

FACTUAL HISTORY

On October 28, 2005 appellant, then a 45-year-old modified letter carrier, filed an occupational disease claim for compensation alleging that she sustained a neck condition related to repetitive work activities since April 20, 2002. The employing establishment indicated that she had not been to work since March 2005. By decision dated September 28, 2006, the Office denied the claim. It accorded determinative weight to Dr. Thomas J. Sabourin, a Board-certified orthopedic surgeon and an Office referral physician, who opined that, while appellant had degenerative disc disease of the cervical spine at multiple levels, this condition was due to factors other than federal employment; namely, a natural process of spinal degeneration due to aging and materially aggravated by a significant neck injury in 1994 which was due to a nonwork-related automobile accident. Dr. Sabourin also opined that while appellant had temporary aggravation of neck pain or symptoms while carrying a mail sack for approximately 15 months, there was no material change in the underlying degenerative neck condition. He further noted that appellant had not used a mailbag since 2002 and opined that any temporary aggravation of the underlying cervical degeneration was resolved.

Appellant disagreed with the Office's decision and requested an oral hearing before a hearing representative, which was held February 9, 2007. Subsequent to the hearing, the Office received statements from her and her representative, corrections to the transcript and a duty status report from her physician. By decision dated May 2, 2007, an Office hearing representative affirmed the September 28, 2006 decision.

On May 22, 2007 appellant requested reconsideration. No evidence or argument accompanied her request. By decision dated June 12, 2007, the Office denied appellant's request for reconsideration.

On April 29, 2008 appellant's attorney requested reconsideration and provided arguments including that appellant worked outside of her restrictions. The Office also received a November 28, 2007 report from Dr. John B. Dorsey, a Board-certified orthopedic surgeon, a May 2, 2008 letter from appellant's attorney and an April 30, 2008 statement from appellant. By decision dated September 15, 2008, the Office denied modification of the prior decisions. It noted that Dr. Dorsey's opinion on causal relationship was not based on an accurate history of the duties performed by appellant.

On May 5, 2009 appellant's attorney requested reconsideration. He argued that the Office's facts about appellant's job duties were incorrect and the veracity of her statement should be accepted as factual. The Office also received a duplicative copy of Dr. Dorsey's November 28, 2007 report, which it previously considered, along with a July 15, 2008 report from Dr. Kristi A. Dove, a Board-certified neurologist. By decision dated July 13, 2009, the Office denied appellant's request for reconsideration.

In a September 3, 2009 letter, appellant requested reconsideration. She stated that, when her claim was denied on the grounds that the medical evidence was insufficient to establish that her neck condition resulted from her activities as a postal worker, she was unclear whether that meant she had not proven that she did the jobs or that the physicians did not tie together the injury with her job. Appellant indicated that Nurse Sherry Ann Coffin's May 4, 2003 report in

one of her other claims² was evidence that she performed the repetitive duties of lifting, weighing and stacking boxes over her shoulder. She argued that those duties could have caused her neck injury. Appellant noted that Nurse Coffin stated “Of significance was the activities of weighing the empty boxes due to the amount of repetitive bending and stooping involved in picking up the boxes for weighing. This was discussed with the supervisor in detail as to why she cannot bend over the bin and pick up even these empty boxes; however she can work at waist height or above in doing this activity.” Appellant also indicated that Dr. Dorsey, in his September 2, 2009 report, stated that her cervical condition was aggravated by her modified-duty work during the period February 13, 2003 to March 21, 2005. She also contended that her work duties were too strenuous. Copies of the May 4, 2003 report from Nurse Coffin and the September 2, 2009 report from Dr. Dorsey were not provided.

By decision dated October 14, 2009, the Office denied appellant’s request for reconsideration without a merit review finding that she did not raise substantive legal questions or include new and relevant evidence.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees’ Compensation Act,³ the Office’s regulations provide 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.⁴ 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 of the merits.⁵

ANALYSIS

Appellant disagreed with the denial of her claim for a neck condition and requested reconsideration. The underlying issue on reconsideration is medical in nature, whether appellant’s neck condition is causally related to her work activities beginning April 20, 2002.

In her reconsideration request of September 3, 2009, appellant argues that her work duties were too strenuous and that a May 4, 2003 nurse’s report in another claim supports that she performed repetitive duties. In the instant claim, the Office found that the medical evidence

² The record indicates that appellant has filed two other claims. Under file number xxxxxx159, the Office accepted that appellant’s full-time letter carrier duties in 2002 caused lumbar strain and an aggravation of thoracic and lumbosacral neuritis. Under file number xxxxxx292, it denied her claim for an emotional condition allegedly sustained on March 4, 2005. These other claims are not before the Board on the present appeal.

³ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the 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)(1)-(2). See *Susan A. Filkins*, 57 ECAB 630 (2006).

⁵ *Id.* at § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006) (when an application for review of the merits of a claim does not meet at least one of the three regulatory requirements the Office will deny the application for review without reviewing the merits of the claim).

did not establish her claim. It did not accept that appellant worked beyond her restrictions as alleged by appellant. The Board only has jurisdiction over the present claim and a copy of the nurse's report referenced by appellant on reconsideration is not of record. Appellant's assertions regarding the contents of evidence not presently before the Board does not show that the Office erroneously applied or interpreted a specific point of law and it does not advance a relevant legal argument not previously considered by the Office. Additionally, her argument regarding her work duties was previously addressed in the Office's July 13, 2009 decision. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁶ Appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also did not submit any pertinent new and relevant evidence regarding the underlying medical issue. While she alleged Dr. Dorsey's September 2, 2009 report was supportive of her claim, a copy of Dr. Dorsey's report is not of record.⁷ Thus, appellant did not provide any relevant and pertinent new evidence to establish that her neck condition is causally related to her work activities.

Appellant did not 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 submit new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

On appeal, appellant reiterates her contention that her doctors have justified her claim that her cervical condition resulted from her work duties and that her statements regarding her work assignments were not exaggerated. As noted, the Board does not have jurisdiction over the merits of this case. The issue is whether the Office properly denied appellant's request for merit review. For reasons stated, the Board finds that she is not entitled to further review of the merits.

CONCLUSION

The Board finds that the Office properly denied appellant's request for further review of the merits of her claim under section 8128(a).

⁶ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁷ The record reflects that the Office received Dr. Dorsey's September 2, 2009 report on October 27, 2009, after issuance of its October 14, 2009 decision. The Board may not consider evidence that was not in the case record when the Office rendered its final decision. *See* 20 C.F.R. § 501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 14, 2009 is affirmed.

Issued: January 10, 2011
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board