United States Department of Labor
Employees' Compensation Appeals Board

PRISCILLA A. DENNIS, Appellant	)	
and	)	**Docket No. 02-2116**
	)	**Issued: January 26, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Riverdale, MD, Employer	)	

Appearances:
Eric Elmore, for the appellant
Julia Mankata-Tamakloe, Esq., for the Director

(Oral Argument December 18, 2003)

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 13, 2002 appellant filed a timely appeal from the nonmerit decision of the Office of Workers' Compensation Programs dated May 22, 2002. By decision dated March 16, 1999, the Office terminated appellant's compensation effective that date and, by decision dated July 18, 2001, the Office affirmed its March 16, 1999 decision. Because more than one year has elapsed between the last merit decision dated July 18, 2001 and the filing of this appeal on August 13, 2002, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 17, 1984 appellant, then a postal clerk, filed a claim alleging that she sustained injury to her right shoulder, right shin, back and hips when a cart crashed into her at work on that date.[1] The Office accepted her claim for right shoulder strain and lumbar strain and she received temporary total disability compensation. Appellant received treatment for extended periods by several attending physicians, including Dr. Charles Emich, a Board-certified orthopedic surgeon, and Dr. Sharon Marselas, a Board-certified neurosurgeon. These physicians found that appellant had continuing neck, upper extremity and back problems and was disabled from work.

The Office referred appellant to Dr. Robert E. Collins, a Board-certified orthopedic surgeon, for further evaluation of her condition.[2] In a report dated July 10, 1985, Dr. Collins indicated that appellant's examination and testing did not reveal any objective findings and noted that she appeared to have exaggerated her symptoms. He asserted that the total disability from appellant's July 17, 1984 injury would have ceased after three to six weeks and recommended that appellant return to work. In a supplemental report dated August 6, 1998, Dr. Collins clarified that appellant was capable of returning to her regular work but that she should be restricted from lifting more than 50 pounds in order to avoid future injury.

Appellant continued to be treated by Dr. Emich and Dr. Marselas but the Office indicated that it was unsuccessful in receiving adequate clarification of their reports. In April 1997 the Office had referred appellant to Dr. John Lossing, a Board-certified neurologist, for a second opinion evaluation. In a report dated May 5, 1997, Dr. Lossing indicated that he was unable to determine the cause of appellant's continuing complaints and need for treatment. He suggested that appellant's complaints of pain might be exaggerated and that she be placed under surveillance. The Office requested that Dr. Lossing clarify his opinion but he advised the Office that he believed there was no need to do so.

In March 1998 the Office referred appellant to Dr. Collins for a second opinion evaluation. In a report dated April 6, 1998, Dr. Collins indicated that appellant exhibited no objective findings to support that she continued to have residuals of the right shoulder strain and lumbar strains she sustained at work on July 17, 1984. He noted that this type of injury would have resolved long ago, probably six to eight weeks after injury, and that appellant's continuing problems were due to nonwork-related degenerative disease of the neck and back. Dr. Collins stated that no work injury prevented appellant from returning to her regular work, but recommended limited-duty work due to her nonwork-related conditions.

By decision dated March 16, 1999, the Office terminated appellant's compensation effective March 27, 1999. The Office found that the weight of the medical evidence regarding

[1] Appellant stopped work on July 17, 1984 and did not return to work.

[2] While the referral documents make note of an "impartial referral," there is no indication that a conflict in the medical evidence existed at that time and Dr. Collins served as an Office second opinion referral physician rather than an impartial medical specialist. Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

this matter rested with the well-rationalized report of the Office referral physician, Dr. Collins. The Office determined that the reports of appellant's attending physicians, Dr. Emich and Dr. Marselas, were of limited probative value.[3]

Appellant requested an oral hearing in connection with her claim which was held on September 28, 1999. At the hearing, appellant and her attorney argued that the examination of Dr. Collins was incomplete and his opinion was not sufficiently well rationalized to justify the termination of compensation. By decision dated and finalized December 13, 1999, an Office hearing representative affirmed the Office's March 19, 1999 decision finding that the opinion of Dr. Collins represented the weight of the medical evidence.

By letter dated December 13, 2000, appellant requested reconsideration of her claim. In support of her request, appellant submitted numerous documents including many which had previously been of record. In two statements, appellant argued that Dr. Collins served as an impartial medical specialist in April 1998, rather than an Office referral physician, because there was no conflict in the medical evidence at that time. Appellant further argued that, because Dr. Collins had examined her in 1985 and produced a "negative" report at that time which was similar to his April 1998 report, he was biased against her and could not serve as an impartial medical specialist. She also argued that the April 1998 opinion of Dr. Collins was not sufficiently well rationalized and that the Office had ignored certain medical evidence.

By decision dated July 18, 2001, the Office affirmed the December 13, 1999 decision. The Office indicated that it had properly found that the weight of the medical evidence rested with the April 1998 opinion of Dr. Collins. By letter dated February 26, 2002, appellant again requested reconsideration of her claim. She argued that the Office's termination of her compensation was improper because it was based on an "unauthorized referee exam[ination]" by Dr. Collins in April 1998 which was not in accordance with the applicable law. Appellant claimed that Dr. Collins' April 1998 report was invalid and reflected unfair bias against her because Dr. Collins had "a personal interest in preserving" the opinion contained in his 1985 report. Appellant further argued that the Office improperly suggested in its July 18, 2001 decision that Dr. Collins had not examined her in 1985. She also submitted a September 21, 1999 form report in which Dr. Emich indicated that she was totally disabled.

By decision dated May 22, 2002, the Office denied appellant's request for merit review. The Office noted that the argument appellant presented in connection with her February 26, 2002 reconsideration request was similar to that presented and considered in conjunction with her December 13, 2000 reconsideration request. The Office also noted that Dr. Collins served as an Office referral physician rather than an impartial medical specialist and indicated that the fact that Dr. Collins examined appellant in 1985 did not show bias or otherwise invalidate the referral examination in April 1998.

[3] The Office provided appellant with a proposed notice of termination dated February 9, 1999 and gave her an opportunity to respond.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[4] 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.[5] 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.[6] 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 on the merits.[7]

ANALYSIS

In the present case, the Office, by decision dated March 16, 1999, terminated appellant's compensation effective March 27, 1999, based on the April 1998 opinion of Dr. Collins, a Board-certified orthopedic surgeon, who served as an Office referral physician. By decision dated July 18, 2001, the Office affirmed its March 16, 1999 decision. By decision dated May 22, 2002, the Office denied appellant's request for merit review.

In connection with her February 26, 2002 reconsideration request, appellant argued that the Office's termination of her compensation was improper because it was based on an improper impartial medical examination by Dr. Collins. She claimed that the fact that Dr. Collins had examined her in 1985 meant that his April 1998 evaluation was invalid and biased against her. Appellant suggested that the prior examination prevented Dr. Collins from changing his opinion of her condition in April 1998. However, appellant had previously made the same argument in connection with her December 13, 2000 reconsideration request and the Office had rejected the argument. At that time, appellant submitted two statements in which she argued that Dr. Collins served as an impartial medical specialist in April 1998, rather than an Office referral physician, and claimed that because Dr. Collins had examined her in 1985 and produced a "negative" report at that time which was similar to his April 1998 report, he was biased against her and could not serve as an impartial medical specialist. The Board has held that the submission of argument or evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[8] Moreover, appellant's argument does not have a reasonable color of

[4] 5 U.S.C. § 8101 *et seq.* Under section 8128 of the Act, "[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." 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b)(2).

[6] 20 C.F.R. § 10.607(a).

[7] 20 C.F.R. § 10.608(b).

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

validity.[9] It is clear from the record that Dr. Collins served as an Office second opinion referral physician in April 1998, rather than as an impartial medical specialist. The procedures for referral examinations do not contain the same strictures as those for impartial medical examinations, which prohibit a physician from serving as an impartial medical specialist if he or she has previously examined an employee.[10]

Appellant also submitted a September 21, 1999 form report in which Dr. Emich, an attending Board-certified orthopedic surgeon, indicated that she was totally disabled. However, this report would not be relevant to the main issue of the present case, *i.e.*, whether the Office properly terminated appellant's compensation effective March 27, 1999, as it does not contain any opinion on the cause of appellant's disability or any opinion on her condition at the time of the termination in March 1999. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[11]

In the present case, appellant has not established that the Office improperly refused to reopen her claim for a review on the merits of its July 18, 2001 decision under section 8128(a) of the Act, because 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.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). The Board finds that the argument appellant submitted in connection with her reconsideration request had previously been submitted and considered by the Office and the evidence she submitted was not relevant to the main issue of the present case.

[9] *John F. Critz*, 44 ECAB 788, 794 (1993) (finding that, 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).

[10] *See generally* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapters 3.500.3 and 3.500.4 (March 1994, May 2003). Appellant also argued that the Office improperly suggested in its July 18, 2001 decision that Dr. Collins had not examined her in 1985. While the Office did suggest that Dr. Collins did not examine appellant in 1985, appellant's mention of this circumstance would not change the fact that her argument regarding the validity of Dr. Collins' report, for the reasons noted above, is repetitious and lacking a reasonable color of validity.

[11] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 26, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member