

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

A.C., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Bay Pines, FL, Employer**

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**Docket No. 10-1232
Issued: January 12, 2011**

Appearances:
Geoffrey P. Damon, Esq., for the appellant
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 21, 2010 appellant, through her attorney, filed a timely appeal of a November 13, 2009 decision of the Office of Workers' Compensation Programs denying further merit review. Because over one year elapsed between the most recent merit decision of November 12, 2008 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

¹ For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to file a Board appeal. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on and after November 19, 2008, a claimant has 180 days to file a Board appeal. *See* 20 C.F.R. § 501.3(e).

On appeal, appellant asserted that the review of her reconsideration request should have been conducted by a new claims examiner. Appellant's attorney argued that appellant had submitted sufficient new and relevant evidence to warrant merit review.

FACTUAL HISTORY

On August 24, 1983 appellant, then a 53-year-old nurse, filed a traumatic injury claim alleging injury to her pelvis, right leg, lower back, left shoulder and face on August 23, 1983 when an unsecured car rolled into her while transporting a patient. On March 1, 1984 the Office accepted her claim for cervical and lumbar strain depressive reaction and stomach ulcers resulting from psychotropic medications.

By decision dated June 14, 1996, the Office denied appellant's claim for the additional conditions of hypertension, tinnitus and hearing loss.

In a letter dated March 9, 2007, the Office proposed to terminate appellant's compensation benefits for the conditions of lumbar strain, cervical strain and stomach ulcers. It found that the weight of the medical opinion evidence rested with the September 27, 2006 report of Dr. John McGrail, a Board-certified orthopedic surgeon and the impartial medical specialist. Dr. McGrail found no physical findings consistent with residual trauma due to the 1983 employment injury. The Office also noted that Dr. Mark Reynolds, a Board-certified psychiatrist, examined appellant on November 21, 2006 and diagnosed depressive disorder. He opined that, while appellant continued to experience medical residuals of this condition, she was not disabled due to her accepted depression. Dr. Reynolds stated, "The claimant has not been on psychotropic medications for many years and I find no indication her [d]epressive condition or medications provided to treat that condition are causally related to any ongoing gastrointestinal complaint." The Office determined that appellant no longer had residuals of stomach ulcers causally related to medications taken for work-related depression. It allowed 30 days for a response.

Appellant submitted a January 29, 2007 narrative statement which addressed the limited nature of the second opinion and impartial medical examinations. Dr. Kimberly Stock, a Board-certified internist, completed a report on February 22, 2007. She opined that appellant could not return to her date-of-injury position due to both her original injury and ongoing physical consequences as well as natural arthritic changes due to advance age. Dr. Jeffrey A. Lefkowitz, a Board-certified gastroenterologist, performed an upper endoscopy on March 26, 2007 and diagnosed small hiatal hernia, gastric polyposis and minimal gastritis. In an April 30, 2007 decision, the Office terminated appellant's wage-loss and medical benefits for her back conditions as of that date.²

In a letter dated May 25, 2007, appellant disagreed with the Office's April 30, 2007 termination and alleged that the physical examinations of Dr. McGrail and the second opinion physician, Dr. Alvare Vitol, an osteopath, were insufficient. She requested a review of the written record. Appellant submitted comments on the March 9, 2009 pretermination notice and

² This decision was authored by Karen Spehar, senior claims examiner.

Dr. McGrail's report. She resubmitted a copy of a March 19, 2007 functional capacity evaluation and other medical reports dated from 1983.

Dr. Michael G. Stiff, a Board-certified gastroenterologist, examined appellant on August 24, 2000 and noted that she had a gastric ulcer on the incisura angularis and recommended testing. On September 13, 2000 appellant underwent a colonoscopy and upper endoscopy. She was diagnosed with severe diverticular disease, diminutive polyp and active internal hemorrhoids. The upper endoscopy described very mild redness to the antrum and biopsies were taken. On March 26, 2007 Dr. Lefkovitz ordered a biopsy of a gastric polyp which was negative for dysplasia or malignancy.

By decision dated November 30, 2007, an Office hearing representative affirmed the termination of appellant's compensation benefits.

In a July 14, 2008 letter, appellant requested reconsideration. On September 10, 2008 she submitted a change of address. Appellant provided a narrative request for reconsideration on October 3, 2008 contending that the Office restore her compensation benefits. She repeated her assertions regarding her examination by Drs. McGrail and Vitol and alleged that she had additional conditions as a result of her employment injuries. On June 13, 2008 Dr. Stephen T. Weeds, Board-certified in physical medicine and rehabilitation, diagnosed degenerative disc disease in the neck and low back, chronic L5 radiculopathy, knee osteoarthritis and gait disturbance. In reports dated April 23 and May 7, 2008, Dr. Ying H. Chen, an osteopath, diagnosed degenerative disc disease and spondylosis. He noted appellant's history of work injury. Dr. Chen opined that some of appellant's back pain symptoms were due to L5-S1 spondylolisthesis. He recommended pain relief and emotional treatment. Appellant underwent a cervical magnetic resonance imaging (MRI) scan on April 28, 2008 which demonstrated multilevel degenerative disc disease and central canal stenosis as well as facet arthropathy and osteophytic narrowing of the neural foramina.

Dr. Abraham Jacob, a Board-certified otolaryngologist of professorial rank, examined appellant on June 24, 2008. Appellant related her hearing loss to her 1983 employment injury and medications for treatment of that injury. Dr. Jacob diagnosed profound bilateral profound sensorineural hearing loss and tinnitus. He stated that the medications that appellant reported taking in 1983 "did not strike me as particularly ototoxic. Therefore, we will never know the reasons for her hearing impairment." On November 1, 2008 appellant provided another change of address.

In a decision dated November 12, 2008, the Office denied modification of the April 30 and November 30, 2007 decisions.

Appellant's attorney requested reconsideration on October 22, 2009. Appellant submitted an August 6, 2009 electrocardiogram and an August 14, 2009 record of a brief episode of atrial fibrillation. Counsel argued that the Office could reopen appellant's claim on its own motion and that appellant had submitted evidence that she had residuals of her 1983 employment injury. He contended that her pain was disabling and that emotional conditions were compensable under the Federal Employees' Compensation Act. Counsel requested that the

Office vacate the November 12, 2008 decision and reinstate appellant's benefits. Appellant submitted a change of address on November 4, 2009.

On November 13, 2009 the Office denied appellant's request for reconsideration finding that she did not submit new or relevant evidence or legal argument.³

LEGAL PRECEDENT

The Office's regulations provide that a timely request for reconsideration in writing may be reviewed on its merits if the employee has submitted evidence or argument which shows that the Office erroneously applied or interpreted a specific point of law; advances a relevant legal argument not previously considered by the Office, or constitutes relevant and pertinent new evidence not previously considered by the Office.⁴

ANALYSIS

The Board finds that the Office properly denied reopening appellant's claim for reconsideration of the merits on November 13, 2009.

In support of her reconsideration request, appellant submitted medical records pertaining to her cardiac condition. This condition was not accepted as related to her employment injury and is not relevant to the termination of her benefits for her back condition.

Appellant's attorney cited general principles of Board case law and Office procedures concerning the reopening of appellant's case on the merits. He addressed the merits of the medical evidence of record to argue that she had residuals of her 1983 injury. Counsel's contentions, however, are not sufficient to require the Office to reopen appellant's claim for reconsideration of the merits. The Board, as noted, does not have jurisdiction over the merits of the claim.

The Office terminated appellant's compensation and medical benefits on the grounds that the weight of the medical opinion evidence established that her disability had ceased. In order to require the Office to reopen her claim, appellant must submit pertinent new and relevant medical evidence establishing continuing disability. She submitted a copy of the November 12, 2008 Office decision and expressed disagreement with the findings and conclusions of the claims examiner. Appellant's assertions are not sufficient to require the Office to reopen her claim for reconsideration of the merits and are not relevant to the central issue, whether the medical evidence established continuing disability or medical residuals of her back and ulcer conditions.

On appeal appellant asserted that the senior claims examiner who authored the November 13, 2009 reconsideration decision was previously involved in the claim. The Office's procedure manual states that each request for reconsideration must be handled by a senior claims

³ Ms. Gumeny, senior claims examiner, authored this decision.

⁴ 5 U.S.C. §§ 10.609(a) and 10.606(b).

examiner who was not involved in the making of the contested decision.⁵ The record on appeal establishes that the contested decision of April 30, 2007 was authored by a different senior claims examiner. Therefore, the Board finds that the Office appropriately followed its procedures.

CONCLUSION

The Board finds that the Office properly declined to reopen appellant's claim for consideration of the merits on November 13, 2009.

ORDER

IT IS HEREBY ORDERED THAT the November 13, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 12, 2011
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

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2(b) (May 1996).