

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

DORIS D. JOHNSON, Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Overland Park, Kansas, Employer**

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**Docket No. 05-193
Issued: April 5, 2005**

Appearances:

*Melford V. McCormick, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On October 18, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decisions of December 24, 2003 and August 27, 2004, denying her requests for reconsideration. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over these nonmerit decisions. Because the Office has not issued a decision on the merits of the claim within the year prior to the October 18, 2004 filing of this appeal, the Board has no jurisdiction to review the merits of the traumatic injury claim.

ISSUE

The issue is whether the Office properly denied appellant's requests for reconsideration.

FACTUAL HISTORY

On March 18, 2002 appellant, a 33-year-old technician, filed a traumatic injury claim (Form CA-2) alleging that she sustained injury to her back as a result of a fall which occurred on

March 15, 2002. Appellant alleged that she was “trying to carry some boxes when [she] slipped hard and fell [and] when [she] tried to carry them again, [her] lower back was killing [her].”

In conjunction with her claim, appellant submitted statements from her supervisor and two coworkers, one of whom reportedly observed the incident. She also provided an unsigned radiology report dated April 8, 2002, reflecting normal cervical spine, negative left rib series and normal chest.

By letter dated May 3, 2002, the Office advised appellant that the information submitted was insufficient to establish her claim and requested additional information, including a detailed narrative report from her physician providing a diagnosis and an opinion on the relationship between her diagnosed condition and her employment-related injury. In response to the Office’s request, appellant submitted several documents, including a statement dated May 20, 2002 in which she described her alleged injury. Appellant claimed that she tripped and fell over some boxes that had been left on the floor and that as she fell, the boxes she was carrying “flew up in the air” and “came down and hit [her] on her back.” Appellant also provided an emergency department report dated April 8, 2002 and electronically signed by Dr. Jon C. Carter, Board-certified in the field of emergency medicine. The report contained diagnoses of cervical and lumbar strain and chest wall contusion. Dr. Carter reported that x-rays of the left ribs, chest, cervical and lumbar spine were all negative. In a report dated May 22, 2002, Dr. Mark A. Greenfield, a Board-certified anesthesiologist,¹ stated that he had treated appellant for multiple pain complaints on 11 separate occasions from March 11 through May 22, 2002. He indicated that the “totality of the [appellant’s] symptoms arose when she fell at work.” He further stated that she had symptoms of sacroiliac joint dysfunction.

By decision dated June 14, 2002, the Office denied appellant’s claim, finding that while appellant had established that the incident occurred as alleged, she had failed to provide a medical opinion establishing work-related injury.

In an attending physician’s report dated June 18, 2002, Dr. Thomas Reece, a treating physician, provided a diagnosis of myofascial pain syndrome, which he attributed to the work-related incident by checking “yes” to a question on the form. No rationale was given for this opinion. In a report dated June 19, 2002, Dr. Greenfield provided diagnoses of lumbar radiculopathy, sacroiliac joint dysfunction and chest wall pain and stated that it “appears” that appellant’s complaints were related to her March 15, 2002 fall. No rationale was provided for this opinion.

By letter dated July 12, 2002, appellant requested review of the written record. By decision dated December 23, 2002, the hearing representative affirmed the Office’s June 14, 2002 decision, finding that appellant had failed to establish a work-related injury.

By letter dated March 3, 2003, appellant requested reconsideration of the hearing representative’s decision. In support of the request, appellant submitted several medical reports, including a report dated March 5, 2003 in which Dr. Reece stated that appellant suffered from chronic myofascial pain syndrome secondary to a work injury.

¹ Dr. Greenfield has a subspecialty certificate in the field of pain medicine.

In a nonmerit decision dated March 21, 2003, the Office denied appellant's request for reconsideration, finding that the request neither raised substantive legal questions nor included new and relevant evidence.

Appellant again requested reconsideration by letter dated March 23, 2004. In support of this request, appellant submitted medical evidence including headache and pain assessment charts and treatment notes from October 9, 2001 through March 5, 2003 and a report dated April 29, 2003 signed by Dr. Reece, who provided a diagnosis of mild fecal pain syndrome secondary to trauma. He stated that the pain "came on abruptly" on March 15, 2002 when she slipped and fell backwards against some boxes and was then hit in the back by some falling boxes. He further indicated that she was totally and permanently disabled because of persistent pain.

By decision dated August 14, 2003, the Office denied modification of its decision denying appellant's claim. The Office noted that Dr. Reece provided an incorrect history of injury and that there were no other objective findings from diagnostic testing, which identified any injury-related diagnosis. Accordingly, the Office found that there was no medical evidence of record, which provided a well-rationalized medical opinion based upon a correct history and objective findings supported that appellant had sustained an employment-related injury.

By letter dated November 6, 2003, appellant by her representative requested reconsideration of the Office's August 14, 2003 decision. In support of the request, appellant submitted a duty status report dated October 23, 2003 and signed by Dr. Reece reflecting a diagnosis of myofascial pain syndrome, as well as a report by Dr. Reece dated October 28, 2003, stating that appellant was injured at work when she was carrying some boxes and she slipped and fell backwards. He further opined that the injury was the proximate cause of her disabling condition.

By decision dated December 24, 2003, the Office denied appellant's request for reconsideration, finding that Dr. Reece's report was cumulative in nature and did not provide any new and relevant evidence supporting that the diagnosed condition resulted from her accepted work incident.

On January 29, 2004 appellant, by her representative, again requested reconsideration, submitting in support thereof a report from Dr. Reece dated January 20, 2004, wherein Dr. Reece reiterated his treatment history and diagnosis of appellant and opined that her disability is completely due to the injury she sustained and that the injury was the proximate cause of her disabling condition.

By decision dated August 27, 2004, the Office again denied appellant's request for reconsideration. Stating that Dr. Reece's January 20, 2004 report was cumulative and lacked probative value in establishing a diagnosed condition other than pain, which is not considered a diagnosed condition under the Federal Employees' Compensation Act, the Office found that appellant had failed to submit new and relevant evidence or to advance legal arguments not previously considered.

LEGAL PRECEDENT

The Act² provides that the Office may review an award for or against compensation upon application by an employee (or his representative) who receives an adverse decision. The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the “application for reconsideration.”³ The application must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a point of law; (2) advances a relevant legal argument or fact not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁴

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards.⁵ If reconsideration is granted, the case is reopened and is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁶

ANALYSIS

The Board finds that the Office’s denial of merit review did not constitute an abuse of discretion.

In order for appellant to obtain review of the merits of her claim, it was necessary for her either to show that the Office erroneously applied or interpreted a point of law; to advance a point of law or fact not previously considered by the Office; or to submit relevant and pertinent evidence not previously considered by the Office.⁷ Appellant did not contend that the Office had erroneously applied or interpreted a point of law; nor did she advance a point of law or fact not previously considered by the Office. Instead, in support of her requests for reconsideration, she submitted medical reports which were cumulative in nature.

In support of her November 6, 2003 request for reconsideration, appellant submitted reports from Dr. Reece in which he provided a diagnosis of myofascial pain syndrome and opined that her work-related injury was the proximate cause of her condition. Dr. Reece’s reports did not provide relevant and pertinent evidence not previously considered by the Office. His diagnosis of myofascial pain syndrome had been provided in his reports dated June 18, 2002 and April 23, 2003, which were considered by the Office in rendering its December 23, 2002 denial of appellant’s claim and its August 19, 2003 denial of her request for reconsideration. On

² 5 U.S.C. §§ 8101 *et seq.*

³ 20 C.F.R. § 10.605 (1999).

⁴ 20 C.F.R. § 10.606.

⁵ *See Shirley Rhynes*, 56 ECAB ____ (Docket No. 04-1299, issued September 9, 2004).

⁶ 20 C.F.R. § 10.608.

⁷ *See supra* note 4.

both occasions, the Office had also considered Dr. Reece's opinion that appellant's work-related injury was the cause of her condition, finding that Dr. Reece had not provided a well-rationalized medical opinion based upon a correct history and objective findings supporting that appellant had sustained an employment-related injury. The Board finds, therefore, that the Office properly concluded in its December 24, 2003 decision that Dr. Reece's report was cumulative.

Similarly, in support of her January 29, 2004 request for reconsideration, appellant submitted another report from Dr. Reece dated January 20, 2004 in which he reiterated his treatment history and diagnosis of appellant and repeated his statement that her disability was due to her work-related injury. He again provided no explanation or rationalized medical opinion. Appellant failed to submit new medical evidence, which would warrant reopening her case for review of the merits. Accordingly, the Board finds that Dr. Reece's report is duplicative of reports previously submitted and considered by the Office.

The Board finds that appellant did not allege that the Office erroneously applied or interpreted a point of law, nor did she advance a point of law or fact or submit relevant and pertinent evidence not previously considered by the Office. Because appellant did not meet any of the requirements of section 16.608(b), the Office was within its rights to deny her requests for reconsideration.

CONCLUSION

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration on the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 27, 2004 and December 24, 2003 are affirmed.

Issued: April 5, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member