

FACTUAL HISTORY

This case has previously been on appeal before the Board. In a February 24, 2005 decision, the Board affirmed the Office's August 25, 2003 decision. It found that appellant did not establish that she sustained a recurrence of disability commencing February 12, 1999 due to her August 27, 1997 employment injury.² The facts and history contained in the prior decision are incorporated by reference.

On February 24, 2006 appellant requested reconsideration. In a March 22, 2006 decision, the Office denied her request for reconsideration, finding it was untimely filed. On April 17, 2006 appellant appealed the March 22, 2006 decision. In an April 26, 2007 order remanding case, the Board set aside the March 22, 2006 decision finding her request for reconsideration was timely filed.³ The Board remanded the case to the Office to issue a decision under the appropriate standard of review. In a June 1, 2007 decision, the Office denied modification of its prior determination.

Appellant requested reconsideration on May 28, 2008. Her representative included a 72-page request for reconsideration. She made numerous arguments pertaining to the sufficiency of the evidence and critiqued the reports of physicians who had treated appellant. In an October 30, 2008 decision, the Office denied modification of its prior decisions.

In an October 28, 2009 magnetic resonance imaging (MRI) scan report, Dr. Kenneth Fortgang, a Board-certified diagnostic radiologist, noted that approximately four and a half months after an injury sustained on the job as a letter carrier, appellant had a January 8, 1998 MRI scan which was normal. He reviewed a report dated September 29, 2006, and noted that it was contrary to the January 1998 study. The 2006 report revealed a posterior central annular tear with stripping of Sharpey's fibers from the superior endplate of L4 without neural impingement. He advised that appellant had an L4-5 desiccation with right foramen disc herniation and protrusion producing retrodiscal foraminal compromise. An L5-S1 minimal annular bulging was noted. Dr. Fortgang opined that the findings demonstrated pathology which was most likely of traumatic etiology. He reviewed a December 7, 2006 radiology report, and noted that it described an L4-5 small annular tear and L3-4 annular tear which could not be aged. Dr. Fortgang advised that additional diagnostic reports revealed annular tears at L3-4 and L4-5 and disc desiccation at L4-5. He stated that it was "unlikely that the relatively brief interval from the injury to the study with resulted in the degree of desiccation at L4-5 and therefore I doubt that this finding is specifically related with the described injury. The finding at L3-4 does appear to represent a very subtle but probably real linear annular tear and that finding is most likely related with the approximate timeframe of the recent injury." Dr. Fortgang reiterated that the annular tear at L3-4 "may well be related with the timeframe of the recent four and half months prior to injury."

² Docket No. 04-2117 (issued February 24, 2005). Appellant's claim was accepted for a lumbosacral strain on August 27, 1997. In a March 24, 2003 decision, the Board remanded the case to consider whether appellant filed a timely request for reconsideration. Docket No. 02-1749.

³ Docket No. 06-1217 (issued April 26, 2007).

On October 29, 2009 appellant requested reconsideration. She provided a copy of an August 27, 1997 statement. Appellant alleged that on November 29, 1997 her supervisor asked her to sign an updated modified job description, which was in line with the limitations prescribed by her physician. She related that the first item, casing mail, was not in her limitations. Appellant alleged that her supervisor informed her that she would not be required to reach above the shoulder. She explained that the repetitive motion of casing had caused her problems and she was informed that the requirements could always be changed. Appellant agreed to try the position. On December 1, 1997 another supervisor requested that she case mail and her case was not modified. After some accommodations were made, appellant attempted to case the mail; however, her back began to hurt after 40 minutes. She went to her supervisor to explain that the work violated her restrictions. Appellant alleged that she was only to stand for six hours intermittently not stationary. She was told to continue working and alleged that her shoulder began to ache as well as her back. Appellant was directed to file a separate claim for her shoulder. She provided a copy of her claim for a December 1, 1997 traumatic injury.

Appellant's representative also requested reconsideration on October 29, 2009. She made numerous arguments, many of which were previously made and considered in prior decisions. She contended that the medical evidence that the Office relied upon was not of sufficient probative value and that new medical evidence raised substantial questions concerning the correctness of the Office's decisions. She noted that she was submitting new evidence that was relevant and pertinent to the issue of continuing disability and/or residuals from the August 27, 1997 work injury. Appellant's representative alleged error by the Office when it referred to an MRI scan read by Dr. Keivan Shifteh, a Board-certified diagnostic radiologist, as undated, when it was actually dated April 30, 2007. She suggested it was error that the report was not properly reviewed. The representative contended that appellant was misdiagnosed, and questioned why she was treated by over 25 physicians. She denied that appellant delayed or refused to be tested, she questioned the time frames for filing a claim for an injury, accused the Office of trying to show appellant in a bad light and she explained that her 72-page brief was to clarify many of the issues and medical evidence that the Office either disregarded or misinterpreted. Appellant's representative referred to evidence from Dr. Michael Winer, a Board-certified orthopedic surgeon, dated September 4, 1998, which she alleged supported that the August 27, 1998 injury aggravated the preexisting spondylosis of the lumbar spine. She asserted that appellant's August 27, 1997 injury was more than a strain/sprain, and included annular tears to L3-4 and L4-5 as shown in previous medical evidence and the new medical evidence submitted on reconsideration.

By decision dated November 19, 2009, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request was irrelevant, immaterial and repetitious in nature and insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁴ 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.⁵ 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.⁶ 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.⁷

ANALYSIS

Appellant disagreed with the denial of her claim for a recurrence of disability and requested reconsideration on October 29, 2009.

In her January 26, 2005 request for reconsideration, appellant and her representative submitted numerous arguments. The underlying issue on reconsideration is a medical one regarding a claimed recurrence of disability beginning February 2, 1999 causally related to her August 27, 1997 work injury. Their arguments included: that the medical evidence was not sufficient; that appellant was permanently and partially disabled; that the Office erred by finding an April 30, 2007 report was undated, that appellant was misdiagnosed and received treatment from over 25 physicians, that the Office tried to place appellant in a negative light; that appellant did not refuse or delay testing, that appellant questioned the time frames for filing a claim, that the Office either disregarded or misinterpreted medical evidence; that Dr. Winer's September 4, 1998 report supported that appellant's preexisting spondylosis of the lumbar spine was aggravated and that her August 27, 1997 injury was more than a strain/sprain, and included annular tears to L3-4 and L4-5 and was supported by previous and new medical evidence. The Board notes that appellant and her representative merely reiterated her previous contentions. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.⁸ Appellant did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office.

⁴ 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).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *Khambandith Vorapanya*, 50 ECAB 490 (1999); *John Polito*, 50 ECAB 347 (1999); *David J. McDonald*, 50 ECAB 185 (1998).

The Board also finds that appellant did not provide any relevant or pertinent new evidence to the issue of whether she sustained a recurrence of disability commencing on or after February 2, 1999 causally related to the August 27, 1997 employment injury. Appellant submitted a new report, an October 28, 2009 MRI scan from Dr. Fortgang. While Dr. Fortgang reviewed earlier reports and opined that appellant's annular tear might have existed four and a half months prior to her injury, he did not specifically address whether she sustained a recurrence of disability commencing February 2, 1999 causally related to the August 27, 1997 employment injury. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁹

Consequently, the evidence submitted by appellant on reconsideration does not satisfy any of the three regulatory criterion, noted above, for reopening a claim for merit review. Therefore, the Office properly denied her request for reconsideration.

On appeal, appellant repeated her previously stated contentions and continued to assert that she suffered residuals from her August 27, 1997 employment injury; however, the Board does not have jurisdiction over the merits of the claim. Appellant has not established that the Office erroneously applied or interpreted a specific point of law, or advanced a relevant new argument not previously submitted.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

⁹ *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB116 (2000).

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 4, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board