

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

K.M., Appellant

and

**DEPARTMENT OF AGRICULTURE,
AGRICULTURAL RESEARCH SERVICE,
Wapato, WA, Employer**

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**Docket No. 11-52
Issued: May 17, 2011**

Appearances:

*John Eiler Goodwin, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 8, 2010 appellant filed an appeal of an April 30, 2010 decision of the Office of Workers' Compensation Programs denying reconsideration. The final merit decision of record is an April 9, 2009 decision and order of the Board. There is no merit decision within 180 days of October 8, 2010, the date appellant filed her appeal with the Board. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of the case.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, counsel contended that under *Donald T. Pippin*,² the Office erred by failing to perform a merit review of a medical report submitted with appellant's March 31, 2010 request for reconsideration. He asserted that the medical report was new and contained relevant opinion on the critical issue of causal relationship.

FACTUAL HISTORY

This is appellant's third appeal before the Board in this case. Pursuant to the second appeal, by decision dated April 9, 2009,³ the Board affirmed a September 18, 2008 decision of the Office denying appellant's occupational disease claims for chronic fatigue syndrome, chronic pain syndrome or fibromyalgia. The Board found that appellant submitted insufficient rationalized medical evidence supporting causal relationship. The law and facts of the case as set forth in the Board's prior decision and order are hereby incorporated by reference.

In a March 31, 2010 letter, appellant requested reconsideration. She asserted that work duties contributed to a chronic back condition. Appellant submitted a March 12, 2010 report from Dr. Joseph Tornabene, an attending Board-certified neurologist and psychiatrist, who noted treating appellant since 2005 for L4-L5 stenosis requiring surgery. Dr. Tornabene opined that repetitive bending and lifting at work "could very well contribute to the development of lumbar spinal canal stenosis." He also noted that chronic lumbar pain might interfere with future employment.

By decision dated April 30, 2010, the Office denied reconsideration on the grounds that the new evidence submitted was irrelevant, did not demonstrate legal error by the Office or advance new, relevant evidence or argument. It found that Dr. Tornabene did not address the claimed conditions of chronic fatigue syndrome, chronic pain syndrome or fibromyalgia. Therefore, his opinion was not relevant to the claim.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁴ section 10.606(b)(2) of Title 20 of the Code of Federal 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) submit relevant and pertinent new evidence not previously considered by the Office.⁵ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁶

² 54 ECAB 631 (2003).

³ Docket No. 09-3 (issued April 9, 2009).

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.608(b). *See also D.K.*, 59 ECAB 141 (2007).

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁷ Appellant need only submit relevant, pertinent evidence not previously considered by the Office.⁸ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.⁹

ANALYSIS

In its April 9, 2009 decision and order, the Board affirmed the Office's September 18, 2008 decision denying appellant's claims for chronic fatigue syndrome, chronic pain syndrome or fibromyalgia. The Board found that the medical evidence of record was insufficiently rationalized to establish causal relationship. Appellant requested reconsideration on March 31, 2010, submitting additional evidence. The critical issue at the time of the last merit decision in the case was whether appellant sustained chronic fatigue syndrome, chronic pain syndrome or fibromyalgia due to work factors. To be relevant, the evidence submitted supporting the request for reconsideration must address the causal relationship of these conditions to appellant's federal employment.

Appellant submitted a March 31, 2010 letter requesting reconsideration, enclosing a March 12, 2010 report from Dr. Tornabene, an attending Board-certified neurologist and psychiatrist, who noted treating appellant for lumbar stenosis with chronic pain. Dr. Tornabene did not address the relevant issue of whether work factors caused or contributed to chronic fatigue syndrome, chronic pain syndrome and fibromyalgia. Therefore, his report does not comprise a basis for reopening the case.¹⁰

Appellant has not established that the Office improperly refused to reopen her claim for a review of the merits under section 8128(a) of the Act. She 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 relevant and pertinent new evidence not previously considered by the Office.

On appeal, counsel contended that the Office erred citing to *Donald T. Pippin*¹¹ by failing to perform a merit review of Dr. Tornabene's March 12, 2010 report, which contained new, relevant opinion on the critical issue of causal relationship. The Board's decision in *Pippin* sets forth the well-established doctrine that under 20 C.F.R. § 10.606(b)(2), a claimant may obtain a review of the merits of his or her claim by submitting relevant and pertinent new evidence not previously considered. Dr. Tornabene's March 12, 2010 is new as it was not previously of

⁷ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁸ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

⁹ *Annette Louise*, 54 ECAB 783 (2003).

¹⁰ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹¹ *Supra* note 2.

record.¹² However, as stated, Dr. Tornabene's report was not relevant as he did not address the claimed conditions or their causal relationship to work factors. Therefore, the Office's April 30, 2010 decision was proper under the facts and circumstances of this case and is consistent with *Donald T. Pippin*.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 30, 2010 is affirmed.

Issued: May 17, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹² The Board notes that Dr. Tornabene's reports dated from June 15 to December 20, 2005 were of record as of April 11, 2008, prior to the Office's September 18, 2008 merit decision.