August 1, 1997 appellant had sustained a recurrence which was directly related to her September 27, 1980 injury. Dr. Morris stated, "As previously stated on June 10, 2008, her recurrence of injury on/or about August 1, 1997 is directly related to her original injury of September 27, 1980 which occurred during the course and scope of employment while employed by the U.S. Postal Service."

The Board finds that the submission of this evidence does not require reopening of appellant's claim for further review of the merits of her claim. Dr. Morris' November 5, 2008 report is not relevant to the main issue of the present case, *i.e.*, whether appellant submitted rationalized medical evidence showing that she sustained a recurrence of disability on or after August 1, 1997 due to her September 27, 1980 employment injury. He did not provide any opinion on appellant's disability but rather only expressed his belief that a work-related "recurrence of injury" had occurred without providing any explanation for this belief. Dr. Morris' November 5, 2008 opinion is similar to other medical reports previously considered and rejected by the Office in that it merely contains an opinion on causal relationship without any medical rationale supporting the conclusion stated.

Appellant has not established that the Office improperly denied her request for further review of the merits of its November 16, 2004 decision under section 8128(a) of the Act, because she did not submit evidence showing 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.

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

⁷ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

⁸ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

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).

ORDER

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

Issued: January 26, 2010
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