

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

S.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
St. Charles, MO, Employer**

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**Docket No. 10-996
Issued: November 12, 2010**

Appearances:
Appellant, pro se
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 March 1, 2010 appellant filed a timely appeal from the October 28, 2009 decision of the Office of Workers' Compensation Programs denying her request for further review of the merits of her case. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision of record was the Office's October 10, 2008 decision terminating her compensation. 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 For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3 (2008).

FACTUAL HISTORY

The Office accepted that on September 19, 1975 appellant, then a 32-year-old special delivery messenger, sustained a low back contusion, lumbar strain, mild concussion and left knee strain due to a fall at work. It later accepted a consequential left knee patellectomy of September 19, 1977. Appellant stopped work following the injury and did not return. The Office paid her compensation for periods of disability.

In an April 4, 2008 decision, the Office terminated appellant's compensation effective April 13, 2008 on the grounds that she had no residuals of her accepted employment injuries after that date. It based its termination on the December 5, 2007 and January 15, 2008 reports of the Dr. Jack C. Tippett, a Board-certified orthopedic surgeon who served as an Office referral physician.

Appellant requested review of her claim before an Office hearing representative. At the August 6, 2008 hearing, appellant's counsel, at the time, presented various arguments. He asserted that there were irregularities with respect to the statement of facts provided to Dr. Tippett, that the physician's opinion was not well rationalized, that referrals should have been made to additional specialists and that appellant was not adequately apprised of her right to have her doctor attend the second opinion examination. Appellant testified regarding the examination with Dr. Tippett and asserted that he refused to look at medical records she brought with her. After the hearing, Robert Garfield submitted an undated nine-page brief in which he expanded upon the arguments raised at the hearing.

In an October 10, 2008 decision, the Office hearing representative affirmed the April 4, 2008 decision. She discussed the various arguments made by Mr. Garfield as well as those contained in the submitted brief, but found that they did not establish that the termination of compensation was improper.

In a September 29, 2009 letter, appellant requested reconsideration of her claim and argued that she continued to have numerous physical symptoms and limitations which showed that she had residuals of her work injuries. She asserted that the opinion of Dr. Tippett contained inaccuracies and was not sufficiently well rationalized to constitute the weight of medical opinion. Appellant claimed she had a disabling emotional condition caused by her work injuries and indicated that her claim was supported by a March 30, 1993 report of Dr. Samuel Bernstein, an attending clinical psychologist.² She submitted numerous other medical reports and a copy of the brief previously of record.

In an October 28, 2009 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

² Appellant submitted a copy of the report. Dr. Bernstein indicated that appellant had a depression and anxiety condition and was unemployable in the labor market.

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 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 While a 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.⁹

ANALYSIS

The Office accepted that on September 19, 1975 appellant sustained a low back contusion, lumbar strain, mild concussion, left knee strain due to a fall at work. It later accepted a consequential left knee patellectomy of September 19, 1977. The Office paid appellant compensation for periods of disability but terminated her compensation effective April 13, 2008 based of the opinion of Dr. Tippett, a Board-certified orthopedic surgeon who served as an Office referral physician.

In the September 29, 2009 reconsideration request, appellant argued that she continued to have physical symptoms and limitations related to her accepted work injuries. She argued that the opinion of Dr. Tippett was not sufficiently well rationalized to serve as the basis for the termination of her compensation. The submission of this argument did not require reopening of appellant's

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).

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).

⁹ *John F. Critz*, 44 ECAB 788, 794 (1993).

claim for merit review as the Office has already considered the sufficiency of Dr. Tippett's opinion with respect to the termination of appellant's compensation.¹⁰

Appellant claimed she had a disabling emotional condition caused by her work injuries and submitted a March 30, 1993 report of Dr. Bernstein, an attending clinical psychologist. However, this evidence and argument is not relevant to the underlying issue of the present case. The Office has not accepted that appellant sustained an emotional condition and Dr. Bernstein did not provide any opinion on the causal relation of such a condition.¹¹ Appellant submitted numerous other medical reports together with the brief from her former counsel; but all of these documents had previously been submitted and considered by the Office. Evidence that is duplicative of that previously of record and considered by the Office does not constitute a basis for further merit review.¹²

On appeal appellant argued that the Office hearing representative did not consider the arguments that she and Mr. Garfield made at the oral hearing; however, a review of the October 10, 2008 decision shows that the Office hearing representative gave extensive consideration to these arguments.

Appellant has not established that the Office improperly denied her request for further review of the merits of its October 10, 2008 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).

¹⁰ Appellant's own opinion that she had work-related residuals would not be relevant because the main issue of the present case, *i.e.*, whether the Office presented medical evidence justify the termination of compensation, is medical in nature and would usually be resolved by the submission of medical evidence.

¹¹ Dr. Bernstein's report is not relevant for the further reason that it pertains to a period many years before the termination of appellant's compensation in April 2008.

¹² See *Brent A. Barnes*, 56 ECAB 336 (2005).

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 12, 2010
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