

case.² Pursuant to the Federal Employees' Compensation Act³ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the November 2, 2009 nonmerit decision.

ISSUE

The issue is whether the Office properly denied appellant's request to reopen her case for further review of the merits pursuant to 5 U.S.C. § 8128.

FACTUAL HISTORY

The Office accepted that on January 4, 1992 appellant, then a 38-year-old letter carrier, sustained a left thigh contusion, low back strain and a herniated nucleus pulposus at L5-S1.⁴ Appellant worked limited duty with intermittent periods of total and partial disability.

By decision dated April 20, 2007, the Office found that appellant failed to establish a recurrence of disability on December 12, 2006 causally related to her employment injury. It determined that the medical evidence was insufficient to establish that she could not work four hours a day in her light-duty position.

In a decision dated November 14, 2007, a hearing representative affirmed the April 20, 2007 decision. She found that appellant had not submitted sufficient medical evidence to establish that she was disabled from employment.

Appellant requested reconsideration. By decision dated April 16, 2008, the Office denied modification of its November 14, 2007 decision. It again found the medical evidence insufficient to show that appellant's injury-related condition worsened such that she had to stop work on December 12, 2006.

On July 14, 2008 appellant requested reconsideration. In a decision dated October 15, 2008, the Office denied modification of its prior merit decision. It determined that appellant's attending physician, Dr. Christopher Lutz, a Board-certified physiatrist, did not provide sufficient clinical findings to establish that her accepted condition worsened.

The Office subsequently determined that a conflict arose between Dr. Lutz and a second opinion examiner, Dr. Andrew Hutter, a Board-certified orthopedic surgeon, regarding appellant's current condition and work restrictions. It referred her to Dr. Norman Heyman, a Board-certified orthopedic surgeon, for an impartial medical examination.

² For final adverse decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *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 an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Office also accepted that appellant sustained a low back and left shoulder contusion due to a traumatic injury on January 8, 1990 assigned file number xxxxxx223. The case was combined with the current case number.

In a report dated August 31, 2009, Dr. Heyman diagnosed chronic lumbosacral sprain and strain, a lumbar laminectomy and discectomy at L5-S1, a rotator cuff tear of the supraspinatus and infraspinatus on the right side and a contusion of the right knee with patellofemoral syndrome. He disagreed with Dr. Hutter's finding that appellant could work and concluded that she could not perform even sedentary employment given her difficulty walking and sitting. Dr. Heyman attributed her right rotator cuff tear to an indirect injury resulting from her prior back injuries. He found it likely that, when "[appellant's] back goes into spasm and her leg gives away, she loses her balance because of the weakness of her leg and falls injuring her right shoulder and right knee." Dr. Heyman recommended a dorsal column stimulator and rotator cuff surgery.

On September 28, 2009 appellant requested reconsideration. She related that on December 12, 2006 she experienced "excruciating pain" radiating from her low back into her left leg. Dr. Lutz advised appellant to remain off work. Appellant asserted that she sustained a consequential injury to her right shoulder when she fell and tore her rotator cuff. She contended that the opinion of the impartial medical examiner supported the opinion of her attending physician. Appellant maintained that she was unable to work due to a recurrence of disability and her consequential employment injury.

Appellant submitted numerous progress reports dated 2008 and 2009, from Dr. Lutz and Dr. Chu-Kuang Chen, a Board-certified anesthesiologist, who specializes in pain management.

By decision dated November 2, 2009, the Office found that the evidence submitted was insufficient to warrant reopening appellant's case for further merit review. It determined that she had not made any relevant new argument and that the medical evidence failed to support that she was disabled from work on or after December 12, 2006.

On appeal, appellant argues that the reports of Dr. Lutz and Dr. Heyman establish that her condition has changed such that she is disabled from employment.

LEGAL PRECEDENT

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 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

⁵ 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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."

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ *Id.* at § 10.607(a).

standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁸

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his burden of proof.⁹ The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.¹⁰ If the Office should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹¹

ANALYSIS

The Office found that appellant had not submitted sufficient evidence to show that she sustained a recurrence of disability on or after December 12, 2006 causally related to her accepted employment injury. On reconsideration and on appeal, appellant argued that the report of Dr. Heyman, the impartial medical examiner, supported her contention that she is disabled. She further asserted in her reconsideration request that she was unable to work due to a consequential injury to her right shoulder. Dr. Heyman, in his August 31, 2009 report, opined that appellant was totally disabled and found that she likely sustained a right rotator cuff tear as a consequence of her employment injury. Appellant's argument that the Office should have considered his report in determining whether she established a recurrence of disability is relevant, not previously considered and pertinent to the issue of whether she is unable to work due to her employment injury. As she has advanced a legal argument not previously considered by the Office, she is entitled to a review of the merits of her claim under section 10.606(b).¹² The case will be remanded for this purpose.¹³

CONCLUSION

The Board finds that the case is not in posture for decision.

⁸ *Id.* at § 10.608(b).

⁹ *Donald T. Pippin*, 53 ECAB 631 (2003).

¹⁰ *Id.*

¹¹ *See Annette Louise*, 53 ECAB 783 (2003).

¹² *Joyce A. Fasanello*, 49 ECAB 490 (1998); *see R.B.*, Docket No. 09-1241 (issued January 14, 2010).

¹³ Appellant also submitted medical evidence on reconsideration; however, as the medical reports do not address the relevant issue of causation, they are insufficient to warrant reopening the case for further merit review.

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 5, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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