

FACTUAL HISTORY

On September 4, 2008 appellant, a 47-year-old mail processor, filed an occupational disease claim (Form CA-2) for severe knee and back pain and osteoarthritis in her knees. She attributed her condition to the performance of her employment duties. Appellant first became aware of her condition on July 25, 2008 and that it was caused by her federal employment on July 28, 2008.

In reports dated July 28 and August 11, 2008, Dr. Delilah Armstrong, a Board-certified internist, diagnosed osteoarthritis, pain and lumbar radiculopathy. She also provided work restrictions.

On July 31, 2008 Dr. James R. Tagliabue, a Board-certified diagnostic radiologist, reported that x-rays of appellant's lumbosacral spine revealed no evidence of compression or subluxation. He reported that x-rays of appellant's left knee revealed no evidence of fracture or dislocation. Dr. Tagliabue diagnosed knee and low back pain.

Appellant submitted medical records from Dr. Armstrong and Dr. Lilia M. Henry, a Board-certified internist, that excused her from work for intermittent periods of time and provided when appellant could return to work. Dr. Armstrong noted that, when appellant returned to work, she could not work more than six hours per day. On October 3, 2008 the Office received a September 26, 2008 offer of limited duty for six hours of work a day.

On November 10, 2008 appellant submitted records signed by Nancy J. Holmes, a physician's assistant, dated July 30 to September 9, 2008. She also submitted an unsigned medical authorization form from Kaiser Permanente.

In a narrative dated September 12, 2008, a supervisor stated that appellant claimed her injury was "not job related." The supervisor stated that appellant was authorized to work within her limitations, which restricted her to no more than a six-hour workday.

On October 24, 2008 appellant described her history of injury and attributed her condition to the motion of pulling trays that weigh more than 25 pounds from the back of a pie wagon rack at a quick pace and in a simultaneous motion.

In a November 13, 2008 decision, the Office denied the claim, finding that the evidence of record did not demonstrate that appellant's alleged medical condition was caused by the accepted employment factors.

On November 5, 2009 appellant requested reconsideration. She resubmitted Dr. Armstrong's July 30, 2008 report, copies of the notes signed by Ms. Holmes and the unsigned medical authorization form from Kaiser Permanente. Appellant also resubmitted the September 26, 2008 offer of modified limited duty.

By decision dated December 7, 2009, the Office denied reconsideration without conducting a merit review.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.³ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁵ 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.⁶ 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.⁷ 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.⁸

ANALYSIS -- ISSUE 1

Appellant's reconsideration request did not allege that the Office erroneously applied or interpreted a specific point of law. It did not advance a relevant legal argument not previously considered by the Office. Therefore, appellant is not entitled to a merit review based upon the first two grounds noted.

Concerning the submission of new relevant and pertinent evidence not previously considered by the Office, appellant submitted copies of Dr. Armstrong's report, the report signed by a physician's assistant, an unsigned authorization form from Kaiser Permanente and the September 26, 2008 offer of limited duty. This evidence was all previously of record and considered by the Office in the November 13, 2008 merit decision. This evidence does not constitute a basis for reopening appellant's claim for further merit review.⁹

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8128(a).

⁴ *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁵ 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).

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(b).

⁹ *See Richard Yzdron*, 57 ECAB 207 (2006).

Appellant has not satisfied any of the above-mentioned criteria, the Board finds that the Office properly refused to reopen her case for merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a merit review of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 17, 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