

FACTUAL HISTORY

This case has previously been before the Board. In the most recent appeal,³ the Board issued a decision on December 7, 2010 affirming OWCP's January 26, 2010 decision which denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).⁴ OWCP had found that the argument submitted by appellant in support of her reconsideration request either duplicated or was similar to argument previously considered by OWCP.⁵ The facts of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

In May 2011, appellant requested reconsideration of her claim for recurrence of disability. In an undated letter received by OWCP on May 10, 2011, she argued that OWCP impermissibly denied her claim under the mistaken assumption that she was terminated from the employing establishment on June 2, 1993 when in fact she was terminated on June 3, 1993. Appellant asserted that OWCP indicated, in a June 6, 2008 decision, that she was terminated from the employing establishment on June 2, 1993 and that her claim should be denied because the factual evidence of the case showed that her work stoppage was a result of being terminated on that date. She claimed that, because her work stoppage occurred on June 2, 1993 and her termination occurred on June 3, 1993, her work stoppage could not have been due to the termination which occurred a day later. Appellant discussed the medical evidence of record, including reports of Dr. Ted E. Barber, an attending Board-certified neurologist, and asserted that the reports established her claim for a recurrence of disability.⁶

In a December 13, 2011 decision, OWCP denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

³ Docket No. 10-1111 (issued December 7, 2010).

⁴ On April 7, 1993 appellant, a letter carrier, sustained a work-related acute lumbosacral strain and right knee strain. She stopped her limited-duty work on June 2, 1993 and was terminated from the employing establishment effective June 3, 1993. Appellant alleged that she sustained a recurrence of disability on June 3, 1993 due to her April 7, 1993 work injury. In several decisions, OWCP denied her claim on the grounds that she did not submit sufficient medical evidence to establish a work-related recurrence of disability on or after June 3, 1993.

⁵ In October 2, 1998 and January 2, 2001 decisions, the Board affirmed OWCP's finding that appellant had not met her burden of proof to show that she sustained a recurrence of disability on or after June 3, 1993 due to her April 7, 1993 employment injury. Docket No. 97-63 (issued October 2, 1998); Docket No. 99-2541 (issued January 2, 2001). In later decisions, the Board found that OWCP had properly denied appellant's multiple requests for further review of the merits of her claim.

⁶ Appellant also submitted a number of reports which had previously been submitted to OWCP, including August 20, 2004 and August 18, 2008 reports of Dr. Barber and an undated disability certificate covering the period June 2 to 21, 1993.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁷ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁸ To be entitled to a merit review of an OWCP 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.⁹ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁰ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹¹ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹² While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹³

ANALYSIS

On April 7, 1993 appellant sustained a work-related acute lumbosacral strain and right knee strain. She stopped work on June 2, 1993 and alleged that she sustained a recurrence of disability on June 3, 1993 due to her April 7, 1993 employment injury. OWCP denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a work-related recurrence of disability on or after June 3, 1993. In a December 13, 2011 decision, it denied her request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

In support of her reconsideration request, appellant argued that OWCP impermissibly denied her claim under the mistaken assumption that she was terminated from the employing establishment on June 2, 1993 when in fact she was terminated on June 3, 1993. She asserted that it denied her claim on the basis that her work stoppage was a result of being terminated on June 3, 1993. Appellant claimed that, because her work stoppage actually occurred on June 2,

⁷ *Supra* note 1. Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at anytime on her own motion or on application." 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(2).

⁹ *Id.* at § 10.607(a).

¹⁰ *Id.* at C.F.R. § 10.608(b).

¹¹ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹² *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹³ *John F. Critz*, 44 ECAB 788, 794 (1993).

1993 and her termination from the employing establishment occurred on June 3, 1993, her work stoppage could not have been due to the termination which occurred a day later.

The Board finds that the submission of this argument does not require reopening of appellant's claim for further review of the merits because this argument does not address the main issue of the present case.¹⁴ Appellant argued that the basis of OWCP's denial of her claim for recurrence of disability was its mistaken assumption that she stopped work due to the termination of her employment. However, the basis for OWCP's denial of her claim was its finding that she did not submit sufficient medical evidence to establish that she sustained a work-related recurrence of disability on or after June 3, 1993. The main issue of the present case is medical in nature and would generally be resolved by the submission of probative medical evidence. It is not relevant when she stopped work. The question is whether new medical evidence demonstrates any disabling condition. Appellant did not submit any new and relevant medical evidence in connection with her reconsideration request.¹⁵

Appellant has not established that OWCP improperly denied her request for further review of the merits of its prior decisions under section 8128(a) of FECA, because the evidence and argument she submitted did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or constitute relevant and pertinent new evidence not previously considered by OWCP.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁴ See *supra* note 13.

¹⁵ On appeal, appellant argued that the nature of her medical condition established that she sustained a recurrence of disability as alleged. However, she did not submit new and relevant medical evidence in support of her reconsideration request. Appellant submitted a number of reports which had previously been submitted to OWCP, including August 20, 2004 and August 18, 2008 reports of Dr. Barber, an attending Board-certified neurologist, and an undated disability certificate covering the period June 2 to 21, 1993. The submission of these documents would not require reopening of appellant's claim as, due to their prior submission, they do not constitute new evidence. See *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2011 nonmerit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 6, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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